Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

April 12, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Publishes QM Rule Compliance Guide. On April 10, the CFPB published a guide to help small entities comply with its ability-to-repay/qualified mortgage rule. As required by the Small Business Regulatory Enforcement Fairness Act, the guide highlights issues for small creditors to consider when implementing the rule. More broadly, the CFPB believes the guide provides an "easy-to-use" summary of the rule for all creditors, as well as secondary market participants, software providers, and other vendors and creditor business partners. However, the CFPB notes that the guide is not a substitute for the rule and the Official Interpretations, and the guide does not consider other federal or state laws that may apply to the origination of mortgage loans. The CFPB also has prepared a chart that compares the general ability-to-repay requirements with requirements for originating qualified mortgages.

Bank Regulators Announce First Foreclosure Review Payments. On April 9, the Federal Reserve Board and the OCC announced that payments to borrowers impacted by allegedly improper foreclosure practices would begin on April 12, 2013. The planned payments range from $300 to $125,000, and will be sent to certain borrowers whose mortgages were serviced by 11 of the 13 mortgage servicers subject to recently amended consent orders that replaced requirements related to the Independent Foreclosure Review process with $3.6 billion in cash payments and $5.7 billion in other assistance to 4.2 million borrowers. Payments to borrowers with mortgages serviced by two other servicers will be announced later. The payments will be sent in several waves, with the last wave expected to be sent in mid-July 2013. The announcement notes that the regulators categorized borrowers according to the stage of their foreclosure process and the type of possible servicer error. Then, amounts were determined for each category using the financial remediation matrix published in June 2012 as guidance, but also incorporating input from various consumer groups. The Board and the OCC also published a chart of payment amounts and the number of borrowers identified for each category.

FHFA Announces Two-Year HARP Extension. On April 11, the FHFA announced that Fannie Mae and Freddie Mac will extend the Home Affordable Refinance Program (HARP) to December 31, 2015. The program was set to expire at the end of 2013. In addition, the FHFA plans to launch a nationwide campaign to educate consumers about HARP. The FHFA announcement also includes HARP frequently-asked-questions and eligibility criteria for a HARP refinance.

State Banking Regulators Support Federal Online Payday Lending Bill. On April 10, the CSBS sent a letter to Senator Jeff Merkley (D-OR) and Representative Suzanne Bonamici (D-OR) - the chief sponsors in their respective chambers of Congress of legislation related to online payday lending - to express support for the bills. The letter focuses on the provisions of the SAFE Lending Act, S. 172 and H.R. 990, that seek to (i) ensure consistent application of state usury laws and (ii) enhance state authority over online lenders. Noting that state regulators have found "countless instances of unlicensed and unregulated online payday lending" in violation of state law, the CSBS contends that the bills should be considered a "framework for the proper state-federal regulatory balance" with respect to online, short-term, small-dollar loans.

SEC Approves Final Investor Privacy Rule. On April 10, the SEC voted unanimously to adopt a final rule requiring broker-dealers, mutual funds, investment advisers, and other regulated entities to implement programs designed to detect and prevent identity theft. The final rule applies to SEC-regulated entities that meet the definition of "financial institution" or "creditor" under the FCRA. The final rule will take effect 30 days after publication in the Federal Register and give covered firms six months from the effective date to comply. Under the final rule, covered firms must establish policies and procedures designed to (i) identify relevant types of identity theft red flags, (ii) detect the occurrence of those red flags, (iii) respond appropriately to the detected red flags, and (iv) periodically update the identity theft program. The rule requires covered firms to provide staff training and oversight of service providers, and provides guidelines and examples of red flags to help firms administer their programs. Further, the rule requires covered firms that issue debit cards or credit cards to take certain precautionary actions when they receive a request for a new card soon after notification of a change of address for a consumer's account.

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hierarchy and updates delinquency status code definitions. The hierarchy requires servicers to report the most appropriate delinquency status code based on priority level, using a six level priority hierarchy. The announcement explains that when multiple delinquency status codes are applicable to an individual loan, the servicer must use the appropriate delinquency status code in the highest priority, though Priority Level 1 through 3 status codes are mutually exclusive. The changes will take effect for the February 2014 delinquency status code reporting cycle (for January 2014 activity), though Fannie Mae encourages servicers to implement the new policies as soon as possible.

