InfoBytes

October 7, 2011

Topics In This Issue

Federal Issues

CSBS Releases Mortgage Loan Originator Compensation Guidelines. On October 7, the Multi-State Mortgage Committee (MMC), a committee created by the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR), released guidelines for examiners to use in reviewing non-depository mortgage loan originators' and creditors' compliance with the Federal Reserve Board's (FRB's) mortgage loan originator compensation rules. The guidelines are intended to promote standardization and consistency within the state regulatory community regarding enforcement of the FRB's rules. The guidelines were developed after the MMC solicited industry feedback, which the CSBS states increases the transparency of mortgage-lending-related supervision. Click here for a copy of the CSBS and AARMR press release, and the guidelines.

Senate Banking Committee Approves Cordray Nomination to Lead the CFPB. On October 6, the Senate Banking Committee voted to approve the nomination of former Ohio Attorney General Richard Cordray to lead the Consumer Financial Protection Bureau (CFPB). Cordray's nomination now goes to the full Senate where, if approved, he would be the first Director of the CFPB, replacing Raj Date who is the CFPB's acting head until a Director is confirmed. The Senate Banking Committee approved Cordray's nomination in a 12-10 party-line vote, and Senate Republicans have stated that they will not support Cordray's nomination without several changes to the CFPB. Click here for a copy of Senate Banking Committee Chairman Tim Johnson's statement on the Cordray nomination.

U.S. Department of Justice Submits Legislative Proposals Intended to Benefit Servicemembers. On September 20, the Office of Legislative Affairs of the U.S. Department of Justice (DOJ) forwarded to Congress a legislative package intended to "significantly strengthen the protections afforded to servicemembers and their families under existing civil rights laws." The package contained three "Titles". Title I is dedicated to enhancing protections related to housing and lending rights under the Servicemembers Civil Relief Act (SCRA), the Fair Housing Act (FHA) and the

Equal Credit Opportunity Act (ECOA). The DOJ's proposed changes to strengthen enforcement of the SCRA included a doubling of the civil penalties now available under Section 801(b)(3) to a maximum of $110,000 for a first offense and $220,000 "for any subsequent violation." The DOJ proposal would also empower the Attorney General (AG) or a designee to issue civil investigative demands for relevant documents prior to commencing a SCRA civil enforcement action. Enhanced penalties like those in the proposed changes to SCRA were also recommended for FHA Section 814(d)(1)(c), and similar empowerment of the AG (or a designee) regarding civil investigative demands was outlined in a proposed Section 814(c)(2). Title II proposes changes to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to ensure that servicemembers and overseas citizens have the opportunity to vote timely and to have their votes counted. Title III would strengthen the enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA) as well as Title VII of the Civil Rights Act of 1964 by authorizing the DOJ to challenge individual USERRA violations and to investigate and bring suit to stop a pattern or practice of USERRA violations. Further, Title III would provide for civil investigative demand authority in both USERRA and Title VII investigations. Last, regarding ECOA, the DOJ proposed empowering the AG (or its designee) to issue civil investigative demands. Click here for the text of the DOJ's legislative proposals as submitted to the Congress.

State Issues

Massachusetts Passes Regulation for Reverse Mortgages. On October 14, a new Massachusetts regulation establishing requirements for reverse mortgage programs will become effective. Under the regulation, a mortgage servicer can give a reverse mortgage loan to only someone who has affirmatively opted in after receiving counseling from an approved third party. Additionally, any mortgagee (including federal lenders) that wants to offer reverse mortgage loans in Massachusetts must be approved by the Commissioner of Banks. The regulation includes a copy of the required Opt in Form. Click here for a copy of the Regulation.

Massachusetts Attorney General Issues Statement on Multistate Negotiations with Major Banks. On October 5, Massachusetts Attorney General (AG) Martha Coakley issued a statement regarding the multistate AG working group (headed by Iowa AG Tom Miller) and its negotiations with major banks and servicers. AG Coakley stated that she had "lost confidence that the banks will bring to the table an agreement that properly holds them accountable for wrongful foreclosures." Based on that conclusion, she further advised that her office was preparing for litigation, and was "aggressively proceeding with efforts to file lawsuits regarding creditor misconduct" including "filing false or misleading documents with registries in the Commonwealth." Click here for a copy of the press release.

