Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

August 24, 2012

Topics In This Issue

Federal Issues

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SEC Announces First Award Under Whistleblower Program. On August 21, the SEC announced the first award issued as part of a new whistleblower program mandated by the Dodd-Frank Act. The program is designed to encourage individuals to submit high-quality evidence of securities fraud. Under the program, if a whistleblower submits information that results in a successful SEC enforcement action in which more than $1 million in sanctions is ordered, the SEC will pay up to thirty percent of the money obtained. The SEC stated that it paid the maximum thirty percent, in this case $50,000 of the $150,000 collected thus far from the enforcement action. The SEC did not reveal the matter for which the whistleblower provided evidence of fraud and did not reveal the individual's name, noting that the Dodd-Frank Act provisions require the SEC to protect any information that could reasonably be expected to reveal a whistleblower's identity.

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State Issues

Massachusetts AG Outlines Foreclosure Expectations for Fannie Mae and Freddie Mac. On August 23, Massachusetts Attorney General Martha Coakley sent a letter to FHFA Director Edward DeMarco in which she advised Fannie Mae and Freddie Mac about their obligation to comply with a recently enacted state law that will make it harder to initiate foreclosures. The letter states that like all creditors, Fannie Mae and Freddie Mac are expected to follow the new statutory requirements and generally should "pursue common-sense loan modifications for borrowers" when economically beneficial to borrowers. The letter also asks the FHFA to reconsider its decision to not require Fannie Mae and Freddie Mac to offer principal forgiveness. Also on August 23, the Massachusetts Division of Banks announced that it will hold a public hearing on August 29, 2012 to gather input regarding regulations it is required to develop to implement the state's new foreclosure law.

New York Bans Yield Spread Premiums, Expands Consumer Privacy Protections. On August 17, New York Governor Andrew Cuomo signed Senate Bill 886, which prohibits any compensation paid to a mortgage broker or lender that is based on the terms of a mortgage, except for compensation linked to the principal balance of the loan. This prohibition of so-called yield spread premiums is a change from existing state law that prohibited "abusive" yield spread premiums in connection with high-cost mortgages.

On August 14, New York enhanced consumer privacy protections when it enacted Assembly Bill 8892. Just as the Federal Privacy Act of 1974 applies to federal, state, and local government agencies, this bill prohibits private businesses from conditioning the provision of services on a consumer's willingness to disclose his or her Social Security number upon request. The law provides several exceptions, including when the collection of the Social Security Number is (i) otherwise required by law, (ii) requested in connection with the opening of a deposit account or a credit transaction initiated by the consumer, or (iii) required for any business function allowed under the Gramm Leach Bliley Act.

Nevada Mortgage Regulator Clarifies Wholesale Lender Licensing Requirements. On August 20, the Nevada Division of Mortgage Lending issued a memorandum clarifying licensing requirements for wholesale lenders under the Nevada Mortgage Brokers and Mortgage Agents Act. The Act prohibits anyone from offering or providing mortgage-broker services-such as making mortgage loans or buying and selling mortgage notes-without first obtaining a license. The memorandum states that a wholesale lender must be licensed as a broker if (i) the wholesale lender closes and funds a mortgage in its own name as the lender of record, or (ii) buys a mortgage loan from a mortgage broker after closing. A wholesale lender need not be licensed if it only provides a funding source for a licensed or exempt mortgage broker to close and fund a loan as the lender of record. After closing, the lender of record may assign a closed or funded loan to the wholesale lender. The Division will allow until October 1, 2012 for wholesale lenders to apply for a license under this interpretation, and it will start enforcing the licensing requirement on January 1, 2013.

