

July 29, 2011

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## Federal Issues

**CFPB Issues Interim Final Rule on Procedures for Investigations.** On July 28, the Consumer Financial Protection Bureau (CFPB) issued an interim final rule that establishes the Bureau's proposed procedures for conducting investigations undertaken pursuant to section 1052 of the Consumer Financial Protection Act of 2010 (Act), 12 U.S.C. § 5562, which authorizes the CFPB to investigate whether any person has engaged in conduct that violates any provision of Federal consumer financial law. The interim final rule specifies procedures for civil investigative demands (CIDs) (similar to subpoenas), written reports and answers to questions (similar to interrogatories), and investigational hearings (similar to depositions). The rules largely parallel Federal Trade Commission (FTC) regulations relating to its conduct of investigations, but with differences reflecting the CFPB's somewhat greater investigative authority. For example: (i) although an FTC CID must be signed by an FTC Commissioner, the head of the CFPB's Division of Enforcement may issue CIDs and may delegate the authority to do so to any other CFPB employee; (ii) in contrast to the FTC, a witness compelled to appear in person at an investigational hearing apparently may not object to a question on the grounds that it is outside of the scope of the investigation or any other basis with the exception of a claimed privilege to refuse to answer or to produce other evidence; and (iii) representatives of other agencies with which the CFPB is conducting a joint investigation may be present at investigational hearings. Like the FTC regulations, the CFPB rules also address procedures for filing a petition for an order modifying or setting aside a CID and the agency's ability to enforce its CIDs in federal court. The interim final rule went into effect when published on July 28, 2011. Comments must be received on or before September 26, 2011. [Click here for a copy of the rule.](#)

**CFPB Adopts Interim Final Rule on Practices for Adjudication Proceedings; Requests Public Comment.** On July 28, the Consumer Financial Protection Bureau (CFPB) issued an interim final rule that establishes practices for adjudication proceedings brought under section 1053 of the Consumer Financial Protection Act of 2010 (Act), 12 U.S.C. § 5563. Section 1053 authorizes the CFPB to use administrative adjudications to ensure or enforce compliance with (i) the provisions of the Act, (ii) the

rules prescribed by the Bureau under the Act, and (iii) any other Federal law or regulation that the Bureau is authorized to enforce. According to the Bureau, the Rules of Practice Governing Adjudication Proceedings (Rules) are intended to create a process that provides for expeditious resolution of claims, while ensuring that parties appearing before the CFPB receive a fair hearing. The proposed Rules are modeled on the uniform rules and procedures for administrative hearings (Uniform Rules) and the Model Adjudication Rules prepared by the Administrative Conference of the United States. In addition, the CFPB's Rules adopt a decision-making procedure which incorporates elements of the rules of practice currently utilized by the Security and Exchange Commission and the Federal Trade Commission. The Rules, however, do not apply to the issuance of temporary cease-and-desist proceedings pursuant to section 1053(c) of the Act, though they are applicable to later proceedings initiated by a notice of charges in which a permanent cease-and-desist order or other relief is sought. The interim final rule is effective immediately, and the CFPB is accepting public comment on the interim final rule through September 26, 2011. For a copy of the interim final rule, [please click here](#).

**CFPB Issues Interim Rule Allowing State Housing Creditors to Continue Making Alternative Mortgages in Compliance with Federal Law.** On July 22, the Consumer Financial Protection Bureau (CFPB) issued an interim final rule that allows state-chartered or state-licensed creditors (state housing creditors) to rely on the federal Alternative Mortgage Transaction Parity Act (AMTPA) to make alternative mortgage transactions in compliance with federal law until the CFPB can complete a notice-and-comment rulemaking to promulgate permanent rules. The interim final rule implements the amendments to AMTPA contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which transferred rule-writing authority to the CFPB on July 21, and permitted state housing creditors to make alternative mortgage transactions under AMTPA after July 21 if they comply with rules issued by the CFPB. Because the CFPB was not vested with authority to issue such rules before July 21, the interim final rule was deemed necessary to avoid a suspension in the operation of AMTPA, which would prevent state housing creditors from entering into alternative mortgage transactions in states where such transactions are otherwise prohibited by state law. The interim rule gives state housing creditors the choice to follow either state law or "straightforward" federal law requirements when making alternative loans. The interim final rule is effective immediately, except that compliance with section 1004.4 setting forth certain requirements for alternative mortgage transactions is optional for federal housing creditors, and for state housing creditors who are not relying on preemption of state law under section 1004.3, until July 22, 2012, at which time it is mandatory for all creditors except as otherwise provided in section 1004.4(d). The CFPB is accepting comments on the interim final rule through September 22, 2011. [Click here for a copy of the interim final rule](#).