Fannie Mae Announces Numerous Selling Guide Updates. On April 9, Fannie Mae issued Selling Guide Announcement SEL-2013-03, which updates numerous guide sections. According to the announcement, effective immediately, all lenders that wish to deliver eMortgages must obtain special approval evidenced by an addendum to their Mortgage Selling and Servicing Contract (MSCC), and not by a variance to their Master Agreement. Lenders that currently have variances by way of their Master Agreement will still be entitled to electronically deliver mortgages until the variance is converted to an MSCC addendum. The Selling Guide also has been updated to reflect previously announced policy changes regarding lender incentives for borrowers, private flood insurance policies, and the new selling representation and warranty framework. With regard to that new framework, the announcement includes a table summarizing the major updates. Fannie Mae also authorized changes to the last page of the note and security instrument to comply with the requirements of TILA and Regulation Z. Lenders are encouraged to implement the changes to the note and security instrument immediately and no later than January 10, 2014. Finally, the announcement includes numerous minor Guide changes and clarifications.

Federal Reserve Board Issues Final Retail Foreign Exchange Transactions Rule. On April 9, the Federal Reserve Board published a final rule that allows supervised entities to engage in off-exchange foreign currency transactions with retail customers. Covered transactions include foreign exchange transactions that are futures or options on futures, options on foreign currency not traded on a registered national securities exchange, and "rolling spot" transactions. The rule, which is substantially similar to the proposed version, establishes requirements for (i) risk disclosure statements to customers, (ii) recordkeeping, (iii) business conduct, (iv) customer confirmations, monthly statements, and notices of transfer, and (v) implementing internal rules and procedures to maintain trading and operational standards. The rule requires regulated institutions engaging in such transactions to (i) provide notice to the Federal Reserve Board, (ii) maintain capital requirements, and (iii) collect a certain margin amount for retail foreign exchange transactions. The rule takes effect on May 13, 2013.

STATE ISSUES

New York Proposes Enhanced Anti-Corruption Law. On April 9, New York Governor Andrew Cuomo announced legislation to broaden the scope of public corruption crimes and enhance enforcement. The law would add and increase penalties for individuals found to have misused public funds and permanently bar those convicted of public corruption offenses from (i) holding any elected or civil office, (ii) lobbying, (iii) contracting, (iv) receiving state funding, or (v) doing business with New York, directly or through an organization. The new crimes would include bribery of a public servant, corrupting the government, and failure to report public corruption. The law also would create new penalties for certain offenses, such as fraud, theft, or money laundering, if the offense involves state or local government property. Finally, the law would extend the statute of limitations that would apply for non-government employees working in concert with government employees, and would limit the immunity available to a witness who testifies before a grand jury investigating fraud on government or official misconduct, allowing authorities to prosecute such a witness if the prosecutor develops evidence other than, and independent of, the evidence given by the witness

Massachusetts Warns Payday Loan Debt Collectors. On April 8, the Massachusetts Division of Banks sent a letter to state-licensed debt collectors advising them that it is illegal to collect on consumer loans that violate the Massachusetts small loan statute. The action follows a similar step taken by the New York Department of Financial Services last month. The Massachusetts letter reminds debt collectors that entities engaged, directly or indirectly, in the business of making loans of $6,000 or less with interest and expenses paid on the loan in excess of 12% annually must be licensed with the Division of Banks. Further, state law limits the annual interest rate that can be charged on small loans to 23%. The letter advises debt collectors that (i) loans made in violation of these rules are void, (ii) it is illegal to attempt to collect on debt that is void or unenforceable, and (iii) it is the responsibility of licensed debt collectors to ensure that they do not facilitate the creation or collection of illegal loans. The letter urges licensed debt collectors to review all client contracts and debtor accounts to ensure that all consumer, compliance, and reputational risks are appropriately evaluated and addressed on an ongoing basis.

