

November 19, 2010

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## Federal Issues

**HUD Solicits Input Regarding Warehouse Lending Structures.** On November 16, HUD posted a notice on its website soliciting comments regarding changes in warehouse lending structures that have occurred since HUD's previous regulations on table funding and secondary market transactions were issued in 1994. The notice seeks input from the industry regarding warehouse lending structures, processes and procedures in order for HUD to determine whether it needs to provide additional guidance regarding the scope of RESPA as it applies to current mortgage funding practices. The specific questions include, among other things: (i) how a warehouse lender funds loan originators; (ii) how a warehouse lender assures repayment by the loan originator; (iii) whether a loan originated by a loan originator ever transfers to the warehouse lender, and if so, whether the loan originators are ever obligated to repurchase the loan; (iv) the extent to which a warehouse lender is involved in the credit approval decision; and (v) the characteristics that distinguish a bona fide transfer of the loan that make it a secondary market transaction. Comments will be due not later than 30 days after the notice is published in the *Federal Register*, which is still pending. [For a copy of the notice, please see here.](#)

## **Key Hires for the Consumer Financial Protection Bureau Implementation Team Announced.**

On November 16, the U.S. Treasury Department (Department) announced the hiring of Peggy Twohig and Steve Antonakes to lead the depository and non-depository institution teams of the Consumer Financial Protection Bureau (CFPB) implementation team currently housed at the Department. Twohig, who will lead the non-depository supervision team, will lead the research and policy analysis guiding the creation of the federal non-depository supervision program. Antonakes, who will lead the depository supervision team, will be responsible for building the consumer supervision program for the nation's largest depository institutions. For a copy of the press release, please see <http://www.treas.gov/press/releases/tg955.htm>.

**Freddie Mac Updates Servicing Requirements, HAMP Incentive Policies, and HAMP Modification Appraisal Terms.** On November 15, Freddie Mac issued a bulletin to change various servicing requirements, including guidance related to the Home Affordable Modification Program (HAMP), and to allow servicers to use a Broker Price Option (BPO) or appraisal that is less than 90 days old to evaluate a borrower for a HAMP trial period. Under the new servicing requirements, to improve efficiency in the foreclosure process, Freddie Mac now allows its designated counsel to request notes directly from document custodians. The bulletin also clarifies that servicers may include accrued late charges in a long-term forbearance agreement, but may not accrue or collect late charges during the forbearance period as long as the borrower is current under the plan. Freddie Mac also revised its Single-Family Seller/Servicer Guide to include the existing requirement that a modified mortgage must be modified to a fully amortizing fixed-rate mortgage. These servicing requirements are effective immediately. In addition, Freddie Mac clarified that it will not pay for any "Pay for Performance" or "Pay for Success" HAMP incentives for HAMP-modified mortgages that are insured by the Federal Housing Administration (FHA) or guaranteed by the Department of Veterans Affairs (VA) or Rural Housing Services (RHS). Finally, Freddie Mac announced that it had updated several HAMP documents in an October 8 email to single-family servicers. For a copy of the bulletin, please see <http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1027.pdf>.

**Federal Reserve Board Proposes Rule on Conformance Period for Volcker Rule.** On November 17, the Federal Reserve Board (Board) proposed a rule that would implement the time period in which banking entities and nonbank financial companies supervised by the Board must conform to the so-called "Volcker Rule," set forth in section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The Volcker Rule generally bars banking entities from (i) engaging in proprietary trading in securities, derivatives, or certain other financial instruments, and (ii) from investing in, sponsoring, or having certain relationships with a hedge fund or private equity fund, with certain exceptions. Under the Dodd-Frank Act, the implementing agencies have 9 months to adopt rules to implement the Volcker Rule provisions. Banking entities will have to comply with the restrictions and prohibitions of the Volcker Rule within one year of the adopted rules, or July 21, 2012, whichever is earlier (the Implementation Date). However, the Dodd-Frank Act also provides for a conformance period for banking entities and non-bank financial companies to either wind down, sell, or otherwise structure its activities to comply with the Volcker Rule and the implementing regulations. In this proposed rule, the Board establishes the conformance period at 2 years after the Implementation Date for existing entities, or, for entities that are not a banking entity, subsidiary, or affiliate as of July 21, 2010 and subsequently becomes one, the later of the 2 years after the Implementation Date or from the date on which the company becomes a banking entity or subsidiary or affiliate of a banking entity. Comments on the proposed rule are due within 45 days of publication in the *Federal Register*. [For a copy of the press release, which also contains a link to the proposed rule, please see here.](#)

**Federal Reserve Board Announces Additional Stress Tests for Large Bank Holding Companies and Guidelines for Evaluation of Proposed Dividend Payments and Other Capital Actions.** On November 17, the Federal Reserve Board (Board) issued a revised temporary addendum to SR Letter 09-04, which addresses supervisory guidance for capital actions such as payment of dividends, stock redemptions and stock repurchases at bank holding companies (BHCs).

