

InfoBytes, June 17, 2011

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Federal Issues

[SEC Issues Proposed Amendments to Broker-Dealer Rules](#). On June 15, the Securities and Exchange Commission (SEC) issued proposed amendments to Rule 17a-5 in order to enhance the auditing and oversight of broker-dealers. The amendments would require broker-dealers to file new annual reports on their compliance with rules relating to net capital and customer protection, and to file reports of their independent auditors regarding compliance with those rules and the internal control over such compliance. With respect to broker-dealers who clear transactions or carry customer accounts, the amendments would require the broker-dealer to consent to its independent auditor making audit work papers available to examiners from the SEC and the broker-dealer's Self-Regulatory Organization and to the auditor discussing its audit findings with such examiners. Finally, the amendments would require broker-dealers to file new quarterly reports (on what the SEC calls "Form Custody") relating to whether and, if so, how, they maintain custody of customer assets. Comments on the proposed amendments are due within 60 days of publication in the *Federal Register* (which has not been published as of the date of this *InfoBytes*). For a copy of the proposed amendments, please see <http://www.sec.gov/rules/proposed/2011/34-64676.pdf>.

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the advanced risk-based capital rules (advanced approaches rules). The rule provides limited flexibility to establish appropriate capital requirements for certain low-risk exposures. The final rule will become effective 30 days after publication in the *Federal Register*. For a copy of the press release, please see <http://www.federalreserve.gov/newsevents/press/bcreg/20110614a.htm>.

Federal Reserve Announces Adoption of Capitalization Rules for Certain Bank Holding Companies. On June 13, the Federal Reserve Board (FRB) announced one final rule and one interim final rule for certain bank holding companies related to capitalization and debt standards. The final rule allows all bank holding companies that are S-Corps or organized in mutual form (S-Corp/Mutual BHCs) to include in Tier 1 capital all subordinated debt issued to Treasury under the Troubled Asset Relief Program (TARP). Additionally, the final rule allows the S-Corp/Mutual BHCs that are also small bank holding companies to exclude subordinated debt issued to the Treasury under TARP from the definition of "debt" for calculation of the small bank holding company debt-to-equity standard. The interim final rule allows the S-Corp/Mutual BHCs that are small bank holding companies to also exclude subordinated debt issued to the Treasury under the Small Business Lending Fund from the definition of "debt" for calculation of the debt-to-equity standard. The FRB is seeking comment on the interim until July 30, 2011. For a copy of the press release, please see <http://www.federalreserve.gov/newsevents/press/bcreg/20110613a.htm>.

Federal Reserve Publishes Its Annual Adjustment to TILA and HOEPA Fee Based Triggers. On June 13, the Federal Reserve Board (FRB) announced the annual adjustment to the amount of rates or fees that triggers additional disclosure requirements under the Truth in Lending Act (TILA) and the Home Ownership and Equity Protection Act of 1994 (HOEPA) for certain closed-end home mortgage loans. Pursuant to TILA and Regulation Z, creditors must comply with HOEPA's requirements if the total points and fees payable by the consumer at or before loan consummation exceed the greater of \$400 or 8 percent of the total loan amount. TILA and Regulation Z also require the \$400 figure to be adjusted annually by using the Consumer Price Index as reported on June 1 of the preceding year. Pursuant to the announcement, commencing January 1, 2012, the \$400 is increased to \$611. The adjustment does not apply to "higher priced" loans under section 226.35 of Regulation Z, which utilizes an alternative rate-based trigger. For a copy of the press release, please see <http://www.federalreserve.gov/newsevents/press/bcreg/20110613c.htm>.

SEC Announces Steps to Address Effective Date of Dodd-Frank Act Provisions. On June 10, the Securities and Exchange Commission (SEC) announced that it will clarify the requirements soon to apply to security-based swap transactions as of July 16, the effective date of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The SEC will (i) provide guidance regarding which provisions of Subtitle B will become operable as of July 16, and provide temporary relief from several of these provisions; and (ii) extend temporary rules under the Securities Act, the Exchange Act, and the Trust Indenture Act in order to help facilitate the clearing of certain credit default sweeps. The SEC also announced that it will act to provide appropriate temporary relief to exchange registration under the Exchange Act. The SEC also announced proposed rules that would exempt clearing agency transactions in security-based swaps that such agencies issue from all provisions of the Securities Act, other than the Section 17(A) antifraud provisions. The proposed rules will also exempt security-based swaps from Exchange Act registration requirements and from the provisions of the Trust Indenture Act, provided certain conditions are met. For a copy of the press release, please see <http://www.sec.gov/news/press/2011/2011-125.htm>.

