

April 22, 2011

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Federal Issues

Federal Reserve Proposes Rule Under Regulation Z Concerning a Consumer's Ability to Repay. On April 18, the Federal Reserve Board proposed a new rule under Regulation Z that would require creditors to determine a consumer's ability to repay a mortgage before making a loan and establish minimum mortgage underwriting standards. Promulgated in response to the Dodd-Frank Wall Street and Consumer Protection Act, the proposed rule would apply to all consumer mortgages except home equity lines of credit, timeshare plans, reverse mortgages, or temporary loans. It would provide creditors four ways to comply with the ability-to-repay requirement: (i) consider and verify specified underwriting factors, such as the consumer's income or assets; (ii) make a "qualified mortgage," which provides the creditor with special protection from liability provided the loan does not have certain features; (iii) make a balloon-payment qualified mortgage if operating in a rural or underserved area; or (iv) refinance a "non-standard mortgage" with risky features into a more stable "standard mortgage" with a lower monthly payment. Comments on the proposed rule will be accepted until July 22, 2011. [For a copy of the press release, please click here.](#)

HUD Revises Mortgagee Advertising Guidelines. On April 15, HUD issued Mortgagee Letter 2011-17, which updates the advertising restrictions placed on FHA-approved mortgagees. Under the updated guidelines, an FHA-approved mortgagee may only use the official "FHA Approved Lending Institution" logo in advertisements if it is displayed in a discreet manner and is accompanied by conspicuous disclaimers that the mortgagee is not acting on behalf of HUD, the FHA or the federal government. Advertisements also must clearly identify the mortgagee's name, location and contact information. Mortgagees are prohibited from altering the official FHA Approved Lending Institution logo or using a government acronym in a manner that falsely represents that the mortgagee's business services or products originate from HUD, FHA, or a federal, state or local government agency. Non-approved mortgagees, including Third Party Originators, are prohibited from using the FHA Approved Lending Institution logo in any way. Finally, use of the official FHA or HUD logos by any entity is prohibited. To ensure compliance, mortgagees must (i) retain copies of advertisements

for two years from the date that the advertisement is circulated; (ii) review all advertisements in circulation for compliance; and (iii) take prompt corrective action upon discovery of any advertising violation by employees, Third Party Originators, marketing firms, or other companies that advertise or generate other business on behalf of the mortgagee. Failure to comply with the updated guidelines may result in sanctions, including civil money penalties or administrative action against the mortgagee or its employees and agents. [For a copy of Mortgagee Letter 2011-17 please click here.](#)

Federal Reserve Notice Regarding Savings and Loan Holding Company Supervision. On April 15, the Federal Reserve Board (Board) issued a notice seeking comment on how it would apply its consolidated supervisory program for bank holding companies (BHCs) to savings and loan holding companies (SLHCs) after assuming supervisory responsibility for SLHCs from the Office of Thrift Supervision (OTS) on July 21, 2011 pursuant to the Dodd-Frank Wall Street and Consumer Protection Act. The notice expresses the Board's intention to apply its existing BHC supervisory program to SLHCs to the fullest extent possible, taking into account the unique characteristics of SLHCs and the requirements of the Home Owners Loan Act to ensure continuous and effective supervision of SLHCs. The notice seeks comments on the Board's supervisory program for large and regional holding companies; small, non-complex holding companies; and the holding company rating system. The Board expects that application of consolidated capital requirements to SLHCs will be addressed in the Basel III rulemaking process. Comments will be accepted until May 23, 2011. [For a copy of the notice, please click here.](#)

White House Proposes the Development Of A Universal Credential For E-Commerce Transactions. On April 15, The White House released its "National Strategy for Trusted Identities in Cyberspace" (NSTIC), which proposes a framework to enable consumers and other parties involved with online transactions to have their identities validated. The ultimate goal is to develop secure, easy-to-use and interoperable identity solutions to replace passwords so that businesses do not have to invest in creating their own secure online payment systems and consumers no longer have to manage different user names and passwords for each e-commerce site they visit. To that end, the Obama administration will develop an implementation roadmap that identifies and assigns responsibility for near- and long-term actions to be taken by the federal government, such as establishing technology and privacy standards that private industry should follow. [For more on the NSTIC, please click here.](#)