The temporary addendum is designed to identify the specific criteria that the Board will consider when evaluating those types of actions by firms that were participants in the Supervisory Capital Assessment Program (SCAP BHCs). In particular, the addendum states that the Board will base its assessments of capital adequacy on a review of a comprehensive capital plan submitted by the SCAP BHCs by January 7, 2011. In addition, the Board, when assessing capital adequacy will consider a number of factors, including: (i) the risk profile, (ii) the content of the capital plan, and (iii) the strength of the firm's internal capital assessment process. Likewise, the addendum notes that SCAP BHCs will be expected to complete repayment of outstanding U.S. government investments and satisfy any other conditions related to the Troubled Asset Relief Program prior to taking any capital actions. Finally, the Board will also consider whether the proposed capital actions are consistent with management's strategies to address and implement the proposed Basel III framework. For the complete press release of the Federal Reserve Board announcing these guidelines and requests, see <http://www.federalreserve.gov/newsevents/press/bcreg/20101117b.htm>. [For a copy of the revised temporary addendum to Supervision and Regulation letter 09-4, see here.](#)

**FTC Issues Final Mortgage Assistance Relief Services (MARS) Rule.** On November 19, the Federal Trade Commission (FTC) issued a final version of its Mortgage Assistance Relief Services (MARS) Rule to regulate mortgage relief companies. Chiefly, the new rule prohibits mortgage relief companies from collecting fees until they have provided consumers with both (i) a written offer from their lender or servicer that the consumer deems acceptable and (ii) a written document from the lender or servicer describing the key changes to the mortgage that would result if the consumer accepts the offer. Additionally, the rule restricts the advertising practices of mortgage relief companies, requiring them to disclose in all advertisements and communications directed at consumers that (i) they are not associated with the government, (ii) their services have not been approved by the government or the consumer's lender, (iii) the lender may not agree to change the consumer's loan, and (iv) if the company advises the consumer to stop paying on the mortgage, they could lose their home and damage their credit rating. The rule also mandates that mortgage relief companies provide disclosures explaining the total fees the companies will charge and that the consumer will not pay a fee unless they accept an offer from their mortgage company/servicer. Finally, the rule prohibits mortgage relief companies from making certain false or misleading claims. The Final Rule applies only to entities within the FTC's jurisdiction under the Federal Trade Commission Act, and excludes, among others, banks, savings and loans, federal credit unions, common carriers, and entities engaged in the business of insurance, as well as attorneys, as long as the attorneys (i) engage in the practice of law, (ii) are licensed in the state where the consumer or the dwelling is located, (iii) are complying with state laws and regulations governing attorney conduct related to the rule. However, attorneys are only exempt from the rule's advance fee restrictions provided that they place any fees they collect in a client trust account and abide by state laws and regulations covering such accounts. All provisions of the rule except the advance-fee ban will become effective December 29, 2010. The advance-fee ban provisions will become effective January 31, 2011. For a copy of the rule, please see <http://www.ftc.gov/os/2010/11/R911003mars.pdf>.

**FTC Cracks Down on Mortgage Relief Operations.** Recently, the Federal Trade Commission (FTC) announced that two fraudulent mortgage relief operations posing as government programs had been shut down and that seventeen marketers were banned from selling mortgage modification and foreclosure relief services. With respect to the two mortgage relief operations, the FTC shut them down for claiming they were part of a "Government Mortgage Relief Program" that could, in return for a large up front fee, reduce consumers' monthly mortgage payments and lower their interest rates. The FTC alleged that consumers would pay a fee without receiving anything in return and would not get refunds. The companies failed to respond to calls or emails and eventually changed the name of their business. The FTC also announced settlements with a number of companies charged with similar practices in 2009. For a copy of the announcement, please see <http://www.ftc.gov/opa/2010/11/mortgage.shtm>.

