Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

August 13, 2010

Topics In This Issue

Federal Issues

HUD Announces New Refinancing Program for "Underwater" Borrowers. On August 6, the U.S. Department of Housing and Urban Development announced details regarding the Federal Housing Administration (FHA) Short Refinance option, which provides a refinancing opportunity for responsible homeowners who are in negative equity positions. Beginning on September 7, 2010, FHA will offer eligible non-FHA borrowers the opportunity to refinance into a new FHA-insured mortgage. In order for a borrower to be eligible, (i) the existing first lien holder must write off at least ten percent of the unpaid principal, (ii) the borrower must be current on the mortgage to be refinanced and occupy the subject property, (iii) the borrower must meet standard FHA underwriting requirements and re-subordinate existing subordinated mortgages on the property, and (iv) the refinanced FHA-insured first lien must have a loan-to-value ratio of no more than 97.75%. Additional eligibility requirements are stated in HUD's mortgagee letter discussing the program, which is available at http://1.usa.gov/db8bpD. For a copy of the press release, please see http://1.usa.gov/a6OwFj.

FDIC Proposes Guidance on Overdraft Programs. On August 11, the Federal Deposit Insurance Corporation (FDIC) invited comments on proposed supervisory guidance on overdraft payment programs. Under the proposed guidance, the FDIC would expect institutions, in an effort to mitigate credit, legal, reputational, safety and soundness and other risks, to (i) promptly honor customer requests to decline overdraft coverage for non-electronic transactions, (ii) provide consumers with the opportunity to choose the overdraft payment product that best meets their needs, (iii) monitor overdraft usage by customers and take effective action to limit its use "as a form of short-term, high-cost credit," including reaching out to consumers who overdraw their accounts more than six times in any rolling twelve-month period, (iv) institute "appropriate" daily limits on overdraft fees, and (v) refrain from processing transactions in an order that maximizes fees for consumers. The FDIC advised institutions that the FDIC will review overdraft payment programs at each examination. In addition, the FDIC reminds institutions that they should provide "clear and meaningful disclosures and other communications about overdraft payment programs" and must comply with recent changes to Regulation E by the Board of Governors of the Federal Reserve. The FDIC's proposed guidance

follows similar guidance proposed by the Office of Thrift Supervision earlier this year (reported in *InfoBytes*, April 23, 2010). For a copy of the FDIC's press release, please see http://www.fdic.gov/news/news/financial/2010/fil10047.html. For a copy of the proposed guidance, please see http://www.fdic.gov/news/news/financial/2010/fil10047.pdf.

FDIC Adds New Divisions to Meet Obligations of Regulatory Reform Bill. On August 10, the FDIC unveiled two new divisions in anticipation of its enhanced obligations under the recently-enacted Dodd-Frank Wall Street Reform and Consumer Protection Act. First, the Office of Complex Financial Institutions (CFI) will be tasked with oversight and review of systemically significant institutions, including both bank holding companies with more than $100 billion in assets and non-bank financial companies identified by the Financial Stability Oversight Council as systemically significant. The CFI also will orchestrate the FDIC's authority to implement orderly liquidations of failed systemically significant institutions. Second, the Division of Depositor and Consumer Protection will enhance the FDIC's compliance examination and enforcement program, with a primary focus on consumer protection and fair lending compliance. Under the new legislation, the FDIC will be responsible for enforcing the consumer protection rules promulgated by the new Bureau of Consumer Financial Protection for banks with $10 billion or less in assets. To read the FDIC press release, please see http://www.fdic.gov/news/news/press/2010/pr10184.html.

SEC Division of Enforcement Granted Permanent Power to Issue Subpoenas. On August 11, the Securities and Exchange Commission (SEC) adopted a final rule that made permanent the delegation of authority to the Director of the Division of Enforcement to issue formal orders of investigation, which authorize the enforcement staff to issue subpoenas in those investigations (*e.g.*, orders to compel testimony under oath and the production of documents). Previously, the Division of Enforcement had to appear before the SEC's five commissioners to request a formal order of investigation. The SEC's decision was based on a one-year trial that began in August 2009, which the SEC concluded "increased efficiency" and improved "communication and coordination in addressing pertinent legal and policy issues." For a copy of the final rule, see http://sec.gov/rules/final/2010/34-62690.pdf.

