

Mortgage Banking Update

PATTON BOGGS LLP | NOVEMBER 30, 2009

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DID YOU KNOW?

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JOINT FINAL RULE ON SAFE MORTGAGE LICENSING ACT SUGGESTS BANKING INSTITUTIONS SHOULD TAKE PROACTIVE APPROACH TOWARD IMPLEMENTATION

During June 2009, the federal banking agencies, including the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation (FDIC), the Farm Credit Administration and the National Credit Union Administration, issued a proposed rulemaking to implement SAFE Mortgage Licensing Act-related registration requirements for institutions regulated by the agencies. Earlier in November, the Board of Directors of the FDIC approved the Joint Final Rule Implementing the SAFE Mortgage Licensing Act Requirements. Although the Joint Final Rule will not be published in the Federal Register until it is approved by each of the agencies listed above, its release by the FDIC reveals certain changes to the original proposal released by the federal banking agencies.

The SAFE Mortgage Licensing Act imposes registration requirements upon mortgage loan originators that are employed by and originate loans on behalf of certain qualifying banking institutions including, among others, federally and state-chartered banks and thrifts, credit unions, and certain subsidiaries of those institutions. Under the Joint Final Rule, mortgage loan originators who must be registered will be required to register within 180 days of the date upon which the federal banking agencies provide public notice that the Nationwide Mortgage Licensing System & Registry (NMLS&R) is accepting registration applications.

The Joint Final Rule incorporates changes to the original guidance proposed by the federal banking agencies. Among other changes, the final rule:

- takes the position that employees who engage in loan modifications or assumptions generally would not be deemed to be mortgage loan originators requiring registration;
- confirms that the agencies will not agree to an implementation period longer than 180 days, as the institutions and their employees can immediately move forward with implementing the rule's requirements prior to the date that the NMLS&R is able to accept registration applications;
- permits institutions to identify individuals who may submit information on behalf of mortgage loan originators, provided that, in most circumstances, those individuals will not themselves be permitted to act as mortgage loan originators;

LOOKING AHEAD:

Mortgage Bankers Association

December 2 - Irvine, CA;
December 11 - Philadelphia, PA
Topic: A workshop to help with implementation of the new RESPA requirements.
Time: 8:30 a.m. – 4:30 p.m.
Patton Boggs participant:
Richard Andreano

Mortgage Lending Practices Under Fire Webinar

December 2
Topic: Compliance, enforcement and litigation risks resulting from the changing regulatory regime in mortgage lending
Time: 1:00 – 2:30 p.m. EST
Patton Boggs participants:
Patrick McManemin
Michael Waldron
50% Off the Webinar when you use the promo code ZDFCT

RESPA Reform, Fact vs. Fiction

December 8
Topic: Training on the new RESPA rules
Time: 1:00 – 3:00 p.m. EST
Patton Boggs participant:
Richard Andreano
Receive a discount when you use the promo code
RESPA1208

The RESPA Reform Rules: Managing the Compliance Labyrinth

December 10
Topic: Ensuring your bank is in compliance with the new RESPA reform rules
Time: 2:00 – p.m. EST
Patton Boggs participant:
Richard Andreano

AllRegs Webinar

December 14
Topic: Understanding RESPA Reform
Time: 2:00 – 4:00 p.m. EST
Patton Boggs participant:
Richard Andreano

- clarifies that the submission of new fingerprint cards will not be required in certain circumstances where the registered mortgage loan originator already has fingerprints less than three years old on file with the NMLS&R;
- reduces the amount of information that must be disclosed by registered mortgage loan originators; and
- clarifies that individuals that originate five or fewer residential mortgage loans during any 12-month period will not be required to be registered, provided that they have never been previously licensed or registered in the NMLS&R.

The Joint Final Rule requires that institutions establish written policies and procedures so they can monitor their registered mortgage loan originators and ensure compliance with the SAFE Act and applicable regulations. Because federal banking agencies do not intend to extend the implementation period beyond the established 180-day timeframe, institutions are encouraged to evaluate their SAFE Act obligations, and move forward with preparing appropriate policies and procedures to ensure that they can successfully implement applicable registration requirements.

