Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

January 14, 2011

Topics In This Issue

Federal Issues

HUD Issues Reporting Changes for Lenders in Parent-Subsidiary Structures and Loan Fees. On January 5, the U.S. Department of Housing and Urban Development (HUD) issued Mortgagee Letter 2011-05 announcing changes to the annual audited financial statement reporting requirements for supervised lenders in parent-subsidiary structures and new requirements for reporting loan fees for participants in the Federal Housing Administration's (FHA) Multifamily Programs. FHA-approved supervised lenders in parent-subsidiary structures may submit the audited consolidated financial statements of a parent company, accompanied by internally prepared consolidating schedules, if one of the two following conditions is met: (i) the subsidiary accounts for at least 40% of the parent company's assets, or (ii) the subsidiary provides the FHA with an executed corporate guarantee agreement between it and the parent company in which the parent guarantees the ongoing net worth and liquidity compliance of the FHA-approved subsidiary. The FHA-approved lender must also submit its fourth quarter Call Report and a Compliance and Internal Control Report as attachments to its annual audited financial statements submission. In addition, mortgagees participating in FHA's Multifamily programs are now required to report loan fees earned that exceed 5% of the insured loan amount on each FHA-insured loan over $2,000,000 endorsed during the mortgagee's fiscal year period covered in its audited financial statements. Loan fees include: (i) origination and placement fees as permitted by the MAP Guide, plus (ii) trade profit, trade premium or marketing gain earned on the sale of the Government National Mortgage Association (GNMA) security at a value above par, even if the security sale is delayed until after endorsement, minus (iii) loan fees applied by the mortgagee to its legal expenses incurred in connection with loan closing. These loan fees should be reported on a separate schedule, and must list certain information, including the loan amount at Initial or Final Endorsement and the total fees earned above 5%. All requirements contained in the Mortgagee Letter are effective immediately. For additional information on HUD's guidance, please see the Mortgagee Letter 2011-05 here.

Federal Reserve Board Publishes Guide for Understanding Notices Received by Consumers Regarding Effect of Credit Scores on Grant of Credit by Lender. On January 12, the Federal Reserve Board (Board) released an online publication, "What You Need to Know: New Rules about Credit Decisions and Notices," to help consumers understand notices they may receive in connection with the use of their credit score in the process of obtaining credit. The publication provides samples of notices, as well as assistance on how to dispute errors in their credit reports. The publication has been released in connection with new rules issued by the Board and the Federal Trade Commission, which took effect January 1, 2011. The new rules require a creditor to provide a consumer with a notice when, based on the consumer's credit report, the terms of credit provided to him or her are less favorable than those provided to other consumers. Click here for a copy of the publication announcement. Click here for a copy of the publication.

OCC Provides Notice of Registration Period for Federal Registration of Mortgage Loan Originators. On January 6, the Office of the Comptroller of the Currency (OCC) issued a reminder notice of the expected start date for federal registration of residential mortgage loan originators employed by banks, savings associations, credit unions, and their subsidiaries as mandated by the S.A.F.E. Act. The period for registration is expected to start on or about January 31, 2011, and last 180 days, ending on or about July 29, 2011. After the registration period ends, any employee subject to registration under the S.A.F.E. Act will be prohibited from originating residential mortgage loans without having first met the registration requirements. For more information regarding who should register, and the process for registration, please see http://mortgage.nationwidelicensingsystem.org/fedreg/Pages/default.aspx. For a copy of the reminder notice, please see http://www.occ.treas.gov/news-issuances/bulletins/2011/bulletin-2011-1.html.