FDIC Announces "Open Door" Policy for Rulemaking to Implement Dodd-Frank Act. On August 12, the Federal Deposit Insurance Corporation (FDIC) announced expanded administrative procedures to interpret and implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Under the FDIC's "open door" policy, the FDIC will (i) host a series of roundtable discussions, (ii) release (bi-weekly) the names and affiliations of private sector individuals who meet with senior FDIC officials regarding the rulemaking process, as well as the subject matter of the meeting, (iii) continue to webcast open meetings of the FDIC Board of Directors, including those pertaining to regulatory reform, and (iv) seek general public comments from the public discussing how the FDIC should implement the law. For a copy of the press release, please see http://www.fdic.gov/news/news/press/2010/pr10187.html. For more information, please see http://www.fdic.gov/regulations/reform/index.html.

Treasury Deputy Secretary States Consumer Protection Issues, Reforming GSEs Among Top Priorities for Regulatory Reform. On August 5, Treasury Deputy Secretary Neal Wolin outlined four important areas for financial regulatory reform to be implemented by various federal agencies over the next several months. In the area of consumer protection, Deputy Secretary Wolin stated that disclosures will be simplified for credit cards, auto loans, and mortgages, new national underwriting standards for mortgages will be put in place. Deputy Secretary Wolin also highlighted reforming the GSEs and the housing finance system, reforming the derivatives market, and establishing new rules on capital restrictions for financial institutions as critical areas for reform moving forward. For a copy of the speech, please click here.

VA Announces New Closing Cost Itemization Requirements. On July 30, the Department of Veterans Affairs (VA) announced that lenders of VA-guaranteed home loans are required to itemize seller, lender, mortgage broker, or real estate agent/broker credits and title service charges, and that these itemizations should conform to the VA's previous statement on origination fees (reported in *InfoBytes*, January 15, 2010). *VA Circular 26-10-9*. With regard to title services and lender's title insurance, lenders are now required to break out the charges shown on line 1101 of the HUD-1 Settlement Statement similarly to the charges on line 801 ("Our origination charge"). The itemizations must be attached to the HUD-1 and the itemization form may either be created by the lender or a standard form. The itemization requirement is mandatory for VA-guaranteed loan applications taken on or after October 1, 2010. For a copy of *VA Circular 26-10-9*, please see http://www.benefits.va.gov/homeloans/circulars/26_10_9.pdf and an addendum at http://www.benefits.va.gov/homeloans/circulars/26_10_9_change1.pdf.

Obama Administration Announces New HUD Foreclosure-Prevention Program. On August 11, the Obama Administration announced the "HUD Emergency Homeowners Loan Program," which will provide up to $50,000 in assistance for up to 24 months for homeowners facing foreclosure. To be eligible, (i) the borrower must be at least three months delinquent in payments and must be likely to resume payments within two years, (ii) the mortgage property must be the borrower's principal and solely-owned residence, and (iii) the borrower must have had a good payment history prior to experiencing a reduction of income. Additional details of the program will be announced in the coming weeks. The statement also announced increased assistance for the Hardest Hit Fund, which began in February 2010 (reported in *InfoBytes*, February 26, 2010). For a copy of the press release, please click here.

Federal Banking Agencies Issue Advance Notice of Proposed Rulemaking Regarding Use of Credit Ratings. On August 10, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision issued an advance notice of a proposed rulemaking (ANPR) regarding alternatives to the use of credit ratings in the risk-based capital guidelines of the federal banking agencies. The recently-enacted Dodd-Frank Wall Street Reform and Consumer Protection Act requires the agencies to develop alternative approaches to credit ratings to determine creditworthiness. The agencies are specifically requesting comment on ideas for methodologies, the feasibility of implementing alternative approaches, the standards for determining creditworthiness, and the cost of alternative approaches. For a copy of the ANPR, please click here.

