

October 1, 2010

## Topics In This Issue

- [Federal Issues](#)
- [State Issues](#)
- [Courts](#)
- [Firm News](#)
- [Miscellany](#)
- [Mortgages](#)
- [Banking](#)
- [Consumer Finance](#)
- [Securities](#)
- [Litigation](#)
- [E-Financial Services](#)
- [Criminal Enforcement Action](#)

## Federal Issues

**FDIC Extends Safe Harbor Protection for Securitizations and Participations.** On September 27, the Federal Deposit Insurance Corporation (FDIC) approved a final rule that extends through December 31, 2010 the Safe Harbor Protection for Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation. Under this safe harbor, all securitizations or participations in process before the end of 2010 are permanently grandfathered under the existing terms of 12 C.F.R. Part 360.6, which confirms the basis on which the FDIC will not seek to recover assets transferred in connection with a securitization or a participation in the event of a failure of an insured depository institution. The safe harbor had been set to expire on September 30, 2010. [For a copy of the FDIC's press release, please see here](#); [for a copy of the final rule, please see here](#).

**Federal Agencies Announce Final CRA Rule.** On September 29, federal banking and thrift regulatory agencies announced the promulgation of a final Community Reinvestment Act (CRA) rule (Rule) requiring consideration of low-cost education loans and participation in ventures with women- and minority-owned financial institutions in assessing a financial institution's CRA record. The Rule was jointly issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision (the Agencies). The Rule implements a provision of the Higher Education Opportunity Act that amended the CRA to require the Agencies to consider low-cost higher education loans to low-income borrowers as a positive factor when assessing a financial institution's record of meeting community credit needs. The Rule also incorporates a CRA statutory provision that permits the Agencies to consider a nonwomen- and nonminority-owned financial institution's ventures with women-owned and minority-owned financial institutions and low-income credit unions when assessing a financial institution's CRA record. The Rule will become effective 30 days after

publication in the *Federal Register*. For a copy of the press release, please see <http://1.usa.gov/cFoFeO>. For a copy of the Rule, please see <http://1.usa.gov/qwHbzt>.

**FDIC Hosts Roundtable on Deposit Insurance Assessment Authority.** On September 24, the Federal Deposit Insurance Corporation (FDIC) held a roundtable to discuss policies and practices regarding the deposit insurance fund (DIF). Under the recently-enacted Dodd Frank Act, the FDIC must increase the DIF minimum reserve ratio from 1.15% to 1.35% by September 2020. Among other things, the discussion addressed the importance of having a countercyclical approach to building the DIF (*i.e.*, building the DIF when banks are at their most profitable), as well as how to avoid overfunding the DIF (*e.g.*, via dividends, assessment rate reductions, and other measures). The discussion also focused on the importance of the FDIC's risk-based pricing proposed rule from April 2010, in which the FDIC proposed two scorecards to assess risk when determining assessments (reported in [InfoBytes, Apr. 16, 2010](#)). Specifically, the discussion focused on the double-counting risk and the need for clear metrics so that financial institutions are able to effectively price risk. To view the archived webcast, and for additional materials, please see <http://www.fdic.gov/regulations/reform/forum2.html>.

**Small Business Lending Fund Program Signed Into Law.** On September 27, President Obama signed into law the small business lending fund program (the Program). The final legislation regarding the Program, based upon the Senate amendment to the House bill, is contained in Title IV, Subtitle A of the Small Business Jobs Act of 2010 (the Act). The Program provides, among other things, an additional opportunity for eligible institutions to receive an investment by the United States Department of the Treasury (the Treasury) in shares of preferred stock issued by the institution. For more details, please see [http://www.buckleysandler.com/documents/SBLFA\\_Outline\\_Passage.pdf](http://www.buckleysandler.com/documents/SBLFA_Outline_Passage.pdf).

