

November 5, 2010

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## Federal Issues

**Fannie Mae Announces Changes and Clarifications to Several Servicing Policies.** On October 29, Fannie Mae announced changes or clarifications to several of its servicing policies, including the following:

- **Retirement of the Payment Reduction Plan (PRP) program.** The PRP program, introduced in 2009, was designed to provide a borrower with temporary payment relief while the servicer and borrower worked together to find an appropriate permanent foreclosure prevention solution. Effective December 31, 2010, the PRP program will be retired. All PRPs must be initiated on or before that date and must end by July 1, 2011, or within 6 months of commencement, if earlier. Servicers will continue to report PRP data on a monthly basis and servicer incentives will continue to be paid on eligible PRPs upon the successful completion of a permanent foreclosure prevention alternative.
- **Restricting waiver of escrow deposits for certain borrowers.** Effective on October 29, a servicer must not grant a request to discontinue escrow requirements for a borrower who has previously defaulted on the related mortgage loan, has a blemished credit history on other credit obligations, or few cash reserves. Additionally, the servicer must establish and assume full responsibility for administering an escrow deposit account in connection with all mortgage modifications in accordance with the mortgage documents and all applicable laws and regulations. The new escrow payment effective date must be the same date as the effective date of the modification, and for loan modifications involving trial payment periods, the effective date shall be the effective date of the trial period.
- **Packaging of files for Fannie Mae review.** When Fannie Mae requests both an underwriting review file and a servicing review file, the servicer must package the material as a single file (with the underwriting and servicing documentation separated and clearly labeled within the file) or as two separate files that are packaged and sent together (with one file identified as the "underwriting" file and the other identified as the "servicing" file).
- **Clarification of Pre-filing Mediation Policy for Mortgage Loans in Florida.** Fannie Mae is clarifying that, following a successful mediation session for a Florida loan in which the borrower accepts an offer and executes the applicable documents, the servicer must complete all

activities necessary to enter the workout into its servicing system promptly upon receipt of the executed agreement and no later than 30 calendar days from the mediation session date. For modifications that require a trial payment period, the completion of those activities must not exceed 30 calendar days from the end of the trial period. [For a copy of Announcement SVC-2010-16, click here.](#)

**HUD Issues Guidance on Occupied Conveyances under Protecting Tenants at Foreclosure Act.** On October 28, HUD issued an interpretive notice regarding the relationship between the Protecting Tenants at Foreclosure Act (PTFA) and the FHA's occupied conveyance regulations. The FHA's regulations provide that upon default of an FHA-insured mortgage, the mortgagee must exercise reasonable diligence in prosecuting the foreclosure proceedings to completion and acquiring title to and possession of the property. In cases where HUD will be accepting conveyance of an occupied property because of foreclosure of an FHA mortgage, the occupant is entitled to a 60-to-90 day notice prior to the date the mortgagee expects to acquire title to the property. The PTFA, however, provides that after foreclosure on an occupied property secured by a federally-related mortgage loan, any immediate successor in interest to the foreclosure must provide a tenant occupying the property under a bona fide lease with a minimum of at least 90 days advance notice before requiring the tenant to vacate the property. For a copy of the notice, please see <http://edocket.access.gpo.gov/2010/pdf/2010-27309.pdf>.

**Fannie Mae Requests Servicer Collaboration with Housing Finance Agencies to Prevent Foreclosures.** On October 29, Fannie Mae released a Lender Letter announcing a Treasury Department award of \$7.6 billion to The Hardest-Hit und (HHF) programs. The letter also provided guidance to servicers regarding their interactions with Housing Finance Agencies (HFAs) administering the HHF Unemployment Programs and HHF Reinstatement Programs across the country. If an HFA determines that a borrower, whose loan is owned or guaranteed by Fannie Mae, qualifies for its HHF Unemployment or Reinstatement programs, then the servicer must accept funds provided by the HFA on behalf of the borrower. The HFA will notify the servicer of approval and payment details and the servicer must apply these funds as outlined in the Servicing Guide. The Servicing Guide also provides information relating to foreclosure process requirements for homes participating in HHF Unemployment and Reinstatement programs. For a copy of the Lender Letter, please see <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/111012.pdf>.

**FRB Establishes the Office of Financial Stability Policy and Research.** On November 4, the Federal Reserve Board announced that it has established the Office of Financial Stability Policy and Research, appointing Board economist J. Nellie Liang as its director. The purpose of the new office is to foster cooperation between economists, banking supervisors, markets experts and others staff in the Federal Reserve dedicated to supporting the Board's financial stability responsibilities. Among other things, the office will develop and coordinate efforts to identify and analyze potential risks to the financial system by (i) monitoring asset prices, leverage, financial flows, and other market risk indicators; (ii) following developments at key institutions; and (iii) and analyzing policies to promote financial stability. In addition, the office will support the FRB's participation on the Financial Stability Oversight Council and play a general supervisory role in the oversight of large financial institutions.

For a copy of the FRB's press release, please see <http://www.federalreserve.gov/newsevents/press/other/20101104a.htm>.