Federal Reserve Board Approves Interim Final Rule on Gift Cards. On August 11, the Federal Reserve Board (FRB) announced that the effective date of certain disclosure requirements under the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Card Act) for gift certificates, store gift cards and general-use prepaid cards produced prior to April 1, 2010 will be January 31, 2011, provided that certain conditions are met. Effective August 22, 2010, the Card Act generally requires disclosures regarding dormancy, inactivity or service fees to be stated "clearly and conspicuously" on the card or certificate. H.R. 5502, which Congress passed in July 2010, extends this compliance date to January 31, 2011 for cards and certificates issued prior to April 1, 2010 if a card or certificate issuer (i) complies with other Card Act restrictions (*e.g.*, imposition of fees), (ii) does not consider the underlying funds of an expired card or certificate to be expired, (iii) replaces a certificate or card that has funds remaining at no cost to the consumer (upon request), and (iv) makes alternative disclosures by alternative means (*e.g.*, advertising, messages during customer service calls, etc.). The substantive fee and expiration date protections provided by the Card Act will still apply to these cards and certificates. The interim final rule is effective August 22, 2010, and public comments on the rule are due 30 days after publication in the *Federal Register*. For a copy of H.R. 5502, please click here. For a copy of the interim final rule, please see http://federalreserve.gov/newsevents/press/bcreg/bcreg20100811a1.pdf.

FDIC Approves Pilot Program for Electronic Deposit Accounts. On August 10, the Federal Deposit Insurance Corporation (FDIC) Board of Directors approved a pilot program that will allow participating institutions to help meet the needs of underserved communities by offering electronic deposit accounts with product features identified in the FDIC Model Safe Accounts Template (for more information on the Model Safe Accounts Template, please see http://www.fdic.gov/consumers/template/background/). These accounts will have "reasonable rates and fees that are proportional to their cost" and institutions offering these accounts will not be permitted to charge fees for insufficient funds or overdrafts on the participating accounts. The FDIC is accepting applications for the program through September 15, 2010, and the FDIC will notify institutions of acceptances by September 30, 2010. For a copy of the announcement, please see http://www.fdic.gov/news/news/press/2010/pr10183.html. For more information, please click here.

FHA to Eliminate Unlimited Combined Loan-to-Value. On August 6, the U.S. Department of Housing and Urban Development (HUD) announced that the Federal Housing Administration (FHA) is eliminating the unlimited Combined Loan-to-Value (CLTV) as of September 7, 2010. Moving forward, with the exception of streamline refinance transactions, the combined amount of the FHA-insured first mortgage and any subordinate lien may not exceed the applicable FHA loan-to-value ratio and geographical maximum mortgage amount. For a copy of the mortgagee letter, please click here.

Obama Administration Announces Details on GSE, Housing Finance Reform Panel. On August 12, the Obama Administration announced a list of panelists and conference agenda for its August 17 Conference on the Future of Housing Finance. The panelists include individuals from the corporate, educational and public policy sectors. The event is part of a process that will result in the Obama Administration's housing finance reform proposal, which is expected, among other things, to propose a permanent status for Fannie Mae and Freddie Mac. The Administration has stated its intention to

deliver a proposal to Congress by January 2011. For a copy of the press release, which includes the speakers and day's agenda, please click here.

FDIC Announces Permanent Increase of Maximum Deposit Insurance Amount. On August 12, the Federal Deposit Insurance Corporation (FDIC) announced that the standard maximum deposit insurance amount insured by the FDIC (per depositor, per insured depository institution for each account ownership category) has been increased permanently to $250,000 (reported in *InfoBytes*, July 23, 2010). In its announcement, the FDIC noted that depository institutions must display new signage reflecting the revised amount no later than January 3, 2011. For a copy of Financial Institution Letter 49-2010, please see http://www.fdic.gov/news/news/financial/2010/fil10049.pdf.

State Issues

New York State Banking Department Adopts New Regulations to Regulate Mortgage Servicers. On August 10, the New York State Banking Department adopted regulations (Part 419 of the New York State Banking Department Superintendent's Regulations) pertaining to mortgage loan servicers. Among other things, the regulations:

- Require servicers to pursue appropriate loss mitigation efforts with homeowners to avoid preventable foreclosures and establish standards for the handling of such efforts;
- Require servicers to make quarterly reports to the New York State Banking Department;
- Impose certain duties on servicers, such as instituting a duty of fair dealing, requiring the prompt crediting of payments, limiting the amount of late fees that can be charged, and prohibiting servicers from placing insurance on mortgaged property without a borrower's knowledge; and
- Require servicers to create procedures to respond to borrower inquiries and complaints in a prompt and appropriate manner, clearly disclose payments made on taxes and insurance premiums, and provide borrowers with clear and accurate communications on their accounts.

The regulations become effective October 1, 2010. For a copy of the regulations, please click here.

