November 26, 2010

Topics In This Issue

Federal Issues

Freddie Mac and Fannie Mae Announce Loan Limits for 2011. On November 19, Freddie Mac announced that it is maintaining loan limits in designated high-cost areas at 2010 levels through September 30, 2011. The announcement complies with the requirements of the continuing resolution passed by Congress and signed into law on September 30, 2010. The current limit of $625,000, set by The Housing and Economic Recovery Act of 2008 (HERA) for one-unit single-family residences in high-cost areas, will be maintained for the first nine months of 2011. In certain circumstances, temporary higher loan limits established by HERA or the Economic Stimulus Act of 2008 also will continue to apply through September 30, 2011. For a copy of the high-cost loan limits announcement, please click here. Also on November 19, Fannie Mae published Lender Letter LL-2010-13, announcing that the general loans limits for 2011 for all conventional mortgage loans remain unchanged from the 2010 limits. The high-cost area loan limits for first mortgage loans originated on or before September 30, 2011 also remain unchanged from the 2010 limits, with a maximum limit of $729,750 for a one-unit property in the continental United States. High-cost area limits for first mortgage loans originated after September 30, 2011, have been revised and consist of a maximum limit of $625,500 for a one-unit property in the continental United States. Lenders are advised to make use of reference material on www.eFannieMae.com to ensure that the original principal balance of each mortgage loan does not exceed the applicable maximum loan limit for the specific area in which the property is located. For a copy of Lender Letter LL-2010-13, please click here.

Freddie Mac Announces Revision of Pooling Options and Post-settlement Delivery Fees. On November 22, Freddie Mac announced the availability of new pooling options for super conforming mortgages and improvements to the Freddie Mac Selling System (Selling System). Under the announcement, new pools may contain up to and including 100% super conforming mortgages in non-TBA Gold and Giant PC Pools. Improvements to the Selling System include a more streamlined process for delivering mortgages under Best Efforts Contracts. For a copy of the announcement relating to the pooling options and Selling System updates, please click here. On November 22, Freddie Mac also issued a bulletin to revise its post-settlement delivery fees for all mortgages with settlement dates on or after March 1, 2011 sold to Freddie Mac. The new delivery fees are designed to address the current increased risks and costs associated with higher loan-to-value (LTV) mortgages. For certain mortgages, Freddie Mac is increasing the Indicator Score/LTV delivery fees and the Secondary Financing delivery fees. Additionally, Freddie Mac is adding a new Secondary Financing delivery fee and revising total loan-to-value (TLTV) parameters for certain mortgages. Although the seller controls the terms offered to a borrower, Freddie Mac believes these delivery fee increases will have only a "nominal" effect on consumer affordability. For a copy of the bulletin, and the revised delivery fees, please see http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1030.pdf.

HUD Issues Additional Guidance on Interpretative Rule Regarding Compensation Arrangements. On November 23, the Department of Housing and Urban Development (HUD) issued guidance in response to questions raised in public comments to its June 25 interpretative rule regarding compensation arrangements by which home warranty companies (HWCs) pay fees or compensation to real estate brokers and agents in connection with a real estate settlement. The June 25 interpretive rule (as reported in *InfoBytes*, June 25, 2010) provided (i) that payments to real estate brokers or agents by HWCs for marketing services directed at particular homebuyers or sellers are illegal kickbacks under RESPA, (ii) that HWCs may compensate real estate brokers or agents for additional services when those services are actual, necessary and distinct from the primary services provided by the real estate broker or agent, and are not nominal or duplicative, and (iii) that the amount of compensation for these additional services must be reasonably related to the value of those services and not include compensation for referrals. HUD's additional guidance answers a number of specific questions regarding the interpretive rule, including, among others, (i) that flat fee payments to brokers and agents for marketing still violate RESPA if the marketing is directed at particular homebuyers and sellers; (ii) that compensation to brokers and agents for undirected advertising may be permissible if such compensation does not rise to the level of a referral, (iii) that home warranties are settlement services under RESPA when they are "provided in connection with a prospective or actual settlement," and (iv) that, though the interpretative rule is directed at HWCs, its analysis may be applicable to other settlement service providers. HUD also advised that the interpretative rule does not change existing law and, therefore, applies retroactively as well as immediately. For a copy of HUD's guidance, please see here.