**New Changes to Federal Reserve Board's Policy of Payment System Risk.** On September 30, the Federal Reserve Board announced changes to its Payment System Risk (PSR) policy that will become effective on March 24, 2011. The new PSR policy formally recognizes the role of the Federal Reserve Banks in providing intraday credit to depository institutions. It is designed to improve intraday liquidity management and payment flows for the banking system while also limiting credit exposures of the Reserve Banks. In pertinent part, the revised PSR policy calls for zero fee collateralized daylight overdrafts, 50 basis points (up from 36) for uncollateralized daylight overdrafts, and a biweekly daylight overdraft fee waiver of \$150. [For a full copy of a press release about these changes, please see here.](#)

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Account Guarantee Program (TAGP), which the proposed rulemaking announced will expire on December 31, 2010. The TAGP provided unlimited deposit insurance coverage to a wider range of transaction accounts, including noninterest-bearing transaction accounts as well as Interest on Lawyer Trust Accounts (IOLTA) and low-interest negotiable order of withdrawal (NOW) accounts. Under the proposed rule, depository institutions must (i) post notices at their branches and on their websites about the new program, (ii) inform customers with IOLTAs and NOW accounts that such accounts will no longer be covered by unlimited deposit insurance as of January 1, 2011, and (iii) notify customers individually of actions that affect the deposit insurance coverage of funds held in noninterest-bearing transaction accounts. Unlike TAGP, which required depository institutions to opt in and pay a separate assessment if they wished to participate, all depository institutions would be covered by the proposed rule without any further assessment. The written comment period on the proposed rule will close on October 15, 2010. For a copy of the proposed rule, please see <http://www.fdic.gov/news/board/10Sept27no8.pdf>.

**FinCEN Proposes Regulations for Financial Institutions.** The Department of the Treasury recently announced that it has submitted for publication in the *Federal Register* a notice of proposed rulemaking pursuant to Section 6302 of the Intelligence Reform and Terrorism Prevention Act of 2004 to support the Secretary's efforts to combat money laundering and terrorist financing. The proposed regulations would require certain depository institutions and money transmitters to affirmatively report to FinCEN transmittal orders associated with certain cross-border electronic transmittals of funds (CBETFs), and to disclose the taxpayer identification numbers of accountholders who transmit or receive CBETFs. Previously these depository institutions and money transmitters were only required to maintain records of CBETFs and make them available when requested. The new requirements would apply only to financial institutions and money transmitters that exchange payment instructions directly with foreign institutions. For a copy of the press release, please see [http://www.fincen.gov/news\\_room/nr/html/20100927.html](http://www.fincen.gov/news_room/nr/html/20100927.html).

**House Bill Aimed at Making Electronics More Accessible to People with Disabilities.** On September 28, the Twenty-First Century Communications and Video Accessibility Act of 2010 (Act) passed by a voice vote in the U.S. House of Representatives and now awaits the President's signature. The Act seeks to improve communications access for people with disabilities. It requires telephones used with the Internet to be hearing aid compatible and expands the relay services to enable communication with anyone, not just between people with and without disabilities. The Act also requires that telecommunications service providers and manufacturers make their services and equipment, such as internet-capable mobile devices, accessible to and usable by people with disabilities. It contains a requirement for real time text support to those who rely on text to communicate to ensure that they have equal access to emergency services. The Act also requires that, if achievable with reasonable effort or expense, devices designed to receive or play back video programming, using a picture screen of any size, must be capable of displaying closed captioning, delivering available video description, and making emergency information accessible to individuals who are blind or have low vision. Finally, multichannel video programming distributors (*i.e.*, cable or satellite subscription TV services) must make their programming guides accessible to people who cannot read the visual display. For a final version of the Act, please see <http://1.usa.gov/b8z6Rw>.

## State Issues

**Michigan Office of Financial and Insurance Regulation Announces the Enforcement of the Mortgage Loan Originator Licensing Act Beginning October 15.** On September 28, the Michigan Office of Financial and Insurance Regulation (OFIR) published a notice reminding mortgage brokers, lenders, servicers, and loan originators that the OFIR will begin enforcing the loan originator licensing requirements of the Mortgage Loan Originator Licensing Act starting October 15. After that date, any individual originating loans without an active approved mortgage loan originator license or anyone employing such an individual could be subject to an enforcement action and civil penalties up to \$25,000. The OFIR encourages all mortgage brokers, lenders, servicers, and loan originators to verify the status of their licensees/their own license. If an individual discovers that his or her loan originator license application does not have an approved status in NMLS, the individual should contact the OFIR immediately to discuss the deficiency. For a copy of the OFIR Notice, please see <http://bit.ly/krhDg7>.