HUD Issues Mortgagee Letter on FHA's Capture of National Mortgage Licensing System and Registry (NMLS) Information. On January 5, the U.S. Department of Housing and Urban Development (HUD) issued Mortgagee Letter 2011-04 to inform mortgagees that HUD will begin collecting NMLS identifier information for individuals and entities participating in the origination of loans submitted for insurance by the Federal Housing Administration (FHA). HUD instructed that FHA-approved mortgagees and their employees must comply with the NMLS registration requirements of "states and entities" with jurisdiction over their activities, and also register in accordance with NMLS's guidelines. FHA-approved mortgagees acting as a sponsor for a third party originator should ensure that those originators obtain and maintain an NMLS unique identifier (ID), again in accordance with the requirements of the applicable state(s) and entities and with NMLS's registration guidelines. The letter states that HUD will modify its forms and online processes to capture NMLS IDs at a number of points in the lender approval and loan origination processes. These include: (i) Application for or Renewal of FHA Lender Approval; (ii) Sponsored Originator Registration; and (iii) Loan Processing and Underwriting. HUD also advised that non-compliance by an FHA-approved lender is cause for withdrawal of FHA lender approval or loss of authorization to participate in FHA lending programs. Click here for a copy of Mortgagee Letter 2011-04.

FHA Releases Third-Party QC Requirements for Quality Control Plans. On January 5, the Department of Housing and Urban Development (HUD) issued Mortgagee Letter 2011-02. The letter reminds mortgagees that, since the Federal Housing Administration (FHA) no longer approves or

monitors Loan Correspondents, mortgagees now must perform quality control reviews on all sponsored third-party originators (TPOs) from whom they acquire loans. Additionally, the letter states that mortgagees must create a report documenting (i) the methodology used to review TPOs, (ii) the results of each review, and (iii) any corrective actions taken as a result of their review findings. This report must be kept on file for two years. In addition to these requirements, the letter states that mortgagees must review (i) rejected applications for compliance with fair lending within 90 days and (ii) all early payment defaults within 60 days. Finally, the letter states that mortgagees must verify the accuracy of Mortgage Change Records on all servicing transfers and loan sales reported to HUD. All of the requirements outlined in the letter are effective immediately. Click here for a copy of Mortgagee Letter 2011-02.

NACHA Amends Rules to Permit Authorization Over the Telephone of Recurring Consumer Transactions. NACHA recently announced that, effective September 16, 2011, originators will be able to obtain oral authorization from a consumer over the telephone for a recurring-entry Automated Clearing House (ACH) transaction. The current Telephone-Initiated Entry (TEL) application only permits an originator to obtain authorization over the telephone for a single-entry ACH debit in conformance with a prior version of the Federal Reserve Board's Official Staff Interpretations of Regulation E (Commentary). The prohibition against oral authorization over the telephone for preauthorized (recurring) debits was removed from the Commentary in 2006. To reflect the change in the Commentary, NACHA has amended its rules. An originator must ensure that the oral authorization complies with Regulation E's authorization requirements for preauthorized transactions. Click here for a copy of the announcement and notice of amendments.

Courts

Southern District of New York Permits RICO and FDCPA Claims to Go Forward in Foreclosure Consumer Class Action. On December 29, 2010, the United States District Court for the Southern District of New York permitted putative class claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Fair Debt Collection Practices Act (FDCPA) to proceed against a debt-buying company, a law firm, a process service company, and others allegedly engaged in a "massive scheme" fraudulently to obtain default judgments against more than 100,000 consumers in state court. *Sykes, et al. v. Mel Harris and Assocs., LLC, et al.*, 09 Civ 8486, 2010 U.S. Dist. LEXIS 137461 (S.D.N.Y. Dec. 29, 2010). In this case, the plaintiffs alleged that the debt-buying defendants purchased debt portfolios and pursued debt collection litigation en masse against the putative class (averaging 133 debt collection actions per day). They are alleged to have lacked in most cases documentation of indebtedness to original creditors, and to have filed unsubstantiated and "robo-signed" affidavits in support of default judgments. They regularly hired the defendant process server, who was alleged to have deliberately failed to notify debtors that the lawsuits were pending against them (a practice known as "sewer service"). The defendants contended that the statute of limitations had run on some or all of the claims, that they were not "debt collectors" within the meaning of the FDCPA, and that the FDCPA did not prohibit their alleged actions. The court found that the statute was equitably tolled because "sewer service" purposefully ensures that a party receives no notice of the claim. The court also found that the defendants were debt collectors, and in particular that a process server cannot claim exemption to the extent it "goes beyond being merely a messenger" and