Indiana Amends Lien Release Provisions. On April 1, Indiana enacted a bill to retroactively amend certain lien release provisions. The bill, HB 1079, provides that if the record of a mortgage or vendor's lien was created before July 1, 2012 and does not show the due date of the last installment, the mortgage or vendor's lien expires 20 years after the date of execution of the mortgage or vendor's lien. If the execution date is omitted, the lien expires 20 years after the lien is recorded. Prior to this change, all liens expired after 10 years. The bill also (i) makes exceptions to the expiration period if a foreclosure action is brought not later than the expiration period, and (ii) removes language that prohibits a person from maintaining an action to foreclose a mortgage or enforce a vendor's lien if the last installment of the debt secured by such lien has been due more than 10 years.

North Dakota Amends Mortgage Late Payment Fee Restrictions. Last month, North Dakota enacted SB 2136, which altered provisions related to late mortgage payment fees. Effective August 1, 2013, a charge for a late payment penalty may be imposed only if the amount of the late charge or the method of calculation of the late charge has been agreed to by the parties in the loan documents that are signed by the borrower. Under current law, servicers can charge up to $15 or 15% of the late payment, whichever is less, unless otherwise agreed to in the real estate note or mortgage. The new law also removes language stating that any contract attempting to make the rate of interest higher after maturity is void as to the increase of interest. Instead, the new law will allow parties to agree in writing to a different rate of interest after maturity.

COURTS

Second Circuit Allows FHFA MBS Suits to Proceed. On April 5, the U.S. Court of Appeals for the Second Circuit affirmed a district court's partial denial of a financial institution's motion to dismiss on standing and timeliness grounds a suit brought by the FHFA. *Fed. Hous. Fin. Agency v. UBS Americas, Inc.,* No. 12-3207, 2013 WL 1352457 (2d Cir. Apr. 5, 2013) The FHFA brought multiple suits against numerous institutions alleging that the offering documents provided to Fannie Mae and Freddie Mac in connection with the sale of $6.4 billion in residential MBS included materially false statements or omitted material information, resulting in massive losses. The institutions moved to dismiss, contending that (i) the securities claims were time-barred, (ii) FHFA had no standing to pursue the action, and (iii) a negligent misrepresentation claim failed to state a claim upon which relief could be granted. The district court denied the motion to dismiss with respect to the statutory claims and granted it only with respect to the negligent misrepresentation claim. On appeal, the Second Circuit held that the action, filed within three years after the FHFA was appointed conservator of Freddie Mac and Fannie Mae, was timely under the relevant sections of Housing and

Economic Recovery Act, and that the FHFA has standing to bring the action. The decision, on interlocutory appeal from the U.S. District Court for the Southern District of New York, holds implications for more than a dozen other similar actions the FHFA has filed.

Two Federal Courts Hold Government MBS Claims Were Untimely. On April 9, the U.S. District Court for the Central District of California dismissed claims brought by the FDIC as receiver for a failed bank against a financial institution related to 10 MBS certificates sold to the bank, holding that the FDIC's claims were time-barred. *Fed. Deposit Ins. Corp. v. Countrywide Secs. Corp.*, No. 12-6911, slip op. (C.D. Cal. Apr. 9, 2013). The court found that "a reasonably diligent plaintiff had enough information about false statements in the Offering Documents of [the firm's] securities to file a well-pled complaint before" the statute of limitations expired on August 14, 2008. The court noted that deviations from stated underwriting guidelines and inflated appraisals had come to light prior to the expiration of the statute of limitations through "multiple lawsuits" and "numerous media sources." The court found that it was irrelevant that the FDIC was named receiver for the bank because "[t]he FDIC [did] not have the power to revive expired claims." Similarly, on April 8, the U.S. District Court for the District of Kansas granted, in part, a motion to dismiss federal and state claims brought by the NCUA on behalf of three failed credit unions against a financial institution related to certain MBS certificates sold to the credit unions, holding that certain NCUA claims were time-barred. *Nat'l Credit Union Admin. Bd. v. Credit Suisse Secs. (USA) LLC*, No. 12 Civ. 2648, 2013 WL 1411769 (D. Kan. Apr. 8, 2013). The court found that the applicable federal and state law statutes of limitations required claims to be filed within one or two years of discovery of the alleged misstatement or omission, and within three or five years of sale or violation, respectively. The judge dismissed the federal and state claims for 12 of the MBS certificates as untimely, but preserved federal claims as to eight certificates, determining that the statutes of limitations were tolled on those claims. In addition, the court found that (i) venue was proper because defendant engaged in activity that would constitute the transaction of business in the district for purposes of the applicable venue statute and (ii) plaintiff set forth plausible claims for relief.

