InfoBytes

August 19, 2011

Topics In This Issue

Federal Issues

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mortgage eligibility and credit underwriting guidelines included, among other things, (i) announcing that mortgages with a pool insurance credit enhancement are eligible for refinancing as Freddie Mac Relief Refinance Mortgages - Open Access, (ii) requiring that borrowers for purchases of newly constructed second homes and investment properties may not be affiliated with or related to the builder, developer or property seller, (iii) removing the option of obtaining a letter from an accountant to confirm that the use of business assets for funds to close will not negatively impact the business, and (iv) requiring that at least one borrower must occupy the mortgaged premises as a primary residence as of the delivery date for a mortgage to qualify as an owner-occupied property. Freddie Mac also announced (i) changes to its pooling requirements for non-assumable Section 502 GRH Mortgages with LTV ratios greater than 105% under the fixed-rate Guarantor program, (ii) the expiration of temporary higher maximum loan limits, and (iii) additional information regarding the eligibility of certain entities as approved insurers. Click here for a copy of the announcement.

HUD Announces Trial Payment Plan Requirements for Loan Modifications and Partial Claims under FHA's Loss Mitigation Program. On August 15, the U.S. Department of Housing and Urban Development published a Mortgagee Letter identifying circumstances under which mortgagors must successfully complete a trial payment plan prior to the mortgagee executing a loan modification or partial claim action under the Federal Housing Administration's (FHA) Loss Mitigation Program. Successful completion of a trial payment plan is a prerequisite for a mortgagee executing a permanent standard modification and/or partial claim where (i) a mortgagor has been delinquent (30 or more days) twice or more in the preceding 12 months, (ii) a mortgagor has been delinquent for 90 days or more (three or more consecutive payments past due) in the preceding 36 months, (iii) a mortgagor has defaulted within 90 days of a previous loss mitigation retention option (special forbearance, loan modification, and partial claim) executed in the past 12 months, (iv) a financial analysis reflects a mortgagor has a net surplus income of less than 20 percent of total net income, (v) less than 14 months have elapsed since the origination of the loan, (vi) the amount added to the loan balance in a loan modification or the amount of the partial claim exceeds 10 percent of the unpaid principal balance, (vii) a mortgagor failed a trial payment plan for FHA's Making Home Affordable Program, or (viii) a mortgagee determines that a trial payment plan is necessary to demonstrate the mortgagor's ability to sustain the modified payment. The Letter also announced the guidelines for the trial payment plan. Finally, a mortgagee must execute the permanent loan modification or partial claim within 60 days of the mortgagor's successful completion of the trial payment plan in order to receive an incentive fee. These requirements will become effective on October 1, 2011. Click here for a copy of the Mortgagee Letter.

Freddie Mac Announces Remedies for Compliance Violations of Mortgage Insurance Coverage Requirements. On August 12, Freddie Mac reminded its sellers and servicers that mortgages sold to Freddie Mac must comply with the requirements of the Single-Family Seller/Servicer Guide (Guide) and other purchase documents, including requirements pertaining to mortgage insurance coverage. Under those requirements, sellers and servicers must obtain a primary mortgage insurance policy for any conventional first mortgage with an LTV ratio greater than 80% by the time the mortgage is sold to Freddie Mac. If a mortgage does not have the required mortgage insurance coverage at delivery, or if the coverage is no longer in force, Freddie Mac may require the seller/servicer to repurchase the mortgage, remit make whole funds, or provide proof that the required

mortgage insurance is in effect. If a seller or servicer currently has an outstanding repurchase request from Freddie Mac relating to the rescission, denial or cancellation of mortgage insurance coverage by the insurer, it must either repurchase the mortgage or may appeal the repurchase request by submitting a fully documented appeal in accordance with Section 72.6 of the Guide. For repurchase requests dated on or before May 31, 2011, the resolution must be completed by September 30, 2011, and for repurchase requests dated after May 31, 2011, the resolution must be completed within the time frames specified in the purchase documents. Freddie Mac will deem the repurchase requests delinquent if they are not resolved within those time frames. Click here for a copy of the announcement.