Massachusetts Enacts Law Delaying Foreclosures, Restricting Evictions, Implementing Reverse Mortgage Counseling. On August 7, Massachusetts Governor Deval Patrick signed into law S.B. 2407, "An Act To Stabilize Massachusetts Neighborhoods" (the Act). Under the Act, before a creditor may foreclose on a residential mortgage, it must provide the borrower 150 days to cure any default, unless the creditor can certify that (i) it met with borrower in a good faith attempt to resolve the issue, or (ii) the borrower did not respond to the creditor's written communications within 60 days. If the creditor can make either certification, then the cure period is reduced to 90 days. Additionally, the Act requires reverse mortgage loan applicants to receive in-person counseling if the applicant's income is less than 50% of the area median income and the applicant has less than $120,000 in assets (excluding the home). Finally, the Act prohibits creditors who have recently foreclosed on a residential property from evicting tenants without just cause, as defined by the Act, unless the creditor executes a binding purchase and sale agreement with a bona fide third party who will purchase the property. For a copy of the Act, please click here.

Massachusetts Regulator Issues 43 Cease-And-Desist Orders to Mortgage Loan Originators in Violation of Massachusetts SAFE Act Law. On August 9, the Massachusetts Division of Banks announced the issuance of 43 temporary cease-and-desist orders against licensed mortgage loan originators in Massachusetts for failing to meet requirements for licensure under Massachusetts' Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act) compliance law. Under the law, mortgage loan originators licensed after July 31, 2009 had until July 31, 2010 to meet the new licensing requirements, while mortgage loan originators licensed prior to July 31, 2009 must pass the required state and national test by October 31, 2010 and must submit fingerprints for a national criminal background check by December 31, 2010. For a copy of the press release, please click here.

Courts

Third Circuit Reverses RESPA Case on Procedural Grounds. On August 5, the U.S. Court of Appeals for the Third Circuit reversed the dismissal of a complaint alleging violations of the Real Estate Settlement Procedures Act (RESPA) because the district court improperly considered material beyond the complaint to determine whether a title services company actually performed services for a disputed recording fee. *Tubbs v. North American Title Agency, Inc.*, No. 09-2757, 2010 WL 3044067 (3rd Cir. Aug. 5, 2010). In the initial complaint, the plaintiff alleged that the title company violated Section 8(b) of RESPA, which prohibits the giving and accepting of any "portion, split, or percentage" of any charge, by charging a release recording fee, even though, according to the plaintiff, the lender, not the title company, recorded the release and charged a fee for doing so. The district court granted the defendant title company's motion to dismiss, finding that the title company's charge was, in fact, a charge for its own services (reported in *InfoBytes*, June 12, 2009). The Third Circuit, in reversing, determined that the district court improperly looked at evidence beyond the complaint, as prohibited by case law construing the Federal Rules of Civil Procedure. The Third Circuit noted that the question of whether the title company performed services could alter the analysis of whether the plaintiff made a proper claim under Section 8(b), and accordingly remanded the matter to the district court. In a dissent, a circuit judge concluded that remand was inappropriate because the plaintiffs conceded that the title company did not split its fee with any third party and, thus, the plaintiffs could not successfully allege a violation of Section 8(b). For a copy of the opinion, please see http://1.usa.gov/n14J5W.

Ohio Federal Court Dismisses Bank's Claims for Declaratory, Injunctive Relief Aimed at Barring City's Lawsuits Against Banks for Nuisance. On August 5, the U.S. District Court for the Northern District of Ohio held that a national bank could not seek declaratory judgment pertaining to nuisance claims brought by the City of Cleveland because, among other things, the National Bank Act (NBA) does not provide banks with a private right of action under 42 U.S.C. § 1983. *Chase Bank USA, N.A. v. City of Cleveland*, No. 08CV514, 2010 WL 3118700 (N.D. Oh. Aug. 5, 2010). The City of Cleveland previously brought nuisance claims against several banks in related state and federal actions alleging that the banks' participation in subprime lending contributed to increase foreclosures that resulted in lower property values and an increase in criminal activity and abandoned properties. In the underlying action, the plaintiffs sought (i) a declaratory judgment that the city's nuisance claims were preempted by the NBA, and (ii) a preliminary injunction to bar the city from pursuing those claims in related actions. The court ruled that neither the Supremacy Clause of the U.S. Constitution, nor the Declaratory Judgment Act, nor the NBA conferred subject matter jurisdiction for the plaintiffs'

declaratory judgment claim. The court also denied the preliminary injunction, finding that the plaintiffs could not make the requisite showing of irreparable harm because their claims were not yet ripe. Accordingly, the court dismissed the plaintiffs' action. For a copy of the opinion, please click here.

