Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

June 1, 2012

Topics In This Issue

Federal Issues

CFPB Delays Release of "Ability-to-Repay" Rule. On May 31,

the CFPB announced that it has reopened the comment period for the proposed "ability-to-repay" rule that would require creditors to verify a consumer's ability to repay prior to making a consumer credit transaction secured by a dwelling. The rule would also define a "qualified mortgage" that has a presumption of compliance with the ability-to-repay requirement. The CFPB is specifically seeking comments on new loan data provided to the CFPB by the Federal Housing Finance Agency. According to the CFPB, the loan data, which contains loan-level information on the characteristics and performance of all single-family mortgages purchased or guaranteed by Fannie Mae and Freddie Mac, can be used to analyze the impact of certain variables on a consumer's ability to repay such as debt-to-income ratio. The CFPB is also seeking comments regarding the potential risk of litigation in connection with the proposed rule. The CFPB specifies that it has not reopened for comment any other aspect of the proposed rule. Comments are due by July 9, 2012. In its press release, the CFPB states that it expects to issue its final rule before the end of 2012. For more information on the proposed rule, see *InfoBytes*, Apr. 22, 2011.

New York Thrift Charged with Mortgage Fraud by Manhattan District Attorney. On May 31, the Manhattan District Attorney's Office (DA) announced charges against Abacus Federal Savings Bank (Bank) and nineteen of its former employees for their alleged involvement in a securities and mortgage fraud scheme from 2005 to 2010 that resulted in the sale of "hundreds of millions of dollars worth of fraudulent loans" to Fannie Mae. The DA charged the Bank with allegedly falsifying mortgage application documents, primarily for immigrants working in cash-only businesses, by inflating their income, assets, and job titles, as well as falsifying employment verifications and other income sources to meet investor guidelines to enable the Bank to sell loans to Fannie Mae. The Office of the Comptroller of the Currency, the Internal Revenue Service, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, and Office of the Inspector General provided assistance and cooperation with the investigation as part of their participation in the Residential Mortgage-Backed Securities Working Group.

Freddie Mac Announces Use of House Finance Agency Funds Eligible for Certain Relief Refinance Mortgages Payments. On May 24, Freddie Mac announced that, effective immediately, the use of "Hardest Hit Fund" (HFF) program funds by a state Housing Finance Agency may be applied to a Relief Refinance Mortgage if the funds do not result in a lien on the property and are used to (i) pay down or curtail the outstanding mortgage balance on a borrower's existing loan at the time of refinancing, and/or (ii) pay closing costs, financing costs and prepaids/escrows. When HFF

funds are used for these purposes, the mortgage file must contain documentation verifying the terms and conditions of the HHF funds, and the HHF funds must be reflected on the HUD-1. When repayment of funds is required, the verified payment generally must be included in the monthly debt payment-to-income ratio, unless the calculation of debt payment-to-income ratio is not required or repayment of funds is due only upon sale or default.

Federal Reserve Establishes Securities Holding Companies Registration Procedures. On May 30, the Federal Reserve Board issued a final rule that establishes procedures for nonbank companies that own at least one registered securities broker or dealer to register for supervision by the Federal Reserve Board as a securities holding company (SHC). The Dodd-Frank Act eliminated supervision of SHCs by the SEC and provided SHCs with the ability to seek supervision by the Federal Reserve Board to satisfy the requirements of foreign regulators or foreign law that companies be subject to consolidated supervision in the United States. The final rule includes capital and financial condition requirements and specifies other information necessary for registration. Once registered, an SHC would be supervised and regulated as if it were a bank holding company. However, the restrictions on nonbanking activities in section four of the Bank Holding Company Act would not apply to the supervised SHC.

State Issues

Tennessee Enacts Legislation Requiring Reasonable Basis to File Liens. On May 15,

Tennessee enacted SB2980, a bill that established provisions relating to liens on real or personal property. Under the bill, it is a misdemeanor to knowingly prepare, sign, or file any lien or other document intended to encumber real or personal property without a reasonable basis for doing so. The bill becomes effective on July 1, 2012.

Colorado Division of Real Estate Clarifies Mortgage Company Registration Exemptions. On May 22, the Colorado Division of Real Estate issued a position statement concerning exemptions from registration as a Mortgage Company. The position statement clarifies the applicability of an exemption to registration that is available to entities including wholesale lenders, private mortgage insurance companies that provide contract underwriting services, and lead generating companies.