HUD Amends Requirements for HECM Counseling Agencies Lists. On August 12, the U.S. Department of Housing and Urban Development published a Mortgagee Letter providing guidance regarding Home Equity Conversion Mortgage (HECM) counseling. The Letter requires that national and regional intermediaries awarded HECM counseling grant funds by HUD must always be included on the list of HECM counseling agencies provided by lenders to borrowers. The Letter also identified three additional intermediaries that received HECM grant funds for this year. In addition to intermediaries receiving those funds, the list must also include at least five agencies within the local area or state of the borrower, one of which must be within reasonable driving distance of the borrower. Lenders must also now enter the date that the borrower received the counselor list. The new guidance became effective May 1, 2011. For Fiscal Year 2011, it is not necessary to revise lists that were given to clients before May 1, 2011. Click here for a copy of the Mortgagee Letter.

State Issues

Illinois Amends Judicial Foreclosure Procedure. Illinois recently enacted House Bill 1960, which amended the Judicial Foreclosure Procedure by adding a 60 day deadline in any residential foreclosure action to file a motion to dismiss or to quash service of process that objects to the court's jurisdiction over the person. Unless extended by the court for good cause shown, the deadline is 60 days after the earlier of (i) the date that the moving party filed an appearance, or (ii) the date that the moving party participated in a hearing without filing an appearance. The moving party waives all objections to the court's jurisdiction over the party's person if the party files a responsive pleading or motion prior to the filing of a motion objecting to the court's jurisdiction. The new law became effective on August 12, 2011. Click here for a copy of the bill.

Courts

Ohio Federal Court Approves Robo-Signing Class Action Settlement. On August 12, the U.S. District Court for the Northern District of Ohio, in *Midland Funding, LLC v. Brent*, No. 3:08-cv-01434, 2011 WL 3557020 (N.D. Ohio Aug. 12, 2011), approved a settlement of class action litigation regarding the use of affidavits where the affiant lacked personal knowledge of the facts set forth in the affidavit. The debt collection company had sued the defendant borrower concerning a debt that borrower owed. The borrower asserted a class action counterclaim alleging violations of the Fair Debt Collection Practices Act (FDCPA). The counterclaim alleged that form affidavits, such as the one initially filed against the borrower, were signed by employees who lacked personal knowledge of the

facts asserted. The court held that the practice of "robo-signing" affidavits during debt collection actions violated both the FDCPA and the Ohio Consumer Sales Protection Act. That decision induced further class action complaints in other states. Following unsuccessful mediation, the court granted class certification of individuals who had been sued using an affidavit that falsely claimed to be based on the affiant's personal knowledge, while rejecting class certification of individuals who had been sued in an effort to collect on a higher interest rate than the law allowed. Following completion of motions practice in the original defendant's action, the parties agreed to participate in a settlement conference with the court. This conference led to an agreement to settle the original action as well as other actions against the debt collection company.

The parties stipulated to the certification of a class of individuals who had been sued by the debt collection company between January 1, 2005 and the date that the Order of Preliminary Approval of Class Action Settlement was entered into by the Court, in any debt collection action in any court where an affidavit attesting to facts about the underlying debt was used in connection with the lawsuit. In exchange for a class-wide release, the debt collection company agreed to pay $5.2 million into an interest-bearing fund for the benefit of the class, with no more than $1.5 million in attorney's fees being paid out of the fund. All eligible class members were to receive $10 each, with possible increases based on the availability of remaining funds. The settlement also included injunctive relief that required the debt collection company to create and implement written procedures for generating and using affidavits in debt collection lawsuits to prevent the use of affidavits where an affiant lacks personal knowledge of the facts in the affidavit. Despite objections from the attorneys general of 38 states and the Federal Trade Commission that the release was overbroad and the settlement sum insufficient, the court approved the settlement of the class action litigation. The court found that the "release is limited to claims where the basis for relief is the affidavit itself," and did not include instances where "the factual basis for the claim is something other than the affidavit." The court further noted that the "release simply prevents a deficient affidavit from furnishing the basis for an independent claim for damages" against the debt collection company. The court also found that the settlement was the product of arms-length negotiations and was fair, reasonable, and adequate. Click here for a copy of the opinion.

Firm News

James Parkinson will speak on the Foreign Corrupt Practices Act as a Visiting Lecturer at Universidad Panamericana, Mexico on August 25.

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.

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 through September 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.

Mortgages

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