

Mortgage Banking Update

PATTON BOGGS LLP | February 15, 2010

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Did You Know?

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SECOND ANNUAL NMLS USER CONFERENCE A SUCCESS

Nearly 300 attendees participated in the second annual Nationwide Mortgage Licensing System (NMLS) User Conference held in San Diego, California from February 9 –11, 2010. Patton Boggs LLP associate [Haydn Richards](#) was invited to participate in a panel where he commented on legal and compliance matters pertaining to the NMLS. Mr. Richards offered suggestions to industry participants regarding how they can limit regulatory risk in light of the implementation of the SAFE Act. He further reminded industry participants that the existing foundation of state laws and regulations must always guide any of their actions in using the NMLS. A more detailed update from Mr. Richards regarding the conference follows below.

NMLS Ombudsman Meeting

Ms. Deborah Bortner, who serves as the Director of the Division of Consumer Services of the Washington Department of Financial Institutions, has been selected as the first ombudsman for the NMLS. At an open meeting with industry members and regulators, Ms. Bortner discussed the decision-making process that takes place regarding NMLS issues, including identifying the Mortgage Licensing Policy Committee, which is composed of state regulators who help shape the direction of the NMLS by arriving at policy decisions in the interest of state regulatory agencies. Those policy decisions generally must meet the approval of the Board of Managers of State Regulatory Registry, LLC (SRR), the wholly-owned subsidiary of the Conference of State Bank Supervisors that owns the NMLS. Consistent with one of the stated goals of the SAFE Act, also announced at the meeting is increased transparency with respect to the development process, as all comments received by the SRR in connection with requests for comment made related to system developments and implementation will be made publicly available. Previously, comments had not been made publicly available.

Education and Examination of Mortgage Loan Originators

In another session, Pete Marks, Vice President, National Mortgage Education Programs, announced that 25 state examination components have been developed and were in use at the time of the conference, with another five state components expected to be released during February 2010. He announced that each state will have an approved state component examination by the end of 2010. To date, SRR has approved 171 education providers and 365 courses. In the next few weeks, SRR anticipates releasing a searchable catalog of approved continuing education courses, which will allow Mortgage Loan Originators to better identify suitable education