Courts

Arizona Supreme Court Holds Beneficiary Does Not Have to Prove Right to Foreclose. On May 18, the Arizona Supreme Court held that the beneficiary under a deed of trust need not prove the right to foreclose prior to initiating non-judicial foreclosure proceedings.

Hogan v. Washington Mutual Bank, N.A., No. CV-11-0115, 2012 WL 1835540 (Ariz. May 18, 2012) (*en banc*). In *Hogan*, the borrower argued that the beneficiary could not foreclose without first proving the right to collect under the note. The court rejected this argument and stated that Arizona's non-judicial foreclosure statute did not require the beneficiary to prove ownership of the note prior to foreclosure. The court also rejected the borrower's argument that the trustee was required to comply

with Arizona's codification of the UCC because the Arizona UCC does not apply to liens on real property. Finally, the borrower claimed that the proper note-holder could later pursue a second collection for the same debt if the beneficiary was not entitled to prove ownership of the note. The court rejected this reasoning because Arizona law does not permit deficiency judgments against debtors with foreclosed residential property similar to that of the borrower (*i.e.*, 2.5 acres or less). The court concluded by noting that the "[Arizona] legislature balanced the concerns of trustors, trustees, and beneficiaries in arriving at the current statutory process," and to hold otherwise would upset the legislature's purpose.

D.C. Federal Court Holds FCRA Credit Report Notice Requirements Apply to Auto Dealers Engaging in Third Party Financing Transactions. On May 22, the U.S. District Court for the District of Columbia rejected the National Automobile Dealer's Association's (NADA) challenge to an FTC determination that an automobile dealer that executes a credit contract based on a third party financing source "uses a consumer report" under FCRA, and, thus, must provide prospective buyers with a "risk-based pricing notice." *National Automobile Dealers Assoc. v. Federal Trade Commission*, No. 11-cv-01711, 2012 WL 1854088 (D.D.C. May 22, 2012). A "risk-based pricing notice" must be provided to buyers who, based upon information contained in their consumer reports, are offered credit at terms "materially less favorable than the most favorable terms available to a substantial proportion of consumers." The notice is intended to alert buyers to the existence of negative information in their credit reports to enable them to correct any inaccuracies. The FTC's 2011 amendments to the Fair Credit Risk-Based Pricing Regulations clarified that even in the context of a third-party transaction-where the auto dealer is not the ultimate source of financing and does not physically obtain a consumer's credit report-the auto dealer must provide a risk-based pricing notification. According to NADA, the FTC's interpretation placed an unreasonable burden on auto dealers who outsource financing to banks or other entities. NADA also argued that the interpretation was arbitrary and capricious and that it was not entitled to Chevron deference. In its ruling, the court rejected these challenges, stating, among other things, that the FTC's determination was "eminently reasonable" and consistent with the overall regulatory scheme of FCRA because auto dealers are able to obtain credit report information and are best suited to convey that information to consumers. NADA intends to appeal the decision.

Eighth Circuit Holds Oral Promise to Postpone Foreclosure Sale Is Not Enforceable under Minnesota Law. On May 21, the U.S. Court of Appeals for the Eighth Circuit held that an oral promise to postpone a foreclosure sale is not enforceable under the Minnesota Credit Agreement Statute (MCAS). *Brisbin v. Aurora Loan Services LLC*, No. 11-2218, 2012 WL 1813435 (8th Cir. May 21, 2012). At issue was a provision of the MCAS that prohibits a debtor from "maintain[ing] an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." The borrower alleged that a promise to postpone a foreclosure sale does not fall within the definition of "credit agreement" because it is not a "financial accommodation" and, therefore, is not subject to this restriction. "Credit agreement" is defined in part as "an agreement to lend or forbear repayment of money . . . or to make any other financial accommodation." The court rejected the borrower's argument, first noting that "financial accommodation" includes a financial accommodation in the nature of a forbearance agreement and that "forbearance" includes refraining from enforcing a debt. The court reasoned that

because foreclosure is a means of enforcing a debt, a promise to postpone a foreclosure sale falls squarely within the plain meaning of a forbearance agreement-therefore, a promise to postpone a foreclosure sale is a "credit agreement" under the MCAS. The court also rejected the borrower's arguments that there was a genuine question of material fact as to whether the borrower detrimentally relied on the promise to postpone the sale of her home, as well as whether the borrower triggered the notice of postponement required by the Minnesota foreclosure-by-advertisement statute. The court reasoned that the borrower did not make a concrete statement of how she would have repaid the debt had the foreclosure sale been postponed, and that the foreclosure-by-advertisement statute only applies when a foreclosure sale actually is postponed by the mortgagee, which was inapplicable in this case.

