Buckley Sandler LLP

InfoBytes, June 10, 2011

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Federal Issues

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OCC Seeks Comments on Proposed Guidance for Deposit-Related Consumer Credit Products. On June 8, the Office of the Comptroller of the Currency (OCC) announced it was seeking comment on its proposed supervisory guidance for deposit-related consumer credit products such

as automated overdraft protection and direct deposit advance programs. The guidance details the principles the OCC expects national banks to follow in order to address potential operational, reputation, compliance, and credit risks. Specifically, the principles include (i) the use of clear and conspicuous disclosures related to alternative products; (ii) credit product legal compliance; (iii) enrollment in the credit product through an affirmative request, not automatically; (iv) analysis to ensure the customer has the ability to repay the credit obligations; (v) prudent limitations placed on credit extensions, customer costs, and usage; (vi) regularly monitoring programs to identify risks; (vii) management's appropriate oversight of new products and services; and (viii) adherence to applicable guidelines on account management and charge-offs. Appendices to the proposed guidance illustrate the application of these principles to automated overdraft protection products and deposit advance products. The guidance would also apply to federal savings associations starting on July 21, 2011. Comments on the proposed guidance are due July 8, 2011. For a copy of the press release, please see http://www.occ.treas.gov/news-issuances/bulletins/2011/bulletin-2011-23.html. For the proposed guidance, please see http://www.occ.treas.gov/news-issuances/bulletins/2011/bulletin-2011-23a.pdf.

FHFA Issues Record Retention Regulation. On June 8, the Federal Housing Finance Agency (FHFA) issued a final regulation setting forth minimum record retention requirements for Freddie Mac, Fannie Mae, the Federal Home Loan Banks (Regulated Entities), and the Office of Finance. The regulation requires the Regulated Entities and the Office of Finance to establish a written record retention program and provide a copy to the Deputy Director for the Division of Enterprise Regulation or Division of Federal Home Loan Bank Regulation within 180 days of the effective date (which is approximately December 5, 2011) and annually thereafter. This record retention program must be evaluated every two years for adequacy and effectiveness and must ensure (i) retained records are complete and accurate; (ii) the form and retention period of records are appropriate; (iii) the record retention responsibilities of company employees and management are specified; (iv) policies and procedures concerning record holds are outlined; (v) an accurate, current and comprehensive record retention schedule is maintained; and (vi) appropriate security and internal controls, including back-up and recovery protocols, are in place. Minimum storage requirements for electronic records and communication and training guidelines must also be established and met. Finally, the regulation describes FHFA's policies and procedures related to record holds, access to records, and supervisory action. The regulation is effective as of June 8, 2011. The full text of the regulation is available at http://www.fhfa.gov/webfiles/21535/Record_Retention_Final_Rule_76_FR_33121_6-8-11.pdf.

Agencies Extend Comment Period on Credit Risk Retention Proposed Rulemaking. On June 7, the Federal Reserve Board, the Department of Housing and Urban Development, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission (Agencies) announced the extension of the comment period for the proposed rule to implement the credit risk retention requirements of Section 15G of the Securities Exchange Act of 1934, as added by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 15G requires sponsors of asset-backed securities to retain at least 5 percent of the credit risk of the assets underlying the securities and does not permit sponsors to transfer or hedge that credit risk. The proposed rule further defines the scope and terms of Section 15G, and specifies the credit risk retention requirements for securitizers of asset-backed securities. The comment period was extended from June 10, 2011 to August 1, 2011 due to the complexity of the rulemaking and to allow parties additional time to weigh the impact of the proposed rule on affected markets. For a copy of the joint press release, please see http://www.federalreserve.gov/newsevents/press/bcreg/20110607a.htm. For a copy of the proposed rule, please see http://www.occ.treas.gov/news-issuances/federal-register/76fr24090.pdf.

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Fannie Mae Updates Servicing Guide relating to Mortgagee Clauses and Servicing Fees on Modified Mortgage Loans, and to Requirements for Property Insurance on MERS loans. On June 6, Fannie Mae announced that the new servicing fee for all modified mortgage loans which closed in the HomeSaver Solutions Network (HSSN) on or after June 18, 2011 will be the lower of (i) the fee the servicer was receiving before the modification; or (ii) one-quarter of one percent (0.25%). Additionally, Fannie Mae announced that where a loan is originated naming the Mortgage Electronic Registration System (MERS) as the original mortgagee of record (HSSN or otherwise), MERS must not be named as the loss payee on property insurance policies. When Fannie Mae is not named as mortgagee, the servicer's name followed by the phrase "its successors and assigns" should be shown as the mortgagee, and all correspondence from the insurer should be directed to the servicer. For a copy of the announcement, please see https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2011/svc1109.pdf.