## State Issues

**DC AG Issues Q&A Guide Regarding Enforcement Statement Clarifying Foreclosure Commencement Procedures.** On November 16, the Attorney General (AG) for the District of Columbia issued a Questions and Answers (Q&A) Guide in an effort to clarify the AG's October 27 Enforcement Statement. The AG's October 27 Enforcement Statement indicated that any foreclosure sale notices sent to homeowners to initiate foreclosure proceedings would be considered a violation of the DC Consumer Protection Procedures Act if the notices misrepresented or failed to state a material fact (as reported in [InfoBytes, Nov. 5, 2010](#)). Among other things, the Q&A Guide clarifies that a noteholder's failure to record the note prior to the foreclosure sale does not, by itself, invalidate the foreclosure. The Guide reaffirms the AG's intent to initiate enforcement actions to stop the use of deceptive foreclosure sale notices. The Guide indicates, however, that the AG does not intend to enforce the Consumer Protection Procedures Act (the Act) against noteholders or trustees who, prior to the AG's October 27 Statement completed foreclosure sales without having recorded the noteholders' interests, so long as there are no other grounds for invalidating the foreclosures. However, the Q&A clarifies the AG's intent to enforce the Act against noteholders or trustees who, after the issuance of the AG's October 27 Statement are continuing to notice foreclosure sales without having recorded the noteholders' interests. [For a copy of the press release and the DC AG's Q&A Guide, please see here.](#)

## Courts

**New Settlement Offered In TD Ameritrade Data Theft.** Several million current and former TD Ameritrade customers whose contact information and email addresses may have been stolen in 2007 will be eligible to receive as much as \$2,500 under a new proposed settlement agreement filed on November 15. *In re TD Ameritrade Account Holder Litigation*, No.07-cv-02852 (N.D. Cal. Nov. 15, 2010). The proposed settlement, scheduled for a hearing on December 23, 2010, would resolve plaintiffs' claims that the 2007 data breach caused them to receive spam e-mail solicitations for the purchase of stocks and other questionable investments. The settlement would also require TD Ameritrade to hire an independent contractor to evaluate and assess the company's internal information technology security controls. The settlement is expected to cost TD Ameritrade between \$2.5 million and \$6.5 million. For a copy of the proposed settlement, please see

<http://bit.ly/ls1HQn>.

## Firm News

[Clinton Rockwell](#) was recognized as one of "The Next 40 Mortgage Professionals to Watch" in the November 2010 issue of National Mortgage Professional Magazine.

[Sam Buffone](#), [David Krakoff](#) and [James Parkinson](#) will be speaking at the "FCPA Enforcement Update: Individuals in the Line of Fire," Web conference on December 6.

[Andrew Sandler](#) will be speaking at PLI's Banking Law Institute 2010: The Future is Here, on December 8, 2010. Mr. Sandler's session is: Consumer Financial Protection & Enforcement Proceedings under the New Legislation.

[James Parkinson](#) will be speaking at "The FCPA's Exception and Affirmative Defenses," Web conference on December 21.

[Donna Wilson](#) will be speaking at the ACI Privacy & Security of Consumer & Employee Information Conference on January 25-26, 2011 in Washington, DC. The topic will be "Responding to the Latest Cyber Threats: Mobile Workforces, Technology, Data Thefts, and Cloud Computing."

[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.

## Miscellany

**Broker Pleads Guilty to Embezzlement.** On November 12, the U.S. Department of Justice (DOJ) announced that Gregory J. Buchholz, formerly a registered securities broker working as an independent contractor for Raymond James Financial Services, Inc., pleaded guilty to one count of wire fraud as part of a scheme to defraud several of his clients out of \$1.35 million. An investigation concluded that Buchholz embezzled the funds from at least ten clients by liquidating many of their investments and depositing the proceeds into his own personal bank accounts. Buchholz was prosecuted by the DOJ's Financial Fraud Enforcement Task Force and is scheduled to be sentenced on January 31, 2011, with a potential sentence of up to 20 years. [For a copy of the press release, please see here.](#)

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providing false income information in support of an application for a loan intended to return money to the buyer at closing, and to creating fraudulent W-2 forms. Charges against dos Santos and Damasceno were originally brought as part of the prosecution of 28 defendants accused of mortgage fraud schemes in New Jersey in a joint prosecution involving the Financial Fraud Enforcement Task Force. The defendants face up to 30 years in prison and a fine of \$1 million, or twice the gain or loss from the conspiracy, at sentencing. For a copy of the press release, please see <http://www.stopfraud.gov/news/news-11152010.html>.

## Mortgages

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Email: [infobytes@buckleysandler.com](mailto:infobytes@buckleysandler.com)

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