CFPB Delays Small Business Data Collection Requirements. On April 11, the General Counsel of the Consumer Financial Protection Bureau (CFPB) issued a letter announcing a delay in the implementation of Section 1071 of the Dodd-Frank Wall Street and Consumer Protection Act, which requires financial institutions to collect information under the Equal Credit Opportunity Act regarding women-, minority-owned and small business. The letter explains that, although Section 1071 becomes effective on July 21, 2011, the obligations to collect and report information will not arise until CFPB-issued regulations take effect. The letter promises that CFPB will "act expeditiously" to promulgate the required rules under Section 1071 and, in so doing, will gather input from interested parties such as nonprofits, small business groups and financial institutions. [For a copy of the letter, please see here.](#)

Federal Trade Commission Charges Marketers for Billing Consumers Without Their Consent.

On March 28, the FTC charged three marketers and their firm, Ventures, Inc., with unfairly and deceptively billing consumers without their consent and not providing promised refunds. The complaint alleges that the defendants unlawfully obtained personal customer information from payday loan websites and then enrolled them in "continuity" programs that charge recurring fees until a customer affirmatively acts to cancel their enrollment in the program. The complaint further alleges that when customers attempted to cancel, the defendants' representatives routinely refused refund requests, falsely promised refunds and falsely represented that the charges had been authorized as part of the customers' payday loan applications. [For a copy of the FTC's complaint, please click here.](#) [And, for a copy of the press release, please click here.](#) The FTC has also released a video, "Free Trial Offers", to help consumers avoid the hidden costs in some "free trial" programs. [It is available here.](#)

Courts

California Federal Court Dismisses Lawsuit After Finding Adequate Disclosures Regarding Online Discount Program. On April 11, the U.S. District Court for the Southern District of California dismissed claims against an online discount program and online movie ticketing website that the defendants deceptively enrolled the plaintiff into a costly program. *Berry v. Webloyalty.com, Inc., et al.*, No. 10-1358, 2011 WL 1375665 (S.D. Cal. Apr. 11, 2011). Plaintiff alleged that, while purchasing movie tickets online, he clicked on an advertisement promising discounted movie tickets and, after later providing his email address, unwittingly enrolled in a "savings club" that began charging a monthly fee. The court dismissed plaintiff's claims of misrepresentation, unfair competition, false advertising, and invasion of privacy on the ground that multiple disclosures in the advertisement (which plaintiff did not read) adequately disclosed the terms and conditions of membership in the savings club, including the monthly fee. [Click here for a copy of the opinion.](#)

Firm News

Join Us! 2011 Fair Lending Today Conference on Compliance, Regulatory & Litigation Issues in Today's Changing Enforcement Environment, hosted by BuckleySandler LLP.

2011 Panel Topics Include:

- Fair and Responsible Lending Enforcement and Litigation Overview
- Fair Mortgage Servicing: The Foreclosure Affidavit Crisis and More Challenges for Servicers
- The New Wave of SCRA Enforcement
- Dodd-Frank and the Consumer Financial Protection Bureau: Implementation, Preemption, State Regulation, and UDAP
- The New Enforcement Environment and Financial Services Regulation
- Privacy, Data Security, and Data Breach Litigation Nationally and Internationally
- Community Reinvestment Act: A Revitalized Statute?
- Key Trends in Fair Lending Risk Management Programs
- Fair Lending Issues Impact on Bank Merger & Acquisition Activity

When: Monday, May 2

Where: The Fairmont Hotel in Washington, DC

Register or Learn More: Visit <http://fairlendingtoday.com> or email fairlending@buckleysandler.com.