California Amends Mortgage Loan Originators Licensing Provisions. On October 4, California amended provisions under the California Finance Lenders Law regarding mortgage loan originator licensing. The amendments include the following: (i) allowing the possibility that applicants who have an expunged or pardoned felony conviction can obtain a license, although the underlying crime, facts, or circumstances can be considered when determining whether to issue a license; (ii) authorizing a person exempt from the provisions of the California Finance Lenders Law to apply to the

Commissioner of Corporations for an exempt company registration for the purpose of sponsoring one or more individuals required to be licensed under the SAFE Act if specific requirements are met; (iii) requiring an exempt person to comply with all rules and orders that the Commissioner deems necessary to ensure compliance with the federal SAFE Act and pay an annual registration fee; and (iv) authorizing a licensed mortgage originator who is an insurance producer for an insurer that is registered to do business in the state, to originate loans on behalf of exempt persons, or on behalf of a licensed financial lender that originates loans for a single exempt person. Click here for a copy of the bill.

Oregon Amends Fees for Mortgage Licenses. On October 3, a rule permanently adopting reduced licensing fees for mortgage bankers, mortgage brokers and mortgage originators took effect in Oregon. This rule continues the reduced licensing fees implemented by the Department of Consumer & Business Services via temporary rules in June. Under the permanent rule, mortgage bankers and mortgage brokers must pay a $960 fee to apply for a license and a $330 fee to renew a license, plus additional fees for each branch maintained in Oregon. Mortgage loan originators must pay an $80 fee to apply for a license and a $65 fee to renew a license. Click here for a copy of this rule.

Colorado Amends Licensing and Registration Fees for Mortgage Lenders. After its annual evaluation of licensing and renewal fees, the Colorado Division of Real Estate and Budgeting Office has determined that, due to an increase in the number of licensing applications, the number of registered companies, and the amount of fines collected, mortgage industry fees can be reduced. The reduction will take effect November 1, 2011. Click here for the Mortgage Loan Originators Fee Schedule.

Courts

United States Recommends Supreme Court Review of RESPA Section 8(b) Decision. The Solicitor General submitted an amicus curiae brief to the United States Supreme Court to support the Court's review of whether unearned fees which are not split with any party violate Section 8(b) of the Real Estate Settlement Procedures Act (RESPA). *Freeman v. Quicken Loans, Inc.*, No. 10-1042 (U.S.). In the consolidated actions underlying the appeal, plaintiffs alleged that their lender violated Section 8(b) by charging them certain loan origination fees for which no services were provided or that were duplicative of other fees. The United States District Court for the Eastern District of Louisiana granted summary judgment to the defendant, noting a split among the circuit courts of appeal and holding that Section 8(b) did not provide a claim where a single settlement service provider retained - rather than split with another person or entity - unearned fees. The United States Court of Appeals for the Fifth Circuit affirmed, joining the Fourth, Seventh, and Eighth Circuits in holding that Section 8(b) is an anti-kickback statute, not "a general prohibition on...unearned fees or other forms of price abuse." The Second and Third Circuits, and arguably the Eleventh Circuit in dicta, have previously held that marking up a fee for a settlement service provided by a third party and retaining the entire unearned portion of the fee violates Section 8(b). The Second Circuit has gone one step further, holding that Section 8(b) prohibits any unearned fee charged by a settlement service provider even without the involvement of a separate party. Plaintiffs filed a petition for certiorari to the Supreme Court, asking it to resolve the circuit split. In response to an Order of the

Supreme Court inviting the view of the United States, the Solicitor General filed a brief recommending that the case be reviewed because of the split among the Circuit Courts and because, in the view of the United States, the Fifth Circuit's decision requiring a split with a separate party is inconsistent with RESPA and the regulations interpreting Section 8(b). Click here for a copy of the brief.

Federal District Court Finds That Failure to Apply a Discount Does Not Constitute the Charge of an Unearned Fee in Violation of RESPA. On September 30, the U.S. District Court for the Western District of New York granted defendant Lawyers Title Insurance Company's motion to dismiss a class action alleging that the insurers failure to apply a reissue discount for title insurance violated the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §2607(b) (RESPA) and New York law. *Partell v. Lawyers Title Insurance Corp.*, No. 08-CV-166S (WD NY Sept. 30, 2011). Plaintiffs had alleged that the non-discounted portion of the fee was an unearned fee that the insurer split with the title company. The court rejected that argument, instead holding that the plaintiffs were actually asserting an overcharge claim that is not cognizable under RESPA. The court noted that "precisely the same partitioned overcharge claims" had been specifically rejected by "the Second Circuit and numerous other courts." In addition to rejecting the RESPA claim, the court declined to exercise supplemental jurisdiction over the state claims, which were dismissed without prejudice. Click here for a copy of the opinion.