Fannie Mae Issues Servicing Standards for Delinquent Mortgages. On June 6, Fannie Mae announced new servicing standards for delinquent mortgages relating to borrower contact, default prevention, and foreclosure timelines. Under the new borrower contact standard, servicers must attempt to achieve "quality right party contact" (QRPC), defined generally as building a strong customer-service relationship with delinquent homeowners in an attempt to increase servicer effectiveness, the consistency and clarity of communications, and early contact with delinquent homeowners, with the goal of avoiding foreclosure. Fannie Mae will charge compensatory fees for non-compliance with certain aspects of these standards, including failure to make QRPC and exceeding the foreclosure timelines, and will provide incentives for compliance with loss mitigation efforts. These new standards are part of Fannie Mae's implementation of the April 28, 2011 Aligned Servicing Requirements by the Federal Housing Finance Agency (FHFA), and encompass a broad range of delinquent management issues such as property inspections, call center benchmarks, pre-referral reviews, loan modification requirements, and borrower inquiries. For all loans owned by Fannie Mae, compliance with foreclosure timelines is required immediately and compliance with the delinquency management and default prevention standards is required by September 1, 2011. For a copy of the Servicing Guide announcements, please see https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2011/svc1107.pdf and https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2011/svc1108.pdf.

HUD Takes Actions Against Lenders for Pregnancy Discrimination in Home Mortgage Lending. On June 1, the U.S. Department of Housing and Urban Development (HUD) announced a settlement agreement with Cornerstone Mortgage Company (Cornerstone), which HUD had charged with discriminatory lending practices and making discriminatory statements against expectant mothers in violation of the Fair Housing Act. Under the terms of the agreement, Cornerstone (doing business as Cornerstone Home Lending) agreed to several remedial measures,

including (i) providing compensation for Dr. Lihua Elizabeth Budde in the amount of $15,000 for her claims that she was initially denied a mortgage loan even though she was on paid maternity leave and planned to return to work; (ii) creating a $750,000 compensation fund for other Cornerstone borrowers who experienced similar pregnancy discrimination at the time they applied for a loan; (iii) notifying all borrowers who applied during a two-year time frame of their right to seek compensation if they experienced similar discriminatory treatment; and (iv) paying successful claimants $7,500 or a lesser pro rata share of the fund if there are more than 100 eligible recipients. Cornerstone was also required to adopt new policies and deliver fair lending training to all employees with significant involvement in residential lending. For a copy of the press release, please see http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo.11-108.

HUD, on behalf of complainant Carly Neals and her family, also charged Mortgage Guaranty Insurance Corporation (MGIC), and two MGIC employees with engaging in pregnancy discrimination by requiring her to return to work from maternity leave as a condition to approving the mortgage insurance application related to her loan. HUD has brought the Charge under the Fair Housing Act. For a copy of the Charge of Discrimination, please see http://portal.hud.gov/hudportal/documents/huddoc?id=11-neals_v_mortgage.pdf.

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State Issues

CORRECTION -- Florida Amends Mortgage Loan Originator Licensing Requirements in Alignment with S.A.F.E. Act. Last week's InfoBytes incorrectly reported on a Florida bill signed into law on May 31 by stating that the law amends provisions of Florida's mortgage licensing law such that in-house loan processors must secure an individual mortgage loan processor license. Although Florida law previously required persons acting solely as loan processors to secure a loan originator license, the new legislation actually relieves in-house loan processors from individual licensing in Florida. Specifically, the bill excludes in-house loan processors from individual licensure, so long as the individual (i) is an exclusive employee of a single mortgage broker or a mortgage lender, (ii) under direct supervision and instruction of a licensed Florida loan originator, and (iii) engages in loan processing only (*i.e.*, receiving, collecting, distributing, and analyzing information for processing a mortgage loan or communicating with consumers to obtain information necessary to process a mortgage loan (not including offering or negotiating or counseling consumers about mortgage loan rates or terms)). Contract (*i.e.*, independent) loan processors remain subject to loan originator licensure in certain circumstances. This amendment brings Florida's law more in line with the federal Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E.) and other state jurisdictions with respect to treatment of mortgage loan processors. As previously reported, the bill additionally requires mortgage lenders to submit reports of their financial condition to the NMLS registry and to authorize the NMLS registry to obtain a credit report for each of the mortgage lender's control persons in order to renew a mortgage lender license. The bill becomes effective July 1, 2011. For a copy of the enrolled amendments, please see http://www.flsenate.gov/Session/Bill/2011/1316/BillText/er/PDF.

Nevada Amends Regulations Implementing the Federal SAFE Act. On June 4, Nevada Governor Brian Sandoval signed into law Assembly Bill 283 (AB 283), which revises Nevada's regulations implementing the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 relating to continuing education, criminal and civil liability, and the employment of mortgage agents. Under AB 283, mortgage agents, bankers,

brokers, and employees of such entities that (i) are not residential mortgage loan originators, (ii) are not otherwise required to register with the Nationwide Mortgage Licensing System & Registry (NMLS), and (iii) have not voluntarily registered or renewed with NMLS are exempt from all regulations promulgated by the Commissioner of Mortgage Lending relating to continuing education requirements. Assembly Bill 283 requires that non-exempt licensees dedicate at least three hours per year to continuing education specific to Nevada laws and regulations per year, as well as an additional two hours of continuing education classes related to ethics. In addition, AB 283 insulates investors who only provide money to acquire a beneficial interest in a mortgage loan from criminal or civil liability resulting from an act or omission committed by a mortgage broker. Finally, AB 283 updates the provisions relating to the licensing and regulation of mortgage agents to clarify the responsibilities of those who hold a certificate of exemption and those who sponsor mortgage agents. For a copy of Assembly Bill 283, please see http://www.leg.state.nv.us/Session/76th2011/Bills/AB/AB283_EN.pdf.