Maine Court Holds MERS Lacks Standing To Foreclose In Maine. On August 12, the Maine Supreme Judicial Court held that Mortgage Electronic Registration Systems, Inc. (MERS) - the "nominee" for the lender under the mortgage - was not the proper party to commence a foreclosure action against delinquent borrowers. *MERS, Inc. v. Saunders*, No. 09-640, 2010 ME 79 (ME Sup. Jud. Ct. Aug. 12, 2010). In this case, the plaintiffs executed a residential mortgage that named MERS as a nominee for the lender. After the plaintiffs defaulted on their loan, MERS filed a complaint seeking to foreclose. The plaintiffs opposed, arguing that MERS lacked standing because it could not show that it was the holder of the mortgage. The Supreme Judicial Court agreed, holding that, because MERS was a "nominee" for the lender and not a "mortgagee," it lacked standing to foreclose on the mortgage under Maine law. However, the court also held that the substitution of the bank for MERS during the foreclosure proceedings was proper. Nonetheless, the court found that the lower court's grant of summary judgment on the foreclosure proceeding was improper because the record did not establish what property owned by the borrowers actually secured the mortgage. For a copy of the opinion, please click here.

Firm News

The BuckleySandler LLP office in Los Angeles, CA has recently relocated to 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401.

James Parkinson will be speaking at the Institute of Continuing Legal Education in Georgia's FCPA seminar "International Business and Crime: An Overview" in Atlanta on September 2. The session is titled "FCPA Compliance Tools and Techniques" and will focus on detection and compliance.

David Krakoff will be speaking at the ALI-ABA Environmental Crimes Conference on September 23.

Andrew Sandler, Sam Buffone, and David Krakoff will participate in the "Financial Crisis Fallout 2010" at PLI New York Center in New York City on November 4. For more information, see http://www.pli.edu/product/seminar_detail.asp?id=91505.

Andrew Sandler, Ben Klubes, and Jonice Gray Tucker will be speaking at the "CRA & Fair Lending Colloquium" hosted by Wolters Kluwer Financial Services November 7-10 in Las Vegas, NV. Senior executives at financial services organizations will discuss their compliance and risk management concerns with top regulators and other industry leaders. Other confirmed speakers include Thomas E. Perez, assistant attorney general for DOJ's Civil Rights Division, and Sandra Braunstein, director of the Federal Reserve Board's Consumer and Community Affairs Division. Online registration is available at http://www.cracolloquium.com.

Chris Witeck was quoted in the article "Investors bullish on reverse mortgage securities," which recently appeared in Reverse Mortgage Daily. See http://reversemortgagedaily.com/2010/08/10/investors-bullish-on-reverse-mortgage-securities/.

Andrew Sandler participated in a webinar by Thomson Reuters, "Enforcement, Governance & Consumer Protection," on July 26.

Andrew Sandler participated in a webinar by the American Bankers Association, "How Financial Regulatory Reform Legislation Will Impact Banks," on July 28.

Andrew Sandler recently participated in four webinars offered by the Financial Services Roundtable on the topic "The Restoring American Financial Stability Act of 2010: Legislative Reform Meets Regulatory Reality."

On August 2-3, Clint Rockwell, Melissa Klimkiewicz, and Jonathan Cannon presented at the LendersOne Summer Conference. On August 2, Clint gave a presentation on the Dodd-Frank Reform Act. On August 3, Clint and Melissa gave a presentation on "Surviving FHA's Enforcement Environment," and Jonathan and Melissa gave a presentation on "Repurchase Defense Strategies and RESPA Developments."

Andrew Sandler, John Kromer, Jeff Naimon, and Jonice Gray Tucker spoke at the American Bar Association's Annual Meeting on August 7-8 in San Francisco, CA.

Jonice Gray Tucker spoke at the California Mortgage Bankers Association's Servicing Conference on August 9 about enforcement activity related to loan modifications and default servicing.

Jon Langlois was a panelist in a webinar for the National Reverse Mortgage Lenders Association titled "Financial Services Reform: How Does It Effect Us?" on August 10.