Florida Court of Appeal Reverses Summary Judgment of Foreclosure for Creditor's Lack of Chain of Title. On September 30, the Fifth District Court of Appeal for the State of Florida reversed a creditor's summary judgment of foreclosure for lack of standing resulting from insufficient evidence of chain of title for the mortgage and because the judgment was entered on grounds not raised in the underlying motion. *Gee v. U.S. Bank Nat'l Ass'n*, No. 5D10-1687. In this case, assignee U.S. Bank filed a complaint against the borrower seeking to reestablish a lost note and mortgage, reform the legal description contained in the mortgage and deed, and to foreclose on the subject property. Without knowing that the U.S. Bank's motion for summary judgment stated in error that the original note, mortgage, and assignment of mortgage would be filed, the trial court entered a judgment in favor of the bank. The Court of Appeal reversed, finding that U.S. Bank did not have standing to bring the action because it had failed to provide sufficient evidence of the mortgage's chain of assignment (and, thus, its own interest). The Court of Appeal additionally held that the trial court improperly entered summary judgment on U.S. Bank's reestablishment and reformation claims because they were not raised with particularity in the motion for summary judgment itself. Click here for a copy of the opinion.

Ninth Circuit Allows Class Recovery of Cumulative Damages Under FDCPA and California Rosenthal Act. On September 23, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court's decision granting summary judgment to a class of plaintiffs for violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e (FDCPA) and California's Rosenthal Act, Cal. Civ. Code § 1788, et seq., and a jury's award of statutory damages under both statutes. In *Gonzales v. Arrow Financial Services*, No. 10-55379 (Sept. 23, 2011 9th Cir.), Mr. Gonzales, on behalf of himself and a class of plaintiffs, alleged that defendant Arrow Financial Services, a debt buyer and collector, violated the FDCPA and Rosenthal Act when it sent nearly identical letters to 40,000 California residents implying that failure to repay certain debts it was attempting to collect could result in its

reporting negative information to credit reporting agencies about those consumers. The Ninth Circuit affirmed the district court's ruling that the letters were "false, deceptive, or misleading" because, in fact, the debts were too old to be legally reported under the FDCPA's limit on reporting debts more than seven years old. After granting summary judgment on these facts, the district court held a jury trial to determine damages. The jury awarded cumulative damages for the FDCPA and the Rosenthal Act, allowing the lead plaintiff and class members to recovery equal amounts under each act for the violations. Defendant argued that the Rosenthal Act does not allow class actions and, even if it did, recovery should not be allowed under both it and the FDCPA. The court rejected these arguments. First, it held the Rosenthal Act was amended in 1999 to allow class actions. Second, it explained that the jury's award was consistent with the Rosenthal Act's intention that its remedies be "cumulative and . . . in addition to" remedies of other laws, and with the FDCPA's express language and deterrent purpose. Affirming the district court decisions, the court summarized that "letters, which misleadingly implied that [defendant] had the ability to report obsolete debts to credit bureaus, and impliedly threatened to make such reports, violated [the FDCPA]," and that "the Rosenthal Act's remedies are cumulative, and available even when the FDCPA affords relief." Click here for a copy of the opinion.

California Appeals Court Affirms Decision Requiring Recordation of Assignment for a Mortgage but not Deed of Trust. The California Court of Appeals for the Second Appellate District affirmed a lower court's ruling that California Civil Code §2932.5 does not apply when the power of sale is conferred in a deed of trust rather than a mortgage. *Calvo v. HSBC Bank USA, N.A.*, No. BC415545 (Cal. Ct. App. 2011) The plaintiff received a loan, not from the defendant, that was secured by a deed of trust against her residence and was recorded on September 1, 2006. In 2008, a substitution of trustee and notice of default was recorded by the defendant purporting to be the assignee of the loan. The substitution of trustee did indicate that an assignment had occurred, however, no actual assignment of deed of trust was recorded. The defendant assignee bought the plaintiff's residence at the foreclosure sale. The plaintiff then sued, alleging that the defendant violated California law by initiating the foreclosure proceeding under the deed of trust without recording the assignment of the deed of trust. The court held that it has been established since 1908 that under §2932.5, an assignment for the beneficial interest in a debt that was secured by real property required recordation if the assignee wanted to exercise the power of sale only for a mortgage and not for a deed of trust. The court noted that this holding has never been reversed or modified in any reported California decision in the 100 years since. Plaintiff contended that in the modern era, no difference exists between a mortgage and a deed of trust. The court responded that California case law does not support that interpretation and that other statutes allowed parties to initiate foreclosure on behalf of the defendant irrespective of the recording of an assignment of deed of trust. Click here for a copy of the opinion.

