March 11, 2011

Topics In This Issue

Federal Issues

CFPB Issues Notice and Request for Comments Regarding the Intake of Consumer Complaints. On March 9, the Consumer Financial Protection Bureau (CFPB) implementation team published a request for comments regarding the intake of consumer complaints by the agency. Specifically, the CFPB implementation team seeks public comment on the following issues: (i) whether the intake of complaints, questions, and other information relating to consumer financial products and services is necessary for the proper performance of the Bureau, and whether such information, once collected, will have practical uses, (ii) whether the agency's estimate of its burden with respect to information collection is accurate, (iii) methods for enhancing the quality, usefulness, and clarity of the information to be collected, (iv) methods for minimizing the reporting and/or record keeping burdens on respondents, including the use of automated collection techniques or other forms of information technology, (v) estimates of start-up costs of operation, maintenance, and purchase of services to provide information, and (vi) the specific types of information that would be useful for the CFPB to collect through its intake forms. The period for public comment closes May 9, 2011. For a copy of the CFPB's notice, please click here.

FDIC and WFB Settle Over Claim of Alleged Unfair and Deceptive Practices. On March 8, the Federal Deposit Insurance Corporation (FDIC) announced a $10.1 million settlement with World's Foremost Bank, Sidney, Nebraska for alleged violations of Section 5 of the Federal Trade Commission Act and provisions of the Truth in Lending Act. The alleged violations related to the bank's credit card programs - specifically its overlimit fees, credit line decreases, minimum payments due, late fees, penalty interest rates, notices to customers, and collection practices. Under the stipulated Consent Order, in which the bank did not admit or deny liability, the bank agreed to modify its credit card penalty and collection practices, increase management and board oversight of credit card operations, pay $10.1 million to current and former cardholders, and pay a civil money penalty of $250,000. Click here for a copy of the press release. Click here for a copy of the consent order.

FTC Charges Mortgage Relief Operation with Marketing Bogus Loan Modifications Services to Borrowers. On March 7, the Federal Trade Commission (FTC) announced that it has charged a national mortgage relief operation with marketing bogus loan modification services to distressed homeowners in violation of the FTC Act and the FTC's Telemarketing Sales Rule. According to the complaint, the defendants targeted financially distressed consumers by using direct mail solicitations, telemarketing, and the Internet, and the defendants falsely promised to obtain mortgage loan modifications even where the defendants had been informed that the lender had previously denied a modification or sent the consumer a foreclosure notice. In addition, the defendants allegedly misled consumers to believe that the defendants were affiliated with or approved by the consumers' lenders. The defendants allegedly charged fees up to $2,600 for their services and required a large portion of the fee up-front, promising a 100% refund if defendants are unsuccessful. However, the defendants regularly failed to obtain mortgage loan modifications and did not provide the promised refunds. In addition, the defendants allegedly called numbers listed on the National Do Not Call Registry and did not pay the required annual fee for accessing telephone numbers included in the Registry. The FTC's case against the defendants is pending in the U.S. District Court for the Southern District of Florida, and a temporary restraining order has been granted in the interim. For a copy of the FTC's press release, the complaint, and the restraining order, please see http://www.ftc.gov/os/caselist/1023146/index.shtm.

Interagency Statement Issued Regarding Reorganization of Bank Secrecy Act Regulations. On March 3, the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration Office of the Comptroller of the Currency, and the Office of Thrift Supervision issued an interagency statement regarding the Financial Crimes Enforcement Network's (FinCEN) final rule reorganizing FinCEN's Bank Secrecy Act (BSA) regulations. The statement provides information on the transfer and reorganization of FinCEN's BSA regulations from 31 CFR 103 to a new chapter entitled "Title 31 Chapter X - Financial Crimes Enforcement Network." The rule does not alter existing BSA regulatory obligations or impose new obligations. FinCEN has developed several tools to assist in the transition to Chapter X that are available at FinCEN's Chapter X webpage. The effective date of the rule is March 1, 2011, and federal and state banking agencies will begin using the new Chapter X citations to document violations of FinCEN's regulations for examinations on or after March 1. For a copy of the interagency bulletin, please see http://www.occ.treas.gov/news-issuances/bulletins/2011/bulletin-2011-8a.pdf.