NCRC Advises Banks it Will File Complaints With Various Government Agencies. This week, the National Community Reinvestment Coalition (NCRC) sent letters to approximately 30 banks challenging their Federal Housing Administration (FHA) mortgage origination guidelines. The NCRC is alleging that banks with underwriting policies that include a FICO score cutoff above the minimum FICO score permitted by FHA guidelines are discriminating against African-American and Latino consumers who comprise a high percentage of FHA borrowers. According to the NCRC, the FHA has issued guidelines that "require" FHA approved lenders to originate mortgages with loan-to-value ratios of 96.5 percent to qualified applicants with credit scores above 580. Banks receiving the letter allegedly impose a higher FICO score minimum for FHA loans - some of which have a cutoff of 620. The NCRC is claiming that this policy has the purpose and effect of discouraging the flow of credit into communities in which loan applicants are predominantly African-American and Latino in violation of the Equal Credit Opportunity Act and Regulation B. The NCRC letters advise banks that NCRC will be filing complaints with the U.S. Department of Housing and Urban Development, mortgage lending regulators, the Consumer Financial Protection Bureau, the U.S. Department of Justice and the FHA to request an investigation of this matter. The letters further advise the banks that the NCRC is open to resolving their concerns amicably to avoid litigation. For more information, please contact infobytes@buckleysandler.com.

State Issues

Arkansas Increases Usury Limit. Arkansas residents recently voted to increase the maximum allowable rate of interest on all loans or other financing transactions entered into within the state. The maximum allowable rate, which is set out in the state constitution, had recently been below 6% per year. Fearful that such low rates chilled business in the state, the voters approved an amendment to the Arkansas constitution that raises the maximum lawful rate of interest for federally insured depository institutions to that which is set out at 12 U.S.C. § 1831u and 17% for all other institutions. The changes become effective January 1, 2011. For the text of the constitutional amendment, click here.

Courts

Illinois District Court Dismisses TCPA And FCRA Claims In Identify Theft And Fraud Alert Case. The United States District Court for the Northern District of Illinois recently dismissed a purported nationwide class action case under the Telephone Consumer Protection Act (TCPA) and the Fair Credit Reporting Act (FCRA) following motions for summary judgment. *Greene v. DirecTV, Inc.*, 2010 WL 4628734, No. 10 C 117 (N.D. Ill. Nov. 8, 2010). In *Greene*, the plaintiff signed up for a fraud alert service after she learned that she had been the victim of identity theft. In doing so, the plaintiff provided her cell phone number for potential creditors to contact her to verify account activity consistent with the fraud alert service. When an individual attempted to open an account with DirecTV using the plaintiff's social security number, but her own name and address, DirecTV's third party vendor contacted the plaintiff's cell phone by automated message to verify that she had opened the account. Upon learning that she had not opened the account, DirecTV, which had never opened an account in the plaintiff's name, began to disconnect the service. Plaintiff sued DirecTV and its third party vendor responsible for the automated phone call, alleging that they violated the TCPA when they contacted her cell phone using a prerecorded message, and that DirecTV also violated FCRA when it used plaintiff's social security number to open a new account without taking steps to confirm her identity. The court rejected both claims. First, it found that the TCPA does not prohibit automated calls to cell phones where the called party gives express consent, and that plaintiff had done so when she provided her cell phone number to the fraud alert company for use by potential creditors. Second, it explained that FCRA requires prospective creditors to take certain steps before establishing a credit account "in the name of [a] consumer" with a fraud alert in their credit report. Interpreting the terms of the statute in a manner consistent with their plain meaning, the court rejected the plaintiff's argument that a social security number may be considered a "name" because it is a unique individual identifier. It concluded that because DirecTV only used Plaintiff's social security number in establishing the account, but did not use her name, it was not liable under FCRA. For a copy of the opinion, please click here.