HUD Issues Mortgagee Letter on Termination of the HOPE for Homeowners Program. On June 10, the Department of Housing and Urban Development (HUD) issued Mortgagee Letter 11-20, which provides instructions on how to process HOPE for Homeowners (H4H) cases while

the H4H program is being phased out. The last day to obtain a new H4H case number is July 29, 2011. H4H cases submitted under the direct endorsement process must be received by the Homeownership Center by September 16, 2011, and lenders with Lender Insurance authority must complete the insuring process in FHA connection no later than September 30, 2011. Finally, under guidance that was previously issued in Mortgagee Letter 09-43, Exit Premium Mortgage documents should be delivered to the National Servicing Center no later than 15 business days from the date of endorsement, or October 24, 2011. For a copy of Mortgagee Letter 11-20, please see <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/11-20ml.pdf>.

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State Issues

Michigan AG Subpoenas Mortgage Processors. On June 15, Michigan Attorney General Bill Schuette announced that his office has issued criminal investigative subpoenas to Lender Processing Services, Inc., Fidelity National Financial, Inc., and CT Corporation System, all of which act as service providers for mortgage servicers. In particular, the subpoenas request documents regarding the companies' operations relating to foreclosure and bankruptcy document processing. Responses are required by June 30, 2011. The subpoenas are part of a larger investigation initiated by Attorney General Schuette in April 2011 into mortgage documentation practices and state filings with Michigan's Register of Deeds. For a copy of the press release, please see <http://www.michigan.gov/ag/0,1607,7-164--257956--,00.html>.

Maine Amends Regulations Implementing the Federal SAFE Act. On June 10, Maine Governor Paul LePage signed into law LD 290, which amends Maine's regulations implementing the federal Secure and Fair Enforcement for Mortgage Licensing Act (SAFE) of 2008. LD 290 relates to good faith failures to comply, credit sales, and persons exempt from SAFE. Under LD 290, an originator's good faith failure to comply with the Act does not affect the validity or enforceability of the underlying mortgage. Additionally, "credit sales" are defined as "the sale of a dwelling or residential real estate . . . in which credit is extended by the seller and either the debt is payable in installments or a finance charge is made," and are generally excluded from covered "residential mortgage loans." Lastly, LD 290 clarifies that certain individuals who qualify for exemptions under HUD rules based on minimal dealings with residential mortgage loans are exempt from the provisions of the Act. For a copy of LD 290, please see http://www.mainelegislature.org/legis/bills/bills_125th/chappdfs/PUBLIC289.pdf.

Massachusetts Provides Guidance to Financial Institutions in Areas Affected by Recent Severe Weather. On June 14, the Commissioner of the Massachusetts Division of Banks sent a letter to state-chartered banks and credit unions in areas impacted by recent tornados and other severe weather to provide guidance on how these institutions could assist in recovery efforts. The letter encourages these institutions to work with borrowers affected by the severe weather by (i) adjusting or revising the terms of existing consumer loans, (ii) engaging in loan modification and loan mitigation measures, and (iii) ensuring procedures are in place to process borrowers' requests to waive or modify the rescission periods in their mortgages because of bona fide personal financial emergencies. The letter also encourages financial institutions to assist in activities to stabilize and revitalize disaster areas, noting that these activities may be considered as community development in the institutions' Community Reinvestment Act evaluations (even if outside of the lender's designated assessment areas). For a copy of the letter, please see http://www.mass.gov/Guidance_Regarding_Severe_Weather_assistance.

Nevada Governor Signs Bill Regulating Foreclosure and Loan Modification Consultants. On June 10, Nevada Governor Brian Sandoval signed into law A.B. 308, which regulates foreclosure and loan modification consultants (but which do not include national banks, federal thrifts, regulated lenders, or their affiliates and agents). The law prohibits any payment to a consultant before a homeowner signs a written mortgage assistance agreement, requires consultants to maintain written records for two years, and obligates consultants to implement specific quality control and complaint tracking procedures. The law also requires consultants to make certain disclosures (including the identity of and the limitations on the role of the consultant) and provide notices to a homeowner. Finally, the law prohibits any person from assisting a consultant when the person knows or reasonably should know that the consultant is in violation of this law. A.B. 308 becomes effective on July 1, 2011. For a copy of the enrolled version of the bill, please see http://www.leg.state.nv.us/Session/76th2011/Bills/AB/AB308_EN.pdf.