**Freddie Mac Announces Requirements for New Servicing Success Program.** On July 25, the Federal Home Loan Mortgage Corporation (Freddie Mac) issued Bulletin 2011-13, announcing requirements for its new Freddie Mac Servicing Success Program. The new program will use the Freddie Mac Servicer Success Scorecard and the Freddie Mac Servicer Success File Reviews to evaluate servicer performance based on investor reporting and remitting criteria and default management criteria. Under the new program, Freddie Mac will provide each servicer with a monthly ranking, which is tied to the Servicing Success Program's criteria and weightings. The new system

replaces Freddie Mac's traditional performance tier ratings. The majority of new requirements will go into effect on August 1, 2011, though certain Exhibit updates and other items were effective immediately, and rankings will be available on the servicer performance profile website starting on October 7, 2011. [Click here for a copy of the Bulletin.](#)

## State Issues

**Conference of State Bank Supervisors Seeks Comments on Reporting of State Regulatory Actions.** The Conference of State Bank Supervisors (CSBS) is seeking comments on "Reporting of State Regulatory Actions," which would allow regulators participating in the Nationwide Mortgage Licensing System and Registry (NMLS) to post information about regulatory actions taken against companies and individuals, and make that information available on NMLS Consumer Access. The stated goal of developing this functionality is to (i) improve transparency and information available regarding state-licensed and registered companies and professionals, (ii) facilitate the sharing of regulatory enforcement information among state regulators, and (iii) satisfy the mandate in the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act) that NMLS provide consumers with easily accessible information regarding publicly adjudicated disciplinary and enforcement actions against mortgage loan originators. Under the proposed Reporting of State Regulatory Actions, public regulatory enforcement actions taken by state regulators will be made available through NMLS Consumer Access in the spring of 2012. The comment submission deadline is September 20, 2011. [Click here for a copy of the Request for Public Comments.](#)

## Courts

**FHFA Alleges \$900 Million in Damages in Suit Filed against UBS for Federal Securities Law Violations Connected to Sale of MBS to Fannie Mae and Freddie Mac.** On July 27, the Federal Housing Finance Agency (FHFA) filed a lawsuit in the U.S. District Court for the Southern District of New York alleging that UBS violated §§ 11, 12(a)(2), and 15 of the Securities Act of 1933 (15 U.S.C. § 77a *et seq.*) through its sale of residential private-label mortgage-backed securities (MBS) to the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). In its complaint, the FHFA alleges that UBS sold securities to Fannie Mae and Freddie Mac pursuant to registration statements, prospectuses and prospectus supplements containing materially false statements and omissions. Specifically, the FHFA alleges that (i) UBS made false representations that the underlying mortgage loans complied with underwriting guidelines and standards, including by significantly overstating the capacity of borrowers to repay, (ii) many loans underlying the securitizations failed to meet the origination, underwriting, and credit quality standards described in the registration statements, prospectuses, and prospectus supplements based in part upon a forensic review of several hundred loan files, and (iii) based upon a forensic review of thousands of loan files, UBS materially misstated information contained in statistical summaries of loan pool characteristics that constituted material risk factors. Because of these and other similar material misstatements, the FHFA is seeking rescission of the transactions, damages in excess of \$900 million to reimburse amounts paid by Fannie Mae and Freddie Mac for the securities plus interest. [Click here for a copy of the FHFA's complaint.](#)

**District Court Rules that Mortgage Servicer Lacks Standing to Bring Suit Against HUD for Failure to Process or Pay FHA Insurance Benefit Claims.** On July 20, the U.S. District Court for the Northern District of Texas held that a servicer of mortgages insured by the Federal Housing Agency (FHA) lacks standing to bring suit against the Department of Housing and Urban Development (HUD) or its Secretary based upon HUDs' failure to process or pay FHA insurance benefit claims where the servicer fails to allege it is an assignee of the FHA-insured mortgages or that its contract with the mortgagee amounts to an effective assignment. *American Home Mortgage Servicing, Inc. v. Donovan*, No. 3:10-CV-1936-M (N.D. Tex. July 20, 2011). In addition, the court held that dismissal of the servicer's claim was proper where the servicer fails to clearly plead the basis for a waiver of sovereign immunity and that the failure to process or pay FHA insurance benefit claims constitutes a final agency action under the APA. AHMSI was granted twenty-one days from the date of the opinion to amend its complaint to allege it had standing when the suit was filed, that there was a waiver of sovereign immunity, and that a final agency action occurred. [For a copy of the opinion, please click here.](#)