Firm News

Sam Buffone, David Krakoff and James Parkinson will be speaking at the "FCPA Enforcement Update: Individuals in the Line of Fire," Web conference on December 6.

Andrew Sandler will be a speaking at PLI's Banking Law Institute 2010: The Future is Here, on December 8, 2010. Mr. Sandler's session is: Consumer Financial Protection & Enforcement Proceedings under the New Legislation.

James Parkinson will speak in the Strafford web conference, "The FCPA's Exception and Affirmative Defenses: Complying with the Requirements for Gifts, Hospitality, and Facilitation Payments" at 1pm EST on December 21. This 75-minute CLE webinar will provide guidance to counsel for U.S. Companies conducting business internationally on navigating the facilitation-payment exception and affirmative defenses under the FCPA in order to avoid violations and penalties.

James Parkinson will be speaking at the web conference "FCPA Compliance: Best Practices for Your Anti-Corruption Compliance Program," hosted by National Constitution Center Conferences on January 19, 2011.

Donna Wilson will be speaking at the ACI Privacy & Security of Consumer & Employee Information Conference on January 25-26, 2011 in Washington, DC. The topic will be "Responding to the Latest Cyber Threats: Mobile Workforces, Technology, Data Thefts, and Cloud Computing."

Andrew Sandler will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27, 2011 at 11am. The conference is taking place at The Helmsley Park Lane Hotel, 36 Central Park South, NYC. The topic will be Emerging Federal and State Regulatory and Enforcement Initiatives: FTC, DOJ, SEC, FRB, and State AGs Perspectives. Also on the panel with Andy will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

Mortgages

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Banking

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Consumer Finance

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Litigation

Illinois District Court Dismisses TCPA And FCRA Claims In Identify Theft And Fraud Alert Case. The United States District Court for the Northern District of Illinois recently dismissed a purported nationwide class action case under the Telephone Consumer Protection Act (TCPA) and the Fair Credit Reporting Act (FCRA) following motions for summary judgment. *Greene v. DirecTV, Inc.*, 2010 WL 4628734, No. 10 C 117 (N.D. Ill. Nov. 8, 2010). In *Greene*, the plaintiff signed up for a fraud alert service after she learned that she had been the victim of identity theft. In doing so, the plaintiff provided her cell phone number for potential creditors to contact her to verify account activity consistent with the fraud alert service. When an individual attempted to open an account with DirecTV using the plaintiff's social security number, but her own name and address, DirecTV's third party vendor contacted the plaintiff's cell phone by automated message to verify that she had opened the account. Upon learning that she had not opened the account, DirecTV, which had never opened an account in the plaintiff's name, began to disconnect the service. Plaintiff sued DirecTV and its third party vendor responsible for the automated phone call, alleging that they violated the TCPA when they contacted her cell phone using a prerecorded message, and that DirecTV also violated FCRA when it used plaintiff's social security number to open a new account without taking steps to confirm her identity. The court rejected both claims. First, it found that the TCPA does not prohibit automated calls to cell phones where the called party gives express consent, and that plaintiff had done so when she provided her cell phone number to the fraud alert company for use by potential creditors. Second, it explained that FCRA requires prospective creditors to take certain steps before establishing a credit account "in the name of [a] consumer" with a fraud alert in their credit report. Interpreting the terms of the statute in a manner consistent with their plain meaning, the court rejected the plaintiff's argument that a social security number may be considered a "name" because it is a unique individual identifier. It concluded that because DirecTV only used Plaintiff's social security number in establishing the account, but did not use her name, it was not liable under FCRA. For a copy of the opinion, please click here.

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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