**New York Extends Credit Lien Protection for Credit Line Mortgage Advances from 25 to 30 Years.** The Governor of New York recently signed a statutory amendment extending the lien protection for future advances made under a credit line mortgage from 25 years to 30 years. Subdivision 2 of section 281 of New York's real property law had provided that a credit line mortgage may secure the original indebtedness and indebtedness created by future advances within 25 years after the recording date of the credit line mortgage. The statutory amendment, Chapter 529 of the New York Laws of 2010, changed the credit lien protection period to 30 years, effective upon enactment. [For a copy of the amendment, please see here.](#)

## Courts

**Maryland Federal Court Again Dismisses Baltimore's FHA Case Against Wells Fargo.** On September 14, for the second time this year, the U.S. District Court for the District of Maryland dismissed the City of Baltimore's (Baltimore or the City) Fair Housing Act case against Wells Fargo. *Mayor and City Council of Baltimore v. Wells Fargo Bank, N.A.*, No. 1:08-CV-00062 (D. Md. Sept. 14, 2010). BuckleySandler represented Wells Fargo in the case which was predicated on allegations that Wells Fargo engaged in predatory and discriminatory practices with respect to the origination of loans in predominantly African-American neighborhoods in the City of Baltimore. Baltimore alleged that these purported practices led to a disproportionately high rate of foreclosure in African-American neighborhoods, causing injury to the City by causing a decline in property values, expenditures to secure and rehabilitate vacant properties, and increased expenditures for police and fire protection due to the vacancies. In January 2010, the U.S. District Court for the District of Maryland dismissed Baltimore's First Amended Complaint, concluding that the causal connection posited by Baltimore between the allegations of Wells Fargo's misconduct and its own damages was not sufficiently plausible to confer Article III standing (as reported in [InfoBytes, January 8, 2010](#)). Baltimore filed a Second Amended Complaint in April 2010 and Wells Fargo moved to dismiss. In the September 14 decision dismissing the case again, the Court held that the City had failed to demonstrate that the properties for which it seeks damages would not have become vacant but for a Wells Fargo loan. The Court has permitted the City to file a third amended complaint by October 22, but noted that the

damages at issue, if any, are likely to be extremely limited. [For a copy of the opinion, please see here.](#)

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## Firm News

[Jamie Parkinson](#) will be speaking on the Foreign Corrupt Practices Act at the International Bar Association conference on October 2 in Vancouver.

[Jamie Parkinson](#) will present at a US-India Business Council event on October 5 in Palo Alto, the topic will be the Foreign Corrupt Practices Act.

[John McGuinness](#) and [Matthew Previn](#) will be speaking at the American Conference Institute's 5th Annual Residential Mortgage Litigation & Regulatory Enforcement conference in Dallas Texas on October 19. The panel is entitled "Defending Against the Latest Investor Lawsuits and Claims." Specifically, they will be presenting on major litigation involving credit rating agencies.

[Jonice Gray Tucker](#) and [Lori Sommerfield](#) will co-present a webinar sponsored by Sheshunoff Information Services entitled "Fair Lending Enforcement is on the Rise: Will You Be Prepared for Your Next Exam?" on October 27.

[Andrew Sandler](#) will be co-chairing the PLI program Financial Crisis Fallout 2010: Emerging Enforcement Trends in New York City on November 4. [David Krakoff](#) and [Sam Buffone](#) will also be presenting at the seminar.

[Andrew Sandler](#), [Ben Klubes](#), and [Jonice Gray Tucker](#) will be speaking at the 2010 CRA & Fair Lending Colloquium in Las Vegas from November 7-10.

[Margo Tank](#) and [Jerry Buckley](#) will be speaking at the [Electronic Signatures & Records Association's Fall Conference](#) on November 9-10.

[Andrew Sandler](#) will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27, 2011 at 11am. The conference is taking place at The Helmsley Park Lane Hotel, 36 Central Park South, NYC. 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 Andy will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

[Joe Kolar](#) will co-present a webinar sponsored by Inside Mortgage Finance entitled "Appraisal Reform 2010; The New Rules" focusing on the appraisal provisions of the Dodd-Frank Act on October 21.