**Members of Congress Indicate That Internet Privacy Could be Priority in Next Congress.** On November 3, U.S. Representatives Joe Barton (R-Texas) and Edward Markey (D-Massachusetts) released responses to the letter they sent to Facebook CEO Mark Zuckerberg regarding privacy breaches on Facebook, a popular social networking website. The letter sent to Zuckerberg by the House Bi-Partisan Privacy Caucus came in light of the discovery that some third-party applications running on Facebook were transmitting users' personal information. In response to Facebook's letter, Representative Markey stated that "Facebook needs to protect personal consumer information to ensure that getting connected doesn't mean being unwittingly friended by data brokers and marketers. No one likes being friends with someone who invades their privacy." Representative Barton is a ranking member of the House Energy and Commerce Committee. Representative Markey is the co-chairman of the House Bi-Partisan Privacy Caucus. [For a copy of the press release, please click here.](#)

## State Issues

**DC AG Issues Enforcement Statement Clarifying Foreclosure Commencement Procedures.** On October 27, the Attorney General for the District of Columbia reiterated that he would consider as a violation of the DC Consumer Protection Procedures Act, any foreclosure sale notices sent to homeowners to initiate foreclosure proceedings that misrepresented or failed to state a material fact. One such omission, the AG announced, would be if the noteholder's security interest in real property was not properly recorded. Under the DC Code, transferees of a security interest must record the deed within 30 days after the execution. The AG further announced that it is a violation of this requirement even if the security interests are tracked in the Mortgage Electronic Registration Systems (MERS). Accordingly, the AG stated that a document that lists MERS as a nominee, but does not identify the actual holder of the security interest, would not suffice as a recording and, therefore, the initiation of foreclosure based on these facts would be considered a violation of the DC Consumer Protection Procedures Act. For a copy of the press release and the DC AG's notice, please see <http://newsroom.dc.gov/show.aspx/agency/occ/section/2/release/20673>.

## Courts

**North Carolina UDAP Claim Preempted by FCRA.** On October 29, the United States Court of Appeals for the Fourth Circuit affirmed the dismissal of false credit reporting claims made under Article 1 of the North Carolina Unfair and Deceptive Trade Practices Act (NCUDTPA), agreeing with the lower court that those claims were preempted by the Fair Credit Reporting Act (FCRA). *Ross v. Federal Deposit Insurance Corporation, as Receiver of Washington Mutual Bank*, No. 08-1851, 2010 WL 4261819 (4th Cir. Oct. 29, 2010). In *Ross*, plaintiff sued her mortgage servicer for false reporting of credit information in violation of FCRA and the NCUDTPA. Plaintiff, who was living in the property secured by the loan and making the loan payments, was not an obligor on the loan. Nonetheless, when the loan went into default, defendant reported negative credit information to credit reporting agencies (CRAs). The district court awarded summary judgment to the defendant, dismissing

plaintiff's FCRA claim on statute of limitations grounds, and plaintiff's NCUATPA claim on the basis of FCRA's preemption provision, 15 U.S.C. § 1681t(b)(1)(F) ("No requirement or prohibition may be imposed under the laws of any State (1) with respect to any subject matter regulated under ... (F) section 1681s2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies...."). Plaintiff appealed the preemption ruling, and the Court of Appeals affirmed. According to the court, "[plaintiff's] NCUATPA claim ... runs into the teeth of the FCRA preemption provision. Her claim concerns [defendant's] reporting of inaccurate credit information to CRAs, an area regulated in great detail under §§ 1681s-2(a)-(b)." The court also rejected plaintiff's argument that her NCUATPA claims fell under FCRA's preemption exemption for claims based on "malice or willful intent to injure," finding that plaintiff did not provide sufficient proof of such malice or willful intent to injure. To the contrary, "[t]he record is replete with evidence that [defendant] made a regrettable but honest mistake and took action to remedy this error once [plaintiff] brought it to [defendant's] attention." According to the court, "[b]anks make mistakes, which include errors in their records. And while we would hope that these errors could be held to a minimum and corrected the first time they are brought to the bank's attention, the failure to do so does not necessarily constitute malice." [For a copy of the opinion, please click here.](#)

## Firm News

[Andrew Sandler](#), [Ben Klubes](#), and [Jonice Gray Tucker](#) will be speaking at the 2010 CRA & Fair Lending Colloquium in Las Vegas from November 7-10, 2010. Senior executives at financial services organizations will discuss their compliance and risk management concerns with top regulators and other industry leaders.

[Margo Tank](#) and [Jerry Buckley](#) will be speaking at the Electronic Signatures & Records Association's Fall Conference on November 9-10.

[David Baris](#), [David Krakoff](#) and [Sam Buffone](#) are presenting a webinar titled "Legal Action by the FDIC to Recover Losses of Failed Banks: A Practical Guide for Officers and Directors," on November 11 from 12-1 p.m. The webinar will show participants how bank directors can mitigate their risks of personal liability from FDIC suits. For more information and to register for the webinar, please go to [www.aabd.org](http://www.aabd.org).

[Andrew Sandler](#) will be 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.

[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.

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

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