[Donna Wilson](#) will be presenting at a CLE webinar on "FCRA and FACTA Class Actions: Leveraging New Developments in Certification, Damages and Preemption" on Tuesday, April 26 at 1pm EDT/10am PDT. This seminar will address recent developments in FCRA and FACTA class action litigation, particularly the issue of proportionality of damages at the class certification stage and state law preemption, and litigation strategies for plaintiffs and defendants bringing or defending these claims. The webinar is sponsored by the legal publishing group of Strafford Publications.

[James Parkinson](#) will participate on a panel entitled "The Role of the Lawyer in Preventing Corruption," at the International Bar Association's Bar Leaders Conference in Miami, on May 4.

[Margo Tank](#) will be speaking at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference on May 15 in Boca Raton, Florida. Her remarks will focus on a legal and regulatory update on mortgage implementation issues.

[Jonice Gray Tucker](#) will be speaking at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference on May 15 in Boca Raton, Florida. Her remarks will focus on Litigation Involving Servicing and Foreclosure.

[Warren Traiger](#) will be speaking about potential changes to the CRA regulations and the current regulatory environment during a webinar hosted by the CRA Qualified Investment Fund, on Thursday, May 19 at 2pm.

[Donna Wilson](#) will be presenting at a CLE webinar on "Emerging Class Action Threat: Consumer Personal Identification Data Strategies to Minimize Litigation Risks and Maximize Insurance Coverage" on Tuesday, May 24. This seminar will analyze the Song-Beverly Act and its impact of ruling on class action litigation under other state privacy statutes. The Webinar is sponsored by the Legal Publishing Group of Strafford Publications.

[James Parkinson](#) will be speaking at the ACI's "FCPA Compliance in Emerging Markets" program in Washington, D.C., on June 15 -16.

[Andrew Sandler](#) will be speaking at CBA Live 2011 and presenting an Annual Fair Lending Report on Tuesday, June 14 at 3:30 pm in Orlando, Florida. Mr. Sandler will be giving an overview of current regulatory and enforcement developments and discussing the most significant fair lending risks confronting consumer lenders in the next twelve months.

[Andrew Sandler](#) will be participating on a panel at the Florida Bar Annual Convention on Friday, June 24 as part of the "Presidential Showcase". On the panel with Mr. Sandler is Paul Bland, Public

Justice. The Moderator is Justice R. Fred Lewis, a Justice of the Florida Supreme Court, a former Chief Justice and founder of Justice Teaching.

[Andrew Sandler](#) will be teaching the Litigation Strategy Session: Developing Strong Protocols, Admissible Documentation & Comprehensive Strategies in Order to Survive Regulatory Enforcement Actions & Litigation Workshop on Tuesday, July 26 in Chicago. This workshop precedes ACI's Consumer Finance Class Actions & Litigation Conference taking place July 27-28 at the Sutton Place Hotel, Chicago, IL.

[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.

Miscellany

Former Taylor, Bean & Whitaker Chairman Convicted of \$2.9 Billion Fraud. On April 19, a federal jury in Virginia convicted Lee Farkas, former Chairman of Taylor, Bean & Whitaker (TBW), of conspiracy, bank fraud, wire fraud, and securities fraud related to the failures of Colonial Bank and TBW. At trial, the government presented evidence that Farkas and his co-conspirators misappropriated \$2.9 billion from Colonial Bank and a TBW mortgage-lending facility by concealing overdrafts in TBW accounts at Colonial Bank and pretending to sell Colonial Bank over \$1.5 billion in fictitious mortgage pools or loans already sold to other parties. The fraud also caused the submission of false and misleading information to the Troubled Asset Relief Program (TARP) and the Securities and Exchange Commission. At sentencing, Farkas will face up to 30 years in prison for each count of conspiracy, bank fraud, or wire fraud affecting a financial institution, up to 20 years in prison for each count of wire fraud related to TARP and up to 25 years in prison for each count of securities fraud. Six co-conspirators have already pleaded guilty (as reported in *InfoBytes*, [April 8, 2011](#), [March 4, 2011](#), and [February 25, 2011](#)). For a copy of the Department of Justice's press release, please see <http://www.stopfraud.gov/news/news-04192011.html>.

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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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