Firm News

On May 31, BuckleySandler announced that **Thomas A. Sporkin**, Chief of the Office of Market Intelligence (OMI) at the Securities and Exchange Commission (SEC),

will join the firm as a partner, effective June 18. Sporkin spent 20 years at the SEC's Division of Enforcement and established and led OMI for the past two and a half years. Under his leadership, OMI attorneys, accountants, and market surveillance specialists performed analysis and conducted investigations on intelligence collected from a variety of internal and external sources, including the SEC's new Dodd-Frank Whistleblower Office. By January 2012, OMI's partnership with the Enforcement Division's specialized units, regional offices, and home office associate director groups was responsible for the origination of over half of all SEC investigations. In a recent New York Times article, Sporkin was noted as a rising star within the SEC, leading the agency's efforts to sift through hundreds of pieces of intelligence a day, distilling the hottest tips into a daily intelligence report (*New York Times*, May 21, 2012). "With the addition of Tom, we will be even better able to assist our clients in navigating an increasingly challenging enforcement and regulatory environment. He brings significant expertise, particularly with respect to federal civil and criminal enforcement and securities investigations, the Foreign Corrupt Practice Act, Dodd-Frank and other whistleblower qui tam actions," explained BuckleySandler Chairman and Executive Partner, Andrew L. Sandler. "Our clients will have the benefit of access to the invaluable insights Tom has to offer and his arrival greatly strengthens our robust criminal and civil enforcement practice."

Jonathan Cannon will speak at the 2012 Predictive Methods Conference in Dana Point, CA on June 4, 2012. Mr. Cannon's session is entitled: "The Dodd-Frank Act: Understanding its Impact on the Mortgage Industry."

Andrea Mitchell will speak at the ABA Fair Lending Tune-Up Workshop in Orlando, FL on June 9, 2012. The event is a pre-conference workshop for the ABA Regulatory Compliance Conference that is designed to help bankers and compliance professionals enhance their fair lending compliance programs and prepare for upcoming examinations.

Andrew Sandler will speak at the American Bankers Association's Regulatory Compliance Conference in Orlando, FL on June 11, 2012. Mr. Sandler's session is entitled: "Hot Topics in Fair Lending."

Jeffrey Naimon will speak at the American Financial Services Association's 14th State Government Affairs & Legal Issues Forum in Fort Lauderdale, FL on June 12, 2012. Mr. Naimon's panel will discuss the CFPB's bulletins regarding fair lending and vendor management.

Jeffrey Naimon and **Howard Eisenhardt** will participate in the Mortgage Bankers Association's Anti-Money Laundering and Suspicious Activity Report Programs for Nonbank Mortgage Lenders and Originators Webinar on June 19, 2012. Mr. Naimon and Mr. Eisenhardt will discuss the role of AML programs and SARs in fighting mortgage fraud and preventing losses; the background of the Bank Secrecy Act; the AML program structure; the roles and responsibilities of various staff at the lender and of the lender compliance officer; what triggers a SAR filing; filing and submitting SAR forms; the importance of filing SARs in a timely manner; and the risks of violating BSA/AML requirements.

Jeffrey Naimon will speak at National Mortgage News' 4th Annual Best Practices in Loss Mitigation Conference in Dallas, TX on July 19, 2012. Mr. Naimon's panel is entitled, "Current Regulatory Issues and Political Outlook" and will provide an overview of the regulatory and legislative developments affecting the mortgage servicing market, review current regulatory issues, and discuss how the issues and election year political moving parts might affect the current regulatory landscape.

Mortgages

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Consumer Finance

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physically obtain a consumer's credit report-the auto dealer must provide a risk-based pricing notification. According to NADA, the FTC's interpretation placed an unreasonable burden on auto dealers who outsource financing to banks or other entities. NADA also argued that the interpretation was arbitrary and capricious and that it was not entitled to Chevron deference. In its ruling, the court rejected these challenges, stating, among other things, that the FTC's determination was "eminently reasonable" and consistent with the overall regulatory scheme of FCRA because auto dealers are able to obtain credit report information and are best suited to convey that information to consumers.

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Privacy/Data Security

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