Courts

Federal Court Declines to Enjoin AG Prosecution of Claims Subject to Class Settlement. On August 22, the U.S. District Court for the Middle District of Florida denied a major bank's motion to enjoin prosecution by two state attorneys general of claims related to the bank's credit card payment protection products. *Spinelli v. Capital One Bank, USA*, No. 08-cv-00132, 2012 WL 3609028 (M.D. Fla. Aug. 22, 2012).In 2010 the bank entered a global class action settlement to release certain claims regarding payment protection, including those by all natural persons who have or had credit card accounts with the bank and who were charged for payment protection during a defined time period. After the Attorneys General of Hawaii and Mississippi (the state AGs) filed cases earlier this year regarding the same products, the bank petitioned the court that approved the class settlement to enjoin the state AGs, as well as any other person or entity with knowledge of the class settlement, from prosecuting similar claims against the bank. The bank argued that the state AG actions were brought on behalf of citizens who were bank customers released as part of the class settlement. The court held that a state's sovereign interests cannot be compromised by a private settlement, the AGs were not bound by the class settlement, and an injunction would violate due process. The court also held that it no longer retained jurisdiction over the matter and that the courts hearing the state AG claims must decide whether the claims can properly proceed.

District Court Holds Gift Cardholders Suffer No Damages from Inability to Apply Unexhausted Balances. On August 17, the U.S. District Court of the Southern District of New York dismissed a putative class action alleging deceptive sales practices under New York law against gift card distributors. *Preira v. Bancorp Bank*, No 11-1547, 2012 WL 3541702 (S.D.N.Y. Aug. 17, 2012).The plaintiff alleged that the defendants advertised that the gift cards could be used like debit cards, but that in fact merchants would not allow cardholders to conduct split transactions where the card was used to pay for a portion of a transaction and other means were used to pay the remaining balance. This restriction, the plaintiff claimed, prevented cardholders from completely depleting the value of the gift cards. The court rejected the plaintiff's claim, holding that she failed to allege a cognizable injury because (i) some merchants do accept split transactions, (ii) the cardholder agreement provides that cards can be returned to the issuer in exchange for the unused balance, which never expires, and (iii) even if the damages are not based on the loss of the remaining value of the cards but on misleading statements that lead cardholders to believe the cards function like debit cards, the plaintiff failed to allege that debit cardholders can make split purchases at any retailer and, in any event, deception itself, without further injury, is not a cognizable harm under state law.

Washington Supreme Court Rules on Electronic Mortgage Registry's Role As Beneficiary. On August 16, the Supreme Court of the State of Washington held that an electronic mortgage registry system cannot commence a nonjudicial foreclosure in that state if it is not the promissory note holder. *Bain v. Metro. Mort. Group, Inc.*, No. 86206-1, 2012 WL 3517326 (Wash. Aug. 16, 2012). In this case, the registry, as the named beneficiary of the deeds of trust, appointed trustees to initiate foreclosure proceedings against two borrowers. The borrowers sought injunctions in federal court to halt the foreclosures, arguing that the beneficiary did not actually hold the promissory notes, and therefore could not foreclose in its own name. The federal court certified several questions for consideration by the Washington Supreme Court. The Washington Supreme Court held that under Washington law

only the actual holder of the promissory note evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure. The court concluded that the electronic registry "does not hold the note, it is not a lawful beneficiary," and therefore cannot commence a nonjudicial foreclosure. The court also noted that an agent can represent the note holder, but found that the electronic registry failed to identify the entities that "control and are accountable for its actions," and therefore failed to establish that it is an "agent for a lawful principal."

Firm News

Benjamin Saul, **Valerie Hletko**, and **Amanda Raines** will present a podcast sponsored by LexisNexis on September 5, 2012 at 2:00 p.m. This podcast will relate to fair lending risk assessments, with a focus on considerations for conducting these risk assessments on non-mortgage lines of business.

Andrew Sandler will speak at the National Mortgage News 2nd Annual Mortgage Regulatory Forum taking place September 13-14, 2012, in Arlington, VA. The Mortgage Regulatory Forum is created to provide the most up-to-date information on newly implemented regulation, and regulation in the pipeline, for both those on the origination side of the business, as well as mortgage servicing.

Melissa Klimkiewicz and **Jon Langlois** will speak on a live teleconference sponsored by the National Business Institute on October 4, 2012. The presentation is titled HAMP, HARP, HAFA and FHA Update: Evolving Program Requirements and Expectations. To register call (800) 931-3140 or visit the website, www.nbi-sems.com.