John Kromer was a panelist on the Mortgage Industry Panel at the American Association of Residential Mortgage Regulators' Annual Conference on August 11 in St. Louis, MO addressing regulatory developments impacting non-bank lenders.

Jonathan Cannon spoke on August 13 at the Women in Housing Finance Legislative Taskforce Brown Bag Lunch titled "Wall Street Reform Act and its Effect on the Industry."

Mortgages

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Ohio Federal Court Dismisses Bank's Claims for Declaratory, Injunctive Relief Aimed at Barring City's Lawsuits Against Banks for Nuisance. On August 5, the U.S. District Court for the Northern District of Ohio held that a national bank could not seek declaratory judgment pertaining to nuisance claims brought by the City of Cleveland because, among other things, the National Bank Act (NBA) does not provide banks with a private right of action under 42 U.S.C. § 1983. *Chase Bank USA, N.A. v. City of Cleveland*, No. 08CV514, 2010 WL 3118700 (N.D. Oh. Aug. 5, 2010). The City of Cleveland previously brought nuisance claims against several banks in related state and federal actions alleging that the banks' participation in subprime lending contributed to increase foreclosures that resulted in lower property values and an increase in criminal activity and abandoned properties. In the underlying action, the plaintiffs sought (i) a declaratory judgment that the city's nuisance claims were preempted by the NBA, and (ii) a preliminary injunction to bar the city from pursuing those claims in related actions. The court ruled that neither the Supremacy Clause of the U.S. Constitution, nor the Declaratory Judgment Act, nor the NBA conferred subject matter jurisdiction for the plaintiffs' declaratory judgment claim. The court also denied the preliminary injunction, finding that the plaintiffs

could not make the requisite showing of irreparable harm because their claims were not yet ripe. Accordingly, the court dismissed the plaintiffs' action. For a copy of the opinion, please click here.

Maine Court Holds MERS Lacks Standing To Foreclose In Maine. On August 12, the Maine Supreme Judicial Court held that Mortgage Electronic Registration Systems, Inc. (MERS) - the "nominee" for the lender under the mortgage - was not the proper party to commence a foreclosure action against delinquent borrowers. *MERS, Inc. v. Saunders*, No. 09-640, 2010 ME 79 (ME Sup. Jud. Ct. Aug. 12, 2010). In this case, the plaintiffs executed a residential mortgage that named MERS as a nominee for the lender. After the plaintiffs defaulted on their loan, MERS filed a complaint seeking to foreclose. The plaintiffs opposed, arguing that MERS lacked standing because it could not show that it was the holder of the mortgage. The Supreme Judicial Court agreed, holding that, because MERS was a "nominee" for the lender and not a "mortgagee," it lacked standing to foreclose on the mortgage under Maine law. However, the court also held that the substitution of the bank for MERS during the foreclosure proceedings was proper. Nonetheless, the court found that the lower court's grant of summary judgment on the foreclosure proceeding was improper because the record did not establish what property owned by the borrowers actually secured the mortgage. For a copy of the opinion, please click here.

Banking

FDIC Proposes Guidance on Overdraft Programs. On August 11, the Federal Deposit Insurance Corporation (FDIC) invited comments on proposed supervisory guidance on overdraft payment programs. Under the proposed guidance, the FDIC would expect institutions, in an effort to mitigate credit, legal, reputational, safety and soundness and other risks, to (i) promptly honor customer requests to decline overdraft coverage for non-electronic transactions, (ii) provide consumers with the opportunity to choose the overdraft payment product that best meets their needs, (iii) monitor overdraft usage by customers and take effective action to limit its use "as a form of short-term, high-cost credit," including reaching out to consumers who overdraw their accounts more than six times in any rolling twelve-month period, (iv) institute "appropriate" daily limits on overdraft fees, and (v) refrain from processing transactions in an order that maximizes fees for consumers. The FDIC advised institutions that the FDIC will review overdraft payment programs at each examination. In addition, the FDIC reminds institutions that they should provide "clear and meaningful disclosures and other communications about overdraft payment programs" and must comply with recent changes to Regulation E by the Board of Governors of the Federal Reserve. The FDIC's proposed guidance follows similar guidance proposed by the Office of Thrift Supervision earlier this year (reported in *InfoBytes*, April 23, 2010). For a copy of the FDIC's press release, please see http://www.fdic.gov/news/news/financial/2010/fil10047.html. For a copy of the proposed guidance, please see http://www.fdic.gov/news/news/financial/2010/fil10047.pdf.