Illinois Federal Court Certifies Considerable Class in Data Company Privacy Suit. On April 2, the U.S. District Court for the Northern District of Illinois certified a class of individuals who downloaded and installed tracking software created and operated by a data company and distributed by one of the company's third-party bundling partners. *Harris v. comScore, Inc.*, No. 11-5807, 2013 WL 1339262 (N.D. Ill. Apr. 2, 2013). The plaintiffs claim the data company used the tracking software to collect information on consumers' computers, including social security numbers and other personally identifiable information. The court estimated the software was installed on millions of computers between 2008 and 2011. The court refused to certify unjust enrichment claims due to variances in laws across states, but allowed claims of violations of the Stored Communications Act, the Electronic Communications Privacy Act, and the Computer Fraud and Abuse Act to move forward. Certification of such a large class is unusual for a privacy suit, but the company's user license agreement and the downloading statement regarding the software provided a basis for shared injury not present in other cases.

FIRM NEWS

Complimentary Webinar - Defending SCRA Actions
Please join BuckleySandler LLP attorneys Kirk Jensen and Jeffrey Naimon on May 1, 2013 from 2:00-3:15 PM ET, to review enforcement actions by federal and state authorities based on alleged violations of the Servicemembers Civil Relief Act. The panelists will discuss how requirements in the various consent orders in many cases exceed the requirements in the statute itself and how careful factual and legal scrutiny can successfully identify meritless claims. The webinar will review what regulators expect from a compliance standpoint, while helping you prepare to defend your institution

against claims that do not involve conduct prohibited by the SCRA. For registration and other information, please click here.

David Whitaker will speak at Silanis' Regional E-Banking Forums for Banking Executives in Chicago, IL on April 16, 2013 and San Francisco, CA on April 18, 2013. David will discuss recent judicial and regulatory developments affecting electronic financial services.

David Baris will speak at the American Bankers Association Risk Management Forum on April 26, 2013 at the Baltimore Marriott Waterfront Hotel in Baltimore, MD. His session is entitled "Developing Effective Board Risk Management Committees".

Benjamin Klubes and Jonice Gray Tucker will speak to the Financial Services Roundtable on May 1, 2013 on the topic of Managing Fair Lending and Jonice Gray Tucker also will speak on May 2, 2013 on the topic of Litigation Trends.

James Parkinson will speak at ACI's Conference for FCPA and Anti-Corruption in the Life Sciences Industry on May 15, 2013, on a panel titled, "Managing Corruption Risks in a Transactional Setting: How to Prevent FCPA Pitfalls in Life Science Joint Ventures, Mergers & Acquisitions and Collaborations."

Andrea Mitchell will speak at an American Bankers Association Fair Lending Workshop on June 8, 2013 in Chicago, IL, offered in connection with the ABA Regulatory Compliance Conference. The Fair Lending Workshop will review current fair lending hot topics and how institutions can manage or mitigate fair lending obstacles and demonstrate compliance with fair lending laws and regulations.

FIRM PUBLICATIONS

Jonice Gray Tucker and Kendra Kinnaird wrote "Mortgage Crisis Triggers Stronger Focus on Vendors," published by the National Notary Association on March 8, 2013.

Andrew Schilling, Ross Morrison, and Michelle Rogers published in Law360, "Finally, 8 Factors Governing FIRREA Civil Penalty Awards," on March 12, 2013, and "FCA Allows Treble Damages - 'But Treble What?'", on March 26, 2013.