## Miscellany

**ABB Ltd and Two Subsidiaries to Pay Civil and Criminal Penalties Pursuant to Settlement of FCPA Charges.** ABB Ltd, a Swiss corporation, and two of its subsidiaries have resolved charges stemming from admitted violations of the Foreign Corrupt Practices Act (FCPA), agreeing to pay a total of \$58.3 million in disgorgement, prejudgment interest and penalties, including \$19 million in criminal penalties, to the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC). ABB Ltd's U.S. subsidiary, ABB Inc., pled guilty to a criminal information charging it with one count of violating the anti-bribery provisions of the FCPA and one count of conspiracy to violate those provisions. The court imposed a sentence that included a criminal fine of \$17.1 million. As part of ABB Inc.'s plea, it admitted that one of its business units based in Sugar Land, Texas, ABB Network Management (ABB NM), paid bribes from 1997 to 2004 that totaled approximately \$1.9 million to officials at Comisión Federal de Electricidad (CFE), a Mexican state-owned utility company. ABB NM's primary business was to provide products and services to electrical utilities, many of them foreign state-owned utilities. In exchange for the bribe payments, according to court documents, ABB NM received contracts worth more than \$81 million in revenue. ABB Inc. admitted that the bribe payments were made through various intermediaries, including a Mexican company that served as ABB NM's sales representative in Mexico on its contracts with CFE.

In a related SEC proceeding, ABB Ltd settled civil charges of FCPA bribery, books and records violations, and internal controls violations based on the conduct of its ABB NM business unit, as well as the conduct of certain of its subsidiaries participating in the United Nations' Oil for Food program in Iraq, agreeing to pay \$1.9 million in criminal penalties and more than \$39 million in disgorgement, pre-judgment interest and civil penalties. ABB Ltd admitted that its subsidiary ABB Ltd - Jordan paid

more than \$300,000 in kickbacks to the former Iraqi government to secure contracts with regional companies of the Iraqi Electricity Commission, an Iraqi government agency.

ABB Ltd has disclosed that it cooperated fully with the DOJ and SEC and has put in place a global comprehensive compliance and integrity program, and that, in lieu of an external compliance monitor, the DOJ and SEC have agreed to allow ABB Ltd to report on its continuing compliance efforts and the results of the review of its internal processes for a three-year period going forward. For a copy of the DOJ's press release, see <http://www.justice.gov/opa/pr/2010/September/10-crm-1096.html>; [for a copy of ABB Ltd's press release related to the settlements, please see here.](#)

**Several Defendants Plead Guilty in Dallas Mortgage Fraud Case.** On September 22, the fourth of eleven co-defendants pled guilty in the United States District Court for the Northern District of Texas to charges in an indictment alleging various felony offenses related to a mortgage fraud scheme in the Dallas area from 2001 through 2005. A fifth defendant is scheduled for a plea later this month, while the six other defendants are set for trial in October. Among the defendants is Eugene J. Lockhart, Jr., a former player with the Dallas Cowboys, who has been charged with wire fraud and conspiracy to commit bank fraud and wire fraud. According to the indictment, the defendants ran a scheme in which they located single-family residences for sale in the Dallas area, including distressed and pre-foreclosure properties, negotiated a sales price with the seller, and then collected proceeds by inflating the sales price to an arbitrary amount substantially higher than the fair market value of the residence. The defendants recruited straw borrowers, promised to pay each borrower a commission, and then falsified their loan applications. The scope of the conspiracy involved approximately 54 fraudulent residential property loan closings resulting in the funding of approximately \$20.5 million in fraudulent loans. For a copy of the announcement, please see <http://www.stopfraud.gov/news/news-09222010-2.html>.