FDIC Adds New Divisions to Meet Obligations of Regulatory Reform Bill. On August 10, the FDIC unveiled two new divisions in anticipation of its enhanced obligations under the recently-enacted Dodd-Frank Wall Street Reform and Consumer Protection Act. First, the Office of Complex Financial Institutions (CFI) will be tasked with oversight and review of systemically significant institutions, including both bank holding companies with more than $100 billion in assets and non-

bank financial companies identified by the Financial Stability Oversight Council as systemically significant. The CFI also will orchestrate the FDIC's authority to implement orderly liquidations of failed systemically significant institutions. Second, the Division of Depositor and Consumer Protection will enhance the FDIC's compliance examination and enforcement program, with a primary focus on consumer protection and fair lending compliance. Under the new legislation, the FDIC will be responsible for enforcing the consumer protection rules promulgated by the new Bureau of Consumer Financial Protection for banks with $10 billion or less in assets. To read the FDIC press release, please see http://www.fdic.gov/news/news/press/2010/pr10184.html.

FDIC Announces "Open Door" Policy for Rulemaking to Implement Dodd-Frank Act. On August 12, the Federal Deposit Insurance Corporation (FDIC) announced expanded administrative procedures to interpret and implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Under the FDIC's "open door" policy, the FDIC will (i) host a series of roundtable discussions, (ii) release (bi-weekly) the names and affiliations of private sector individuals who meet with senior FDIC officials regarding the rulemaking process, as well as the subject matter of the meeting, (iii) continue to webcast open meetings of the FDIC Board of Directors, including those pertaining to regulatory reform, and (iv) seek general public comments from the public discussing how the FDIC should implement the law. For a copy of the press release, please see http://www.fdic.gov/news/news/press/2010/pr10187.html. For more information, please see http://www.fdic.gov/regulations/reform/index.html.

FDIC Approves Pilot Program for Electronic Deposit Accounts. On August 10, the Federal Deposit Insurance Corporation (FDIC) Board of Directors approved a pilot program that will allow participating institutions to help meet the needs of underserved communities by offering electronic deposit accounts with product features identified in the FDIC Model Safe Accounts Template (for more information on the Model Safe Accounts Template, please see http://www.fdic.gov/consumers/template/background/). These accounts will have "reasonable rates and fees that are proportional to their cost" and institutions offering these accounts will not be permitted to charge fees for insufficient funds or overdrafts on the participating accounts. The FDIC is accepting applications for the program through September 15, 2010, and the FDIC will notify institutions of acceptances by September 30, 2010. For a copy of the announcement, please see http://www.fdic.gov/news/news/press/2010/pr10183.html. For more information, please click here.

FDIC Announces Permanent Increase of Maximum Deposit Insurance Amount. On August 12, the Federal Deposit Insurance Corporation (FDIC) announced that the standard maximum deposit insurance amount insured by the FDIC (per depositor, per insured depository institution for each account ownership category) has been increased permanently to $250,000 (reported in *InfoBytes*, July 23, 2010). In its announcement, the FDIC noted that depository institutions must display new signage reflecting the revised amount no later than January 3, 2011. For a copy of Financial Institution Letter 49-2010, please see http://www.fdic.gov/news/news/financial/2010/fil10049.pdf.

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Consumer Finance

FDIC Adds New Divisions to Meet Obligations of Regulatory Reform Bill. On August 10, the FDIC unveiled two new divisions in anticipation of its enhanced obligations under the recently-enacted Dodd-Frank Wall Street Reform and Consumer Protection Act. First, the Office of Complex Financial Institutions (CFI) will be tasked with oversight and review of systemically significant institutions, including both bank holding companies with more than $100 billion in assets and non-bank financial companies identified by the Financial Stability Oversight Council as systemically significant. The CFI also will orchestrate the FDIC's authority to implement orderly liquidations of failed systemically significant institutions. Second, the Division of Depositor and Consumer Protection will enhance the FDIC's compliance examination and enforcement program, with a primary focus on consumer protection and fair lending compliance. Under the new legislation, the FDIC will be responsible for enforcing the consumer protection rules promulgated by the new Bureau of Consumer Financial Protection for banks with $10 billion or less in assets. To read the FDIC press release, please see http://www.fdic.gov/news/news/press/2010/pr10184.html.