"engages in prohibited abusive or harassing activities." The court further concluded that, while the FDCPA does not prohibit the filing of debt collection actions and affidavits of merit, the defendants were alleged to have made false or deceptive representations about the status or character of the debts and were therefore within the ambit of the FDCPA. The court held as well that the complaint alleged a viable RICO claim. Specifically, the court found a pattern of racketeering activity, an enterprise among the defendant entities, and alleged conduct sufficient to establish substantive RICO liability. Finally, the court found that the *Rooker-Feldman* doctrine did not apply because the plaintiffs asserted claims independent of their state-court judgments and did not seek to overturn them; that the litigation privilege did not apply because the plaintiffs did not claim defamation; that the *Noerr-Pennington* doctrine did not apply because the defendants were alleged to have engaged in unethical conduct in prior court proceedings; and that the complaint advanced allegations sufficient to pierce the corporate veil with respect to the debt-buying defendants. Click here for a copy of the opinion.

Firm News

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.

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

Benjamin Klubes will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27 at 11am. The conference is taking place at The Helmsley Park Lane Hotel, 36 Central Park South, New York City. 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 Mr. Klubes will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

Andrew Sandler will be speaking at Compliance Summit '11 hosted by FIS on Friday, January 28 in San Diego. Mr. Sandler's session is: Fair Lending: How Do Good Banks Get Into Bad Trouble, What You Must Avoid; How to Perform a Fair Lending Risk Assessment & Implement a Highly Effective Fair & Responsible Lending Compliance Program.

Andrew Sandler will be speaking at the 2011 ABA National Conference for Community Bankers on Tuesday, February 22 in San Diego. Mr. Sandler's session is: The Federal Bank Regulatory and Enforcement Environment Post-Dodd-Frank. Speaking with Mr. Sandler is Mark W. Olson, Co-Chairman, Treliant Risk Advisors LLC.

Miscellany

Investment Adviser Pleads Guilty to Securities Fraud. On January 7, a registered investment adviser pleaded guilty to conspiracy and securities fraud related to an insider trading scheme. The case was brought by the U.S. Attorney in the Southern District of New York in coordination with the Financial Fraud Enforcement Task Force. The defendant admitted that he obtained inside information regarding potential mergers and acquisitions in the healthcare industry from an investment banker and then traded on that information. He pled guilty to three counts of securities fraud, each carrying a maximum of 20 years in prison and a $5 million fine, and one count of conspiracy, carrying a maximum sentence of five years and a maximum fine of $250,000 or twice the gain or loss from the offense. The defendant has agreed to forfeit at least $1,414,290, as the amount of proceeds obtained as a result of the offense. The defendant is scheduled to be sentenced in April. Click here for a copy of the press release.

Mortgages

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Banking

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Consumer Finance

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Pennington doctrine did not apply because the defendants were alleged to have engaged in unethical conduct in prior court proceedings; and that the complaint advanced allegations sufficient to pierce the corporate veil with respect to the debt-buying defendants. Click here for a copy of the opinion.

E-Financial Services

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Criminal Enforcement Action

Investment Adviser Pleads Guilty to Securities Fraud. On January 7, a registered investment adviser pleaded guilty to conspiracy and securities fraud related to an insider trading scheme. The case was brought by the U.S. Attorney in the Southern District of New York in coordination with the Financial Fraud Enforcement Task Force. The defendant admitted that he obtained inside information regarding potential mergers and acquisitions in the healthcare industry from an investment banker and then traded on that information. He pled guilty to three counts of securities fraud, each carrying a maximum of 20 years in prison and a $5 million fine, and one count of conspiracy, carrying a maximum sentence of five years and a maximum fine of $250,000 or twice the gain or loss from the offense. The defendant has agreed to forfeit at least $1,414,290, as the amount of proceeds obtained as a result of the offense. The defendant is scheduled to be sentenced in April. Click here for a copy of the press release.