Miscellany

Eight Charged with Mortgage Fraud Scheme in California. In one of the most recent actions pursued by the President's Financial Fraud Enforcement Task Force, the U.S. Attorney for the Eastern District of California, Benjamin B. Wagner, announced an indictment on September 30, 2011, charging eight people with conspiracy to commit mail fraud in connection with a mortgage fraud scheme involving the purchase of seven homes. Two of the defendants were also charged with

money laundering in connection with the scheme. The indictment alleged that the defendant strawbuyers purchased homes at substantially inflated prices in order for the defendant sellers to receive the excess cash at the close of escrow. The defendant strawbuyers allegedly submitted fraudulent loan applications to lenders to finance the inflated prices of the homes. Another defendant - a licensed California real estate agent - allegedly prepared the fraudulent applications and attempted to disguise his involvement with those loan applications. The remaining four defendants were the homeowners who allegedly sold their properties as part of this scheme. They allegedly signed fake invoices claiming repairs and improvements had been completed on their properties to substantiate the inflated home prices. After the lenders funded the loans, the defendants allegedly diverted a portion of the proceeds to themselves and to businesses controlled by the defendants. All seven properties were foreclosed, resulting in more than $1.8 million in losses for the lenders. If convicted, the defendants face a maximum penalty of 20 years in prison for conspiracy to commit mail fraud, 10 years in prison for money laundering, and a $250,000 fine. Click here for a copy of the announcement.

Firm News

Margo Tank will be a presenter at a webinar entitled "E-Signatures for Financial Services Legal Counsel" on October 20 at 1 PM ET. To register for the free 90-minute presentation, click here.

Benjamin Klubes will be moderating a panel titled, "The Path Ahead for Housing Finance: Just Changing Lanes or Time for a New Road?" at George Washington University Law School's "Dodd-Frank's Future Direction: On Course or Off Track" symposium on October 21. BuckleySandler is a sponsor for this symposium.

Benjamin Klubes will be speaking at the ACI's 7th Annual Forum on Preventing, Detecting and Resolving Mortgage Fraud from October 24-25 in Washington, DC. Mr. Klubes' session is entitled: "The New and Complex World of HUD/FHA Lending Requirements: Using Lessons Learned from Investigations of Cases by the Agencies to Avoid Costly Penalties, Including Expulsion from the Program".

Jonice Gray Tucker, **Robyn Quattrone**, and **Liana Prieto** will be speaking at the Women in Housing & Finance Regulatory Taskforce Lunch in Washington, D.C. on October 25. Their presentation will focus on the current state of the Consumer Financial Protection Bureau including its structure, rulemaking efforts, and anticipated regulatory and enforcement priorities.

Jerry Buckley will participate in a panel discussion on Dodd Frank, the Settlement activities and related items at the FocusPoints Conference in Orlando Florida on October 26. the conference is sponsored by QBE First.

Jonice Gray Tucker will be speaking at the Fall Meeting of the ABA Banking Law Committee in Washington, D.C. on November 4. Ms. Tucker will be discussing enforcement trends related to mortgage servicing.

Andrew Sandler and **Benjamin Klubes** will be speaking at the 15th Annual CRA & Fair Lending Colloquium which will be held in Baltimore, Maryland from November 6-8, 2011. Mr. Sandler will be addressing "Hot, Hot, Hot Compliance Topics: Reform Impact, Oversight Trends, Enforcement Actions and More!" on November 7. Mr. Klubes will be moderating a panel on "Non-Mortgage Lending: The Fair Lending Dragon is Breathing Fire" on November 8. For further details on the colloquium please see www.cracolloquium.com.

Margo Tank and **John Richards** will participate in the ESRA Fall Conference in Washington, D.C. on November 9 and 10. For details on registration, accommodations, and agenda, please see http://esignrecords.org/events/.

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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Criminal Enforcement Action

Eight Charged with Mortgage Fraud Scheme in California. In one of the most recent actions pursued by the President's Financial Fraud Enforcement Task Force, the U.S. Attorney for the Eastern District of California, Benjamin B. Wagner, announced an indictment on September 30, 2011, charging eight people with conspiracy to commit mail fraud in connection with a mortgage fraud scheme involving the purchase of seven homes. Two of the defendants were also charged with money laundering in connection with the scheme. The indictment alleged that the defendant strawbuyers purchased homes at substantially inflated prices in order for the defendant sellers to receive the excess cash at the close of escrow. The defendant strawbuyers allegedly submitted fraudulent loan applications to lenders to finance the inflated prices of the homes. Another defendant - a licensed California real estate agent - allegedly prepared the fraudulent applications and attempted to disguise his involvement with those loan applications. The remaining four defendants were the homeowners who allegedly sold their properties as part of this scheme. They allegedly signed fake invoices claiming repairs and improvements had been completed on their properties to substantiate the inflated home prices. After the lenders funded the loans, the defendants allegedly diverted a portion of the proceeds to themselves and to businesses controlled by the defendants. All seven properties were foreclosed, resulting in more than $1.8 million in losses for the lenders. If convicted, the defendants face a maximum penalty of 20 years in prison for conspiracy to commit mail fraud, 10 years in prison for money laundering, and a $250,000 fine. Click here for a copy of the announcement.