## Miscellany

**FTC Action Leads to \$4.8 Million Judgment Against Marketer.** On July 21, the Federal Trade Commission (FTC) announced that the U.S. District Court for the Northern District of California has ordered Swish Marketing, Inc. to (i) pay more than \$4.8 million for deceiving hundreds of thousands of payday loan applicants into paying for an unrelated debit card, (ii) obtain consumers' informed consent before using their personal information for any purpose other than the stated purpose or by a different entity, and (iii) refrain from engaging in certain enumerated acts. The FTC's complaint alleged that Swish Marketing and certain individuals operated websites that claimed to match loan applicants with short-term lenders. When a consumer attempted to submit an online loan application, the consumer was led to four unrelated product offers, including an offer for a debit card, the acceptance of which was pre-selected contrary to the pre-selection option of the other three offers and the cost of which was automatically charged to the consumer unless he or she opted out. Along with requiring Swish Marketing to pay more than \$4.8 million, the court order prohibits the company from (i) marketing any product with a "negative-option" program, (ii) misrepresenting material facts about any product or service, (iii) misrepresenting that a product or service is free or a "bonus," (iv) charging consumers without first disclosing billing and payment information and all material terms and conditions, and (v) failing to monitor their marketing affiliates. [Click here for the press release.](#) [Click here for the court documents.](#)

## Firm News

[Andrew Sandler](#) and [Jonice Gray Tucker](#) will speak on recent trends in fair lending litigation at the American Bar Association's Annual Conference in Toronto, Canada on August 5.

[Andrew Sandler](#) will be participating on the Banking Law Committee's CLE Program, "Dodd-Frank's Regulatory Triangle: Love or Bermuda?" at the ABA's Annual Meeting in Toronto, Ontario, Canada, Saturday, August 6, 2011.

[Jeremiah Buckley](#), [Jonathan Cannon](#), and [Jon Langlois](#) will be speaking at the Lender's One Summer Conference August 8-10, 2011. Mr. Buckley and Mr. Cannon will be presenting "CFPB Future and RESPA/TILA Update," and Mr. Langlois "QM/QRM Updates/FHA Updates/Fannie and Freddie Updates" as well as "Secondary Market and MERS Updates." Mr. Buckley will also present "Fair Lending for Community Mortgage Lenders" and Mr. Cannon "Regulatory and Attorney General Enforcement Environment" and "State Law Update."

[James Parkinson](#) will speak on the Foreign Corrupt Practices Act as a Visiting Lecturer at Universidad Panamericana, Mexico on August 25.

[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.

[Benjamin Klubes](#) will be moderating a panel focusing on Preparing for and Responding to New and Emerging Federal and State Enforcement Actions at the ACI's Residential Mortgage Litigation and Regulatory Enforcement Conference on Tuesday, September 20.

[Andrew Sandler](#), [Benjamin Klubes](#) and [Jonice Gray Tucker](#) will be speaking at the Mortgage Bankers Association's Regulatory Compliance Conference which will be held in Washington, D.C. from September 25 through September 27. Mr. Sandler will be addressing enforcement priorities. Mr. Klubes will address litigation and enforcement trends relating to loan originations and Ms. Tucker will speak on developments in mortgage servicing.

[James Parkinson](#) will be speaking at two International Bar Association training sessions as part of the IBA's Anti-Corruption Strategy for the Legal Profession (<http://www.anticorruptionstrategy.org/>) on September 27 (Sao Paulo, Brazil), and on September 29 (Caracas, Venezuela).

[David Krakoff](#) will be speaking at the International Association of Defense Counsel's program on Anti-Corruption laws in February 2012.

## Firm Publications

[Elizabeth E. McGinn](#), [Sasha Leonhardt](#) and [Gastón Kuperschmit](#) authored [\*From Pickpockets to Playstations: Evolving Data Privacy Threats and Federal and State Responses\*](#) which was published on July 11 in *Bloomberg Law Reports*.

## Mortgages

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## Securities

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## Litigation

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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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