James Parkinson will be speaking at the ABA's International White Collar Crime Conference in London on October 8, 2012. Mr. Parkinson's panel is entitled "What Every General Counsel Needs to Know Regarding Compliance and Internal Investigations."

Jonice Gray Tucker, **Valerie Hletko**, and **Amanda Raines** will present a webinar sponsored by the California Mortgage Bankers Association on October 9, 2012. Their remarks will focus on fair lending enforcement trends and related risk assessments.

John Stoner will speak on a panel addressing "The Uniform Commercial Code and the Mortgage Crisis" at the State Bar of California Annual Meeting on October 12, 2012. Mr. Stoner recently was appointed to the Commercial Transactions Committee of the State Bar of California.

Tom Sporkin will speak at the Securities Enforcement Forum 2012 on October 18, 2012, in Washington, DC. The Securities Enforcement Forum 2012 is a one-day conference in Washington, D.C. that brings together securities enforcement and white-collar attorneys, current and former senior SEC and DOJ officials, in-house counsel and compliance executives, and other top professionals in the field.

David Krakoff, **James Parkinson**, **Andrew Schilling**, and **Thomas Sporkin** will speak at the Commerce and Industry Group's seminar, "Anti-Bribery: The Changing Anti-Corruption Environment

in Key Jurisdictions" on October 24, 2012, in London. The panel will examine recent developments in anti-corruption enforcement in the UK, US, and Continental Europe; it will also consider best practices to identify and mitigate exposure to corruption risk.

Firm Publications

Benjamin Saul, **Bradley Marcus**, and **Sasha Leonhardt** recently published "The Paper Chase: Effects of FDIC Document Retention Policies on D&O Suits," in *Consumer Lending Litigation News*.

Thomas Sporkin, **Robyn Quattrone**, and **Kendra Kinnaird** authored "Minimizing Missteps When Interfacing with SEC Staff", which was published in *Law360* on July 6, 2012.

Jonice Gray Tucker and **Kendra Kinnaird** published "Will Vendors Create New Liability for Servicers?" in the July 2012 issue of *Mortgage Banking Magazine*.

Thomas Sporkin authored "Seven Steps Companies Can Take to Incentivize Internal Reporting of FCPA Violations" for the July 2012 issue of *The FCPA Report*.

Andrew Sandler, **Jeffrey Naimon**, and **Kirk Jensen** on July 13, 2012 authored for the American Bankers Association a white paper entitled "Disparate Impact Under FHA and ECOA: A Theory Without a Statutory Basis."

Andrew Schilling published "Understanding FIRREA's Reach: When does Fraud 'Affect' a Financial Institution?" in the July, 24, 2012 BNA Banking Report.

Bradley Marcus and **Nakiya Whitaker** authored for the August 2012 issue of Mortgage Banking Magazine an article titled "The Risk of Vicarious Liability for Broker Misconduct."

Mortgages

FHFA Announces New Short Sale Guidelines. On August 21, the FHFA announced new guidelines that align and merge Fannie Mae's and Freddie Mac's (the GSEs) short sale programs to facilitate quicker short sale processing. For mortgages owned or guaranteed by the GSEs, the consolidated guidelines, as implemented through Freddie Mac Bulletin 2012-16 and Fannie Mae Announcement SVC-2012-19, (i) reduce or eliminate the documentation borrowers must provide to demonstrate a need for a short sale, (ii) allow servicers to qualify certain borrowers for short sales-for example those based on hardship caused by death, divorce, or disability-without approval from the GSEs, even when the borrower is current, (iii) automatically qualify for short sale servicemembers receiving Permanent Change of Station Orders and borrowers who must relocate more than fifty miles for existing or new employment, (iv) waive the GSEs' rights to pursue deficiency judgments in certain circumstances, and (v) allow the GSEs to expedite short sales by offering up to $6,000 to second lien holders. These changes take effect on November 1, 2012.

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Privacy/Data Security

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Criminal Enforcement

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