Treasury Deputy Secretary States Consumer Protection Issues, Reforming GSEs Among Top Priorities for Regulatory Reform. On August 5, Treasury Deputy Secretary Neal Wolin outlined four important areas for financial regulatory reform to be implemented by various federal agencies over the next several months. In the area of consumer protection, Deputy Secretary Wolin stated that disclosures will be simplified for credit cards, auto loans, and mortgages, new national underwriting standards for mortgages will be put in place. Deputy Secretary Wolin also highlighted reforming the GSEs and the housing finance system, reforming the derivatives market, and establishing new rules on capital restrictions for financial institutions as critical areas for reform moving forward. For a copy of the speech, please click here.

Federal Reserve Board Approves Interim Final Rule on Gift Cards. On August 11, the Federal Reserve Board (FRB) announced that the effective date of certain disclosure requirements under the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Card Act) for gift certificates, store gift cards and general-use prepaid cards produced prior to April 1, 2010 will be January 31, 2011, provided that certain conditions are met. Effective August 22, 2010, the Card Act generally requires disclosures regarding dormancy, inactivity or service fees to be stated "clearly and conspicuously" on the card or certificate. H.R. 5502, which Congress passed in July 2010, extends this compliance date to January 31, 2011 for cards and certificates issued prior to April 1, 2010 if a card or certificate issuer (i) complies with other Card Act restrictions (*e.g.*, imposition of fees), (ii) does not consider the underlying funds of an expired card or certificate to be expired, (iii) replaces a certificate or card that has funds remaining at no cost to the consumer (upon request), and (iv) makes alternative disclosures by alternative means (*e.g.*, advertising, messages during customer service calls, etc.). The substantive fee and expiration date protections provided by the Card Act will still apply to these cards and certificates. The interim final rule is effective August 22, 2010, and public comments on the rule are due 30 days after publication in the *Federal Register*. For a copy of H.R. 5502, please click here.dbname=111_cong_bills&docid=f:h5502enr.txt.pdf. For a copy of the interim final rule, please see http://1.usa.gov/p6ReFd.

Securities

SEC Division of Enforcement Granted Permanent Power to Issue Subpoenas. On August 11, the Securities and Exchange Commission (SEC) adopted a final rule that made permanent the delegation of authority to the Director of the Division of Enforcement to issue formal orders of investigation, which authorize the enforcement staff to issue subpoenas in those investigations (*e.g.*, orders to compel testimony under oath and the production of documents). Previously, the Division of Enforcement had to appear before the SEC's five commissioners to request a formal order of investigation. The SEC's decision was based on a one-year trial that began in August 2009, which the SEC concluded "increased efficiency" and improved "communication and coordination in addressing pertinent legal and policy issues." For a copy of the final rule, see http://sec.gov/rules/final/2010/34-62690.pdf.

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Litigation

Third Circuit Reverses RESPA Case on Procedural Grounds. On August 5, the U.S. Court of Appeals for the Third Circuit reversed the dismissal of a complaint alleging violations of the Real Estate Settlement Procedures Act (RESPA) because the district court improperly considered material beyond the complaint to determine whether a title services company actually performed services for a disputed recording fee. *Tubbs v. North American Title Agency, Inc.*, No. 09-2757, 2010 WL 3044067 (3rd Cir. Aug. 5, 2010). In the initial complaint, the plaintiff alleged that the title company violated Section 8(b) of RESPA, which prohibits the giving and accepting of any "portion, split, or percentage" of any charge, by charging a release recording fee, even though, according to the plaintiff, the lender, not the title company, recorded the release and charged a fee for doing so. The district court granted the defendant title company's motion to dismiss, finding that the title company's charge was, in fact, a charge for its own services (reported in *InfoBytes*, June 12, 2009). The Third Circuit, in reversing, determined that the district court improperly looked at evidence beyond the complaint, as prohibited by case law construing the Federal Rules of Civil Procedure. The Third Circuit noted that the question of whether the title company performed services could alter the analysis of whether the plaintiff made a proper claim under Section 8(b), and accordingly remanded the matter to the district court. In a dissent, a circuit judge concluded that remand was inappropriate because the plaintiffs conceded that the title company did not split its fee with any third party and, thus, the plaintiffs could not successfully allege a violation of Section 8(b). For a copy of the opinion, please see http://1.usa.gov/n14J5W.

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