State Attorneys General Propose Settlement Terms for Mortgage Servicers. On March 3, state attorneys general - led by Iowa Attorney General Tom Miller - proposed settlement terms in ongoing negotiations with mortgage servicers regarding issues with the home foreclosure process. The 27-page term sheet addresses the following seven areas: (i) foreclosure and bankruptcy information and documentation, (ii) loss mitigation requirements, (iii) restrictions on servicing fees, (iv) force-placed insurance, (v) general servicer duties and prohibitions, (vi) monetary relief for servicer misconduct, and (vii) compliance review and monitoring. Highlights include requiring servicers to offer loan modifications when they will result in a greater net present value than foreclosure, forbidding servicers from moving forward with foreclosure while evaluating borrowers for loan modifications, forcing servicers to create an online portal to provide direct access to loan modification information, and requiring principal forgiveness based upon the borrower's performance under a loan modification.

The term sheet demonstrates the extent to which the state attorneys general are seeking to change servicer practices. For more details on the settlement terms, please see our summary memo: Summary of 27-Page Term Sheet Issued by State AGs on March 3, 2011. Click here for a copy of the term sheet.

FRB Proposes Amendments to Regulation CC. On March 3, the Federal Reserve Board proposed several amendments to Regulation CC (Availability of Funds and Collection of Checks) and requested public comment. Among the proposed amendments are changes to the Regulation's collection and return provisions that would only allow banks to demand expeditious return of a check if the bank agrees to receive returned checks electronically. The proposal would also permit the bank making payment on the check to require electronic presentment of checks as a condition of same-day settlement. The amendments would abolish the distinction between local and nonlocal checks such that all checks would be subject to a two-business-day hold period, which would eliminate the old rule that allowed a four-day hold for "nonlocal" checks. The amendments would implement provisions of the Dodd-Frank Act that increase the next-day availability requirement from $100 to $200 effective July 21, 2011. Finally, the amendments include proposed model funds-availability forms that banks may use in making disclosures to consumers. The period for public comment ends June 3, 2011. Click here for a copy of the press release. Click here for a copy of the proposed amendments.

Inspector General Audit of 15 FHA Lenders Finds Systemic Problems. On March 2, the Department of Housing and Urban Development's (HUD) Office of Inspector General (OIG) released a report summarizing a review of 15 Federal Housing Administration (FHA) direct endorsement lenders that had excessive default and claim rates and for which many of the defaults had occurred early in the life of the loan. The review found that 49% of the loans reviewed were not underwritten properly and as a result the FHA insurance fund suffered "an unacceptable percentage of loans defaulting and resulting in claims that never should have caused losses to FHA." In addition to finding that HUD missed critical opportunities to recover losses on loans that did not meet FHA requirements, the report indicated that all 15 lenders incorrectly certified to HUD that they had conducted due diligence and reviewed the associated documents for the improperly underwritten loans. The material underwriting deficiencies included (i) failure to calculate or verify borrowers' income, to determine income stability, or to verify employment history, (ii) failure to properly document the source of borrowers' funds to close the loan, (iii) failure to properly assess the borrowers' financial obligations, (iv) failure to reject loans when the borrowers' payment-to-income ratios exceeded FHA's requirements, (v) failure to properly document gift funds received by borrowers, (vi) failure to properly evaluate borrowers' credit histories, (vii) failure to properly verify borrowers' rental histories, (viii) failure to verify borrowers' cash investment in the property, and (ix) failure in allowing skipped mortgage payments. The OIG recommended that HUD take appropriate administrative action against each of the 15 lenders, which include pursuing the appropriate remedies under the Program Fraud Civil Remedies Acts. The report also indicated that the improper certifications could result in civil enforcement actions of more than $23 million. For a copy of the report, please click here.