NEW YORK CASE DEMONSTRATES IMPORTANCE OF ACCURATE RECORDS AND GOOD FAITH

A Lenders know that when judicially foreclosing defaulted residential mortgage loans, they must, among other things, prove ownership of the promissory notes; make sure loan records accurately reflect the outstanding principal, interest and other amounts due from the borrowers; and be prepared for settlement conferences with the borrower before the judge, e.g. as mandated under the Foreclosure Prevention and Responsible Lending Act. Sometimes in a foreclosure matter the lender makes a mistake, such as pleading the wrong interest amount due or losing a promissory note. Not infrequently, when the court believes the lender and its counsel are acting appropriately and are not in disregard of the law or the court, the court will allow the lender a limited period to fix the erroneous amount and find the missing note (or submit a lost note affidavit).

But what can happen when the foreclosing lender disregards the court, cannot provide suitable and accurate evidence of amounts due from the borrower and declines a settlement under the Act? Perhaps we now know. A state court, upset with the conduct of a lender in an action foreclosing an underwater residential mortgage loan, ordered that the promissory loan note is “cancelled, voided, avoided, nullified, set aside and is of no further force and effect...” (Indymac Bank F.S.B. vs. Dian Yano-Horoski, Wells Fargo Bank Minnesota National Association as Trustee for Soundview Home Equity Loan Trust 2001-1 and Kimberly Horoski, November 19, 2009, Supreme Court, Suffolk County, State of New York).

In this case, the lender made a \$292,500 loan in August 2004, and commenced foreclosure in July 2005. A judgment of Foreclosure and Sale

was entered on January 12, 2009. In post-judgment mandatory settlement conferences (including five continuances of the conference) for “sub-prime”/“high-cost” residential mortgage loans (held under CPLR § 3408), the Court found the lender “uncooperative,” and complained of the lender’s “continuing failure and refusal to cooperate, both with the Court and with Defendant’s multiple and reasonable requests...” The Court described an attempted forbearance agreement bungled by the lender, the lender’s refusal of a short sale, refusal of a modification with no principal forgiveness and lender’s equivocation over the homeowner’s offer to provide a deed in lieu. Most of all, the Court described in great detail the lender’s multiple inconsistencies in sworn and submitted testimony in more than seven court appearances over what amounts were due under the loan. The Court noted that “[i]t certainly is no secret that Suffolk County is in the yawning abyss of a deep mortgage and housing crisis with foreclosure filings at a record high rate and a corresponding paucity of emergency housing.” Finally, the Court described the lender’s poor credibility and its representative’s “opprobrious demeanor and condescending attitude...” toward a resolution of the defaulted loan, while noting the good faith and obvious physical difficulties of the home owner and her husband, both of whom attended the multiple court appearances over several years with their daughter. The relief granted to the borrower by the Court was extraordinary, and may be appealed.

Unfortunately, elements of this decision resulting from conduct of lenders are reported all too frequently in other loan collection or foreclosure cases. So lenders, do not send your attorney to court without evidence of promissory note ownership, ensure that your attorney has access to accurate records of amounts due and payments made under the loan and do not sign sworn affidavits, whether submitted to the foreclosure referee or to the court, regarding those amounts due without adequate proof of the records’ accuracy. It seems reasonable that in a foreclosure action’s mandatory settlement conference regarding a foreclosure of an underwater sub-prime/high-cost residential mortgage loan with sympathetic borrowers living in an area adversely affected by the housing crises, and where the lender’s numbers are embarrassingly inconsistent, that a lender should consider a settlement. A court may review certain cumulative conduct of a lender in what is arguably part of an equitable proceeding (foreclosure). In this instance, the Court found the lender’s conduct to be “inequitable, unconscionable, vexatious and opprobrious.” The Court stated that it “is constrained, solely as a result of Plaintiff’s affirmative acts, to conclude that Plaintiff’s conduct is wholly unsupportable at law or in equity, greatly egregious and so completely devoid of good faith that equity cannot be permitted to intervene on its behalf.” If you would like further information about this issue, please contact Jerry Phelps at 214.758.3507 or at jphelps@pattonboggs.com.

NEWS FROM CAPITOL HILL: HOUSE PROPOSAL TO IMPOSE RISK-BASED ASSESSMENTS

On Thursday, November 19, 2009, the House Financial Services Committee completed its markup of the Financial Stability Improvement Act (FSIA). The FSIA establishes the Financial Services Oversight Committee (FSOC), which would serve as a systemic risk regulator, monitoring and imposing tougher controls upon systemically significant bank and nonbank financial institutions that could pose a systemic risk to the U.S. economy in the event of a failure. The legislation would also give resolution authority to the Federal Deposit Insurance Corporation (FDIC) to wind down failing firms, with the cost of the wind-down paid for by industry peers rather than taxpayer funds. The membership of the FSOC would consist of officials from federal banking regulators which, together with the Federal Reserve, would be charged with identifying systemically significant firms and imposing higher capital level requirements and other more stringent operating standards.