Alabama Modifies Late Fee Restrictions Under Consumer Credit Act. On June 9, Alabama HB3 went into effect, amending § 5-19-4 of the Alabama Consumer Credit Act (Mini-Code, which does not apply to real estate loans where the creditor is a national bank or federal thrift, except for prepayment penalties), which sets minimum and maximum late charges that may be imposed on consumer credit transactions. Prior to the amendment, § 5-19-4 allowed lenders to charge the greater of \$10 or 5% of the amount of the scheduled payment in default, capped at \$100, when a payment on a consumer credit transaction - which includes residential mortgage loans - is ten or more days past due. The amendment increases the dollar limitation to \$18, while retaining both the alternative 5% of the amount of the scheduled payment provision and the \$100 maximum late charge. This amendment brings the Mini Code and Small Loan Act into accord regarding the charging of late fees. For a copy of the amendment, please see http://www.buckleysandler.com/Alabama_HB3.pdf.

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Courts

New York Appellate Division Dismisses Foreclosure Action for Lack of Standing. On June 7, the Second Judicial Department of the New York Appellate Division dismissed a mortgage foreclosure action where the mortgagee did not have possession of the underlying promissory note. *Bank of New York v. Silverberg*, No. 17464-08 (N.Y. App. Div., June 7, 2011). For a copy of the opinion, please see <http://www.courts.state.ny.us/courts/ad2/calendar/webcal/decisions/2011/D31547.pdf>.

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Firm News

[Kirk Jensen](#) will be speaking on Litigation Developments and Clint Rockwell will be speaking on Regulatory Developments at the AFSA State Government Affairs & Legal Issues Forum on June 22.

[Jonice Gray Tucker](#) will moderate a panel on Fair Servicing Analysis at the 6th Annual Strategic Markets and Diversity Conference on June 23 in Arlington, Virginia.

[Andrew Sandler](#) will be participating on a panel at the Florida Bar Annual Convention on Friday, June 24 as part of the "Presidential Showcase". On the panel with Mr. Sandler is Paul Bland, Public Justice. The Moderator is Justice R. Fred Lewis, a Justice of the Florida Supreme Court, a former Chief Justice and founder of Justice Teaching.

[Andrew Sandler](#) and [Jonice Gray Tucker](#) will speak at an American Bar Association webinar on mortgage servicing issues on July 21 at 1 pm. The program entitled, "Mortgage Servicing Under Fire: Regulatory, Litigation, and Enforcement Trends Stemming from the Foreclosure Crisis and More" will also feature Terry Goddard, the former Arizona Attorney General, as a speaker.

[Andrew Sandler](#) will be teaching the Litigation Strategy Session: Developing Strong Protocols, Admissible Documentation & Comprehensive Strategies in Order to Survive Regulatory Enforcement Actions & Litigation Workshop on Tuesday, July 26, in Chicago. This workshop precedes ACI's Consumer Finance Class Actions & Litigation Conference taking place July 27-28 at the Sutton Place Hotel, Chicago, IL.

[Andrew Sandler](#) will be speaking at the ACI's Consumer Finance Class Actions & Litigation Conference on Thursday, July 28. Mr. Sandler's panel is: "Class Action Developments: What Recent Cases and Pending Policy Changes Mean for Your Litigation, Investigation and Settlement Strategies.

[Jonice Gray Tucker](#) will be moderating a panel focusing on Regulatory and Litigation Developments in Servicing at the California Mortgage Bankers' Servicing Conference on August 29 in Las Vegas.

FIRM PUBLICATIONS

[John Kromer](#) and [Melissa Klimkiewicz](#) authored [OCC Issues Proposed Rule to Implement Dodd-Frank Preemption](#), which will be published in the *Consumer Financial Services Law Report's* June 22 issue.

[David Krakoff](#), [James Parkinson](#), and [Bradley Marcus](#) authored [FCPA: Recent Enforcement Activity Sounds Warning for Financial Services Industry](#), which was published in the *Business Crimes Bulletin* on June 1.

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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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