Courts

Federal District Court Finds UCC Article 3 Does Not Preclude Common Law Negligence Action for Purchasing Stolen Mortgage Loans. On March 7, the U.S. District Court for New Jersey denied Fannie Mae's motion to dismiss a common law negligence complaint by Suffolk Federal Credit Union rejecting the assertion that the negligence claim was pre-empted by the Uniform Commercial Code. *Suffolk Fed. Credit Union v. Fed. Nat'l Mortg. Ass'n*, No. 10-2763, (D.N.J. March 7, 2011). Plaintiff alleged that from 2004-09, Fannie Mae purchased 189 loans stolen without verifying the sellers' authority to execute loan transfer documents, including purchasing $6.6 million in stolen loans after being specifically advised by the U.S. Attorney's Office that the sellers were under investigation for the unauthorized sale of credit union loans to Fannie Mae. Fannie Mae argued that the plaintiff could not assert a common law negligence claim because its cause of action involved negotiable instruments and therefore could only be brought under Article 3 of the UCC. The court held that parallel UCC and common law actions may be maintained, unless the UCC provided a comprehensive remedial scheme and reliance on the common law would undermine the purposes of the UCC. The court found that (i) the plaintiff's negligence claim was not contemplated by the UCC, so Article 3 did not provide a comprehensive remedial scheme and (ii) a remedy in tort furthers the general policy of the UCC by placing the risk of loss on the party most able to minimize the risk. Click here for a copy of the opinion.

Maine Federal Court Rejects Emotional Distress Claims in Mortgage Foreclosure. Recently, the U.S. District Court for the District of Maine held that a plaintiff could not state a cause of action for either negligent or intentional infliction of emotional distress against a servicer or trustee in a mortgage foreclosure action. *James v. GMAC Mortg. LLC*, No. 2.09-cv-84 (D. Me. Jan. 10, 2011). In *James*, the mortgage originator allegedly understated the amount that the borrower owed on his mortgage payments by $32 per month in the required federal disclosure forms. Over a year later, the loan servicer notified the borrower that his loan was in default. Although the borrower tendered a check to remedy the default, the check lacked any information to identify the borrower or the loan, and the servicer returned the check and foreclosed on the mortgage. The magistrate judge rejected the borrower's argument that the relationship between a homeowner and a mortgagor or servicer is a "special relationship" that could form the basis of a negligent infliction of emotional distress claim. The court also held that a minor error in the required mortgage payments, failure to cash a check that lacked identifying information, actual foreclosure, and force placing insurance were not "so extreme and outrageous as to exceed all possible bounds of decency" and that these actions could not sustain a claim for intentional infliction of emotional distress. Click here for a copy of the opinion.

Firm News

BuckleySandler LLP will host its West Coast Mortgage Lending and Servicing Today Conference on Monday, April 11 at the Balboa Bay Club and Resort in Newport Beach, CA. The conference will focus on compliance, regulatory and litigation issues in today's changing mortgage lending and servicing environment. For more information, please visit http://fairlendingtoday.com/. To register for the conference, please email Anne McKenzie at amckenzie@buckleysandler.com.

Jonathan Cannon will be speaking on "Loan Origination Compensation Strategies: Become the Dodd-Frank Expert at Your Institution," as part of the Shesunoff and A.S. Pratt Wall Street Reform Executive Briefing Series on Tuesday, March 15, 2011.

James Parkinson will speak on the Foreign Corrupt Practices Act as a Visiting Lecturer at Universidad Panamericana, Mexico (via videoconference), on March 16.

Margo Tank will be speaking at the E-Signature Summit for Banking Executives in New York on April 8.

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.

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

Miscellany

Nine Defendants Indicted in Relation to Collapse of Ohio Credit Union. On March 2, nine defendants were indicted in the Northern District of Ohio and charged with bank fraud, bank bribery, and money laundering related to the April 2010 liquidation of the St. Paul Croatian Federal Credit Union in Eastlake, Ohio. Anthony Raguz, the former Chief Operating Officer of the credit union, allegedly issued over 1,000 fraudulent loans to customers, totaling over $70 million, and accepted over $500,000 in bribes, kickbacks, and gifts from customers to issue those loans. The other defendants were charged with obtaining millions of dollars in fraudulent loans, paying bribes to Raguz in relation to those loans, aiding and abetting those crimes, and laundering money received from the bank. The Department of Justice brought the case in coordination with the federal Financial Fraud Enforcement Task Force. For a copy of the press release announcing the indictment, please see http://www.stopfraud.gov/news/news-03022011.html.

Mortgages

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Banking

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Litigation

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Criminal Enforcement Action

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