One of the accepted amendments related to the Fund was a proposal by Rep. Gutierrez (D-IL) designed to provide for the orderly dissolution of a failed financial company that poses a systemic risk to financial markets.

The Fund's purpose is to facilitate and provide for the "orderly and complete dissolution of any failed financial company or companies that pose a systemic threat to the financial markets or economy" and "ensure that any taxpayer funds utilized to facilitate such liquidations are fully repaid from assessments levied on financial companies."

As set forth in the amendment, the Fund is created from assessments levied on financial companies with assets greater than \$10 billion. Rep. Gutierrez supported such a threshold so that "small and community banks will not be put on the line for the consequences of large firms taking big risks." Additionally, the assessments will be paid by financial companies in amounts proportional to their assessed risk, as determined by the FDIC and the newly-created Financial Services Oversight Council.

During the debate of the proposal, Rep. Sherman (D-CA) proposed to increase the threshold amount from \$10 billion to \$50 billion, in order to clearly exclude small and community banks from the Fund provisions. The result of such an amendment is that large financial institutions with more than \$50 billion in assets will be subject to paying an assessed fee into the Fund. According to Federal Reserve data, impacted institutions would include the 33 largest U.S. chartered commercial banks as of June 30, 2009, including JP Morgan Chase, Bank of America, Citibank and Wells Fargo. (<http://www.federalreserve.gov/releases/lbr/current/default.htm>)

In order to capture hedge funds within the scope of the legislation, however, Rep. Sherman added an additional clause which would require hedge funds (as defined by the FDIC and Securities and Exchange Commission) to

contribute to the Fund should the hedge fund have more than \$10 billion in assets under management. Hedge funds that hold more than \$10 billion include, but are not limited to, Bridgewater Associates, DE Shaw, Soros Fund Management and Paulson & Co.

(<http://www.bloomberg.com/apps/news?pid=20601103&sid=auoJn1UIRV2Q&refer=us>)

Ultimately, the Gutierrez amendment, as amended by Rep. Sherman, was approved by the House Financial Services Committee by a 41-28 vote.

The result of this legislative proposal is that hedge funds with more than \$10 billion in assets and other financial companies with more than \$50 billion in assets would be required to make contributions to the Fund to finance the orderly dissolution of failed financial companies that pose a systemic risk to financial markets.

On December 2, the House Financial Services Committee approved this legislation by a vote of 31-27, which will bring it to the House floor for a full debate and vote.

For more details or if you have any questions, please contact any member of the [Patton Boggs Financial Services Group](#).

NEWS FROM CAPITOL HILL: HOUSE PROPOSAL TO IMPOSE RISK-BASED ASSESSMENTS

HUD has made good on its promise to propose rules that would increase the minimum net worth FHA-approved mortgagees must maintain to \$1 million (and, two years later, further increasing the net worth requirement to \$2.5 million) and remove the “loan correspondent” category of approved entities, thereby shifting the liability for loan correspondent actions to the approved mortgagees with whom they work. The proposed rule, published on November 30, 2009, also incorporates into its regulations the revised eligibility requirements for participation in FHA lending that were enacted through the Helping Families Save Their Homes Act of 2009. See the [October 5, 2009 issue](#) of the Mortgage Banking Update for details on the revised eligibility requirements and information on HUD’s previous announcement regarding the program changes.

DID YOU KNOW

- Effective November 25, 2009, Iowa Regulated Loan Companies and Industrial Loan Companies must maintain surety bonds in an amount based on the volume of residential mortgage loans made, originated, arranged, brokered, processed and underwritten during the preceding calendar year. The required bond amount for Regulated Loan

Companies and Industrial Loan Companies shall be adjusted annually by March 31. Additionally, effective January 1, 2010, Iowa Mortgage Bankers and Mortgage Brokers must maintain surety bonds in an amount based on volume of residential mortgage loans made, originated, arranged, brokered, processed and underwritten during the preceding calendar year. The required annual report for Iowa Mortgage Bankers and Mortgage Brokers is now due on March 31, instead of April 15.

This information is not intended to constitute, and is not a substitute for, legal or other advice. You should consult appropriate counsel or other advisers, taking into account your relevant circumstances and issues. While not intended, this update may in part be construed as an advertisement under developing laws and rules.

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