Oklahoma Amends Telephone Solicitation Statutes to Include Cellular Telephone Calls and Text Messages. On May 26, Oklahoma's Governor approved legislation amending provisions of the Oklahoma Consumer Protection Act and its Telemarketer Restriction Act to address the rapidly increasing use of text messages for commercial solicitation. The new law modifies relevant statutory definitions and expands existing consumer protections related to commercial telephone solicitation to include cellular telephone calls and text messages made by automatic dialing devices without the use of a live operator. The legislation also instructs the Attorney General to expand the do-not-call registry to include an opt-in list of consumers who would do not want to receive any unsolicited telemarketing text messages. For a copy of the bill, please see http://www.buckleysandler.com/Oklahoma_SB398.pdf.

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Firm News

Andrew Sandler will be speaking at the ABA Regulatory Compliance Conference on Sunday, June 12 and Monday, June 13, in Washington, DC. Mr. Sandler's panels will focus on Fair Lending Hot Topics.

Stephen Ambrose will be speaking at AFSA Law Committee in Denver on Emerging Issues on June 13 and June 14.

Andrew Sandler will be speaking at CBA Live 2011 and presenting an Annual Fair Lending Report on Tuesday, June 14, at 3:30 pm in Orlando, Florida. Mr. Sandler will be giving an overview of current regulatory and enforcement developments and discussing the most significant fair lending risks confronting consumer lenders in the next twelve months.

James Parkinson will be speaking at the ACI's "FCPA Compliance in Emerging Markets" program in Washington, D.C., on June 15-16.

Kirk Jensen will be speaking on Litigation Developments and **Clint Rockwell** will be speaking on Regulatory Developments at the AFSA State Government Affairs & Legal Issues Forum on June 22.

Jonice Gray Tucker will moderate a panel on Fair Servicing Analysis at the 6th Annual Strategic Markets and Diversity Conference on June 23 in Arlington, Virginia.

Andrew Sandler will be participating on a panel at the Florida Bar Annual Convention on Friday, June 24 as part of the "Presidential Showcase". On the panel with Mr. Sandler is Paul Bland, Public Justice. The Moderator is Justice R. Fred Lewis, a Justice of the Florida Supreme Court, a former Chief Justice and founder of Justice Teaching.

Andrew Sandler and **Jonice Gray Tucker** will speak at an American Bar Association webinar on mortgage servicing issues on July 21 at 1 pm. The program entitled, "Mortgage Servicing Under Fire: Regulatory, Litigation, and Enforcement Trends Stemming from the Foreclosure Crisis and More" will also feature Terry Goddard, the former Arizona Attorney General, as a speaker.

Andrew Sandler will be teaching the Litigation Strategy Session: Developing Strong Protocols, Admissible Documentation & Comprehensive Strategies in Order to Survive Regulatory Enforcement Actions & Litigation Workshop on Tuesday, July 26, in Chicago. This workshop precedes ACI's Consumer Finance Class Actions & Litigation Conference taking place July 27-28 at the Sutton Place Hotel, Chicago, IL.

Andrew Sandler will be speaking at the ACI's Consumer Finance Class Actions & Litigation Conference on Thursday, July 28. Mr. Sandler's panel is: "Class Action Developments: What Recent Cases and Pending Policy Changes Mean for Your Litigation, Investigation and Settlement Strategies.

Jonice Gray Tucker will be moderating a panel focusing on Regulatory and Litigation Developments in Servicing at the California Mortgage Bankers' Servicing Conference on August 29 in Las Vegas.

Firm Publications

David Krakoff, **James Parkinson**, and **Bradley Marcus** authored FCPA: Recent Enforcement Activity Sounds Warning for Financial Services Industry, which was published in the *Business Crimes Bulletin* on June 1.

Kirk Jensen and **Jeffrey Naimon** conducted a podcast on the Servicemembers Civil Relief Act on May 26.

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years for adequacy and effectiveness and must ensure (i) retained records are complete and accurate; (ii) the form and retention period of records are appropriate; (iii) the record retention responsibilities of company employees and management are specified; (iv) policies and procedures concerning record holds are outlined; (v) an accurate, current and comprehensive record retention schedule is maintained; and (vi) appropriate security and internal controls, including back-up and recovery protocols, are in place. Minimum storage requirements for electronic records and communication and training guidelines must also be established and met. Finally, the regulation describes FHFA's policies and procedures related to record holds, access to records, and supervisory action. The regulation is effective as of June 8, 2011. The full text of the regulation is available at http://www.fhfa.gov/webfiles/21535/Record_Retention_Final_Rule_76_FR_33121_6-8-11.pdf.

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We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes. Email: infobytes@buckleysandler.com

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