About BuckleySandler LLP (www.buckleysandler.com)

With more than 150 lawyers in Washington, New York, Los Angeles, and Orange County, BuckleySandler provides best-in-class legal counsel to meet the challenges of its financial services industry and other corporate and individual clients across the full range of government enforcement actions, complex and class action litigation, and transactional, regulatory, and public policy issues. The Firm represents many of the nation's leading financial services institutions. "The best at what they do in the country." (Chambers USA).

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Washington: 1250 24th Street NW, Suite 700, Washington, DC 20037, (202) 349-8000
New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400
Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (310) 424-3900
Orange County: 3121 Michelson Drive, Suite 210, Irvine, CA 92612, (949)398-1360

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

In addition, please feel free to email our attorneys. A list of attorneys can be found here.

For back issues of InfoBytes, please see: http://www.buckleysandler.com/infobytes/infobytes.

InfoBytes is not intended as legal advice to any person or firm. It is provided as a client service and information herein is drawn from various public sources, including other publications.

MORTGAGES

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dismissed the federal and state claims for 12 of the MBS certificates as untimely, but preserved federal claims as to eight certificates, determining that the statutes of limitations were tolled on those claims. In addition, the court found that (i) venue was proper because defendant engaged in activity that would constitute the transaction of business in the district for purposes of the applicable venue statute and (ii) plaintiff set forth plausible claims for relief.

PRIVACY/DATA SECURITY

Illinois Federal Court Certifies Considerable Class in Data Company Privacy Suit. On April 2, the U.S. District Court for the Northern District of Illinois certified a class of individuals who downloaded and installed tracking software created and operated by a data company and distributed by one of the company's third-party bundling partners. *Harris v. comScore, Inc.*, No. 11-5807, 2013 WL 1339262 (N.D. Ill. Apr. 2, 2013). The plaintiffs claim the data company used the tracking software to collect information on consumers' computers, including social security numbers and other personally identifiable information. The court estimated the software was installed on millions of computers between 2008 and 2011. The court refused to certify unjust enrichment claims due to variances in laws across states, but allowed claims of violations of the Stored Communications Act, the Electronic Communications Privacy Act, and the Computer Fraud and Abuse Act to move forward. Certification of such a large class is unusual for a privacy suit, but the company's user license agreement and the downloading statement regarding the software provided a basis for shared injury not present in other cases.

SEC Approves Final Investor Privacy Rule. On April 10, the SEC voted unanimously to adopt a final rule requiring broker-dealers, mutual funds, investment advisers, and other regulated entities to implement programs designed to detect and prevent identity theft. The final rule applies to SEC-regulated entities that meet the definition of "financial institution" or "creditor" under the FCRA. The final rule will take effect 30 days after publication in the Federal Register and give covered firms six months from the effective date to comply. Under the final rule, covered firms must establish policies and procedures designed to (i) identify relevant types of identity theft red flags, (ii) detect the occurrence of those red flags, (iii) respond appropriately to the detected red flags, and (iv) periodically update the identity theft program. The rule requires covered firms to provide staff training and oversight of service providers, and provides guidelines and examples of red flags to help firms administer their programs. Further, the rule requires covered firms that issue debit cards or credit cards to take certain precautionary actions when they receive a request for a new card soon after notification of a change of address for a consumer's account.

CRIMINAL ENFORCEMENT

New York Proposes Enhanced Anti-Corruption Law. On April 9, New York Governor Andrew Cuomo announced legislation to broaden the scope of public corruption crimes and enhance enforcement. The law would add and increase penalties for individuals found to have misused public funds and permanently bar those convicted of public corruption offenses from (i) holding any elected or civil office, (ii) lobbying, (iii) contracting, (iv) receiving state funding, or (v) doing business with New York, directly or through an organization. The new crimes would include bribery of a public servant, corrupting the government, and failure to report public corruption. The law also would create new penalties for certain offenses, such as fraud, theft, or money laundering, if the offense involves state or local government property. Finally, the law would extend the statute of limitations that would apply for non-government employees working in concert with government employees, and would limit the immunity available to a witness who testifies before a grand jury investigating fraud on government or official misconduct, allowing authorities to prosecute such a witness if the

prosecutor develops evidence other than, and independent of, the evidence given by the witness.