## Mortgages

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## Banking

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Lawyer Trust Accounts (IOLTA) and low-interest negotiable order of withdrawal (NOW) accounts. Under the proposed rule, depository institutions must (i) post notices at their branches and on their websites about the new program, (ii) inform customers with IOLTAs and NOW accounts that such accounts will no longer be covered by unlimited deposit insurance as of January 1, 2011, and (iii) notify customers individually of actions that affect the deposit insurance coverage of funds held in noninterest-bearing transaction accounts. Unlike TAGP, which required depository institutions to opt in and pay a separate assessment if they wished to participate, all depository institutions would be covered by the proposed rule without any further assessment. The written comment period on the proposed rule will close on October 15, 2010. For a copy of the proposed rule, please see <http://www.fdic.gov/news/board/10Sept27no8.pdf>.

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## Securities

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## Litigation

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## Criminal Enforcement Action

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**ABB Ltd and Two Subsidiaries to Pay Civil and Criminal Penalties Pursuant to Settlement of FCPA Charges.** ABB Ltd, a Swiss corporation, and two of its subsidiaries have resolved charges stemming from admitted violations of the Foreign Corrupt Practices Act (FCPA), agreeing to pay a total of \$58.3 million in disgorgement, prejudgment interest and penalties, including \$19 million in criminal penalties, to the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC). ABB Ltd's U.S. subsidiary, ABB Inc., pled guilty to a criminal information charging it with one count of violating the anti-bribery provisions of the FCPA and one count of conspiracy to violate those provisions. The court imposed a sentence that included a criminal fine of \$17.1 million.

As part of ABB Inc.'s plea, it admitted that one of its business units based in Sugar Land, Texas, ABB Network Management (ABB NM), paid bribes from 1997 to 2004 that totaled approximately \$1.9 million to officials at Comisión Federal de Electricidad (CFE), a Mexican state-owned utility company. ABB NM's primary business was to provide products and services to electrical utilities, many of them foreign state-owned utilities. In exchange for the bribe payments, according to court documents, ABB NM received contracts worth more than \$81 million in revenue. ABB Inc. admitted that the bribe payments were made through various intermediaries, including a Mexican company that served as ABB NM's sales representative in Mexico on its contracts with CFE.

In a related SEC proceeding, ABB Ltd settled civil charges of FCPA bribery, books and records violations, and internal controls violations based on the conduct of its ABB NM business unit, as well as the conduct of certain of its subsidiaries participating in the United Nations' Oil for Food program in Iraq, agreeing to pay \$1.9 million in criminal penalties and more than \$39 million in disgorgement, pre-judgment interest and civil penalties. ABB Ltd admitted that its subsidiary ABB Ltd - Jordan paid more than \$300,000 in kickbacks to the former Iraqi government to secure contracts with regional companies of the Iraqi Electricity Commission, an Iraqi government agency.

ABB Ltd has disclosed that it cooperated fully with the DOJ and SEC and has put in place a global comprehensive compliance and integrity program, and that, in lieu of an external compliance monitor, the DOJ and SEC have agreed to allow ABB Ltd to report on its continuing compliance efforts and the results of the review of its internal processes for a three-year period going forward. For a copy of the DOJ's press release, see <http://www.justice.gov/opa/pr/2010/September/10-crm-1096.html>; [for a copy of ABB Ltd's press release related to the settlements, please see here](#).

**Several Defendants Plead Guilty in Dallas Mortgage Fraud Case.** On September 22, the fourth of eleven co-defendants pled guilty in the United States District Court for the Northern District of Texas to charges in an indictment alleging various felony offenses related to a mortgage fraud scheme in the Dallas area from 2001 through 2005. A fifth defendant is scheduled for a plea later this month, while the six other defendants are set for trial in October. Among the defendants is Eugene J.

Lockhart, Jr., a former player with the Dallas Cowboys, who has been charged with wire fraud and conspiracy to commit bank fraud and wire fraud. According to the indictment, the defendants ran a scheme in which they located single-family residences for sale in the Dallas area, including distressed and pre-foreclosure properties, negotiated a sales price with the seller, and then collected proceeds by inflating the sales price to an arbitrary amount substantially higher than the fair market value of the residence. The defendants recruited straw borrowers, promised to pay each borrower a commission, and then falsified their loan applications. The scope of the conspiracy involved approximately 54 fraudulent residential property loan closings resulting in the funding of approximately \$20.5 million in fraudulent loans. For a copy of the announcement, please see <http://www.stopfraud.gov/news/news-09222010-2.html>.

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