Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

August 17, 2012

TOPICS - COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

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amendments to TILA under the Dodd-Frank Act that require creditors to meet certain appraisal conditions before making a higher-risk loan. A creditor would have to obtain a written appraisal from a certified or licensed appraiser that is based on a physical property visit of the interior of the property. At application, the creditor would have to issue a disclosure stating the purpose of the appraisal, that the creditor will provide the applicant a copy of any written appraisal, and that the applicant may choose to have a separate appraisal conducted at his or her own expense. The creditor also would have to provide the borrower with a free copy of any written appraisals at least three business days before closing. Additional appraisal requirements would apply under certain circumstances.

Concurrently, the CFPB proposed a rule to implement a Dodd-Frank Act provision that adds similar appraisal requirements to ECOA. According to the proposal, for any loan to be secured by a first lien on a dwelling, a creditor would have to (i) notify applicants within three business days of receiving an application of their right to receive a free copy of written appraisals and valuations and (ii) provide applicants a free copy of all written appraisals and valuations promptly after receiving them, but in no case later than three business days prior to closing on the mortgage. The proposed rule prohibits creditors from charging additional fees for providing a copy of written appraisals and valuations. Applicants would be permitted to waive the three day requirement, provided a copy of all written appraisals and valuations is provided at or prior to closing. Together, the revisions to TILA and ECOA, as implemented by the proposed rules, would require creditors to provide two appraisal disclosures to consumers applying for a higher-risk loan secured by a first lien on a borrower's principal dwelling. Comments on both rules are due by October 15, 2012.

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FTC Finalizes Privacy Settlement with Facebook. On August 10, the FTC approved a final settlement to resolve charges that Facebook deceived customers by failing to meet stated privacy protections. The FTC alleged, among other things, that Facebook shared personal information with advertisers despite assurances that it would not do so. The agreement does not include any monetary penalty, but Facebook is prohibited from making any deceptive privacy claim, and it must obtain consumers' approval before changing the way it shares their data. For the next twenty years,

Facebook also must obtain periodic assessments of its privacy practices by independent auditors. One Commissioner objected, stating that because the agreement includes a denial of the allegations, the Commission does not have sufficient grounds under the FTC Act to accept the consent agreement. Further, the dissenting Commissioner stated that the settlement is insufficient because it does not clearly extend to all representations made in the Facebook environment and specifically may not cover third-party applications.

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COURTS

Sixth Circuit Holds Lender May be Liable for Broker's Failure to Disclose Commission. On August 13, the U.S. Court of Appeals for the Sixth Circuit held that a lender may be liable under state common law claims of civil conspiracy for failing to disclose fees paid to a mortgage broker. *Lee v. Countrywide Home Loans, Inc.*, No. 10-3777, 2012 WL 3264064 (6th Cir. Aug. 13, 2012). In this case, the borrowers brought common law civil conspiracy and fraud claims against their lender, alleging that the lender defrauded the borrowers by failing to disclose a commission the lender paid to the broker (the Yield Spread Premium) and subsequently recouped by raising the interest rate on the borrowers' loan over the life of the loan. The borrowers also brought a claim for rescission under TILA. The district court found no evidence that the lender had any knowledge that the broker failed to disclose the fee and granted summary judgment to the bank on both common law claims. The district court also granted summary judgment for the lender with regard to the borrowers' federal TILA claim. The appeals court upheld the district court ruling on common law fraud and TILA rescission but reversed the district court's holding with regard to civil conspiracy. The appeals court held that a jury could find the lender participated in a civil conspiracy if the borrowers could show

that the lender was aware that the broker was breaching its fiduciary duty by misrepresenting or concealing the commission and that the lender aided in this breach.

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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 regulations, and regulations in the pipeline, for 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 speak 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.

Thomas 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 in the July 2012 issue of Mortgage Banking "Will Vendors Create New Liability for Servicers?".

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 prepared 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.

MORTGAGES

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We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes.
Email: **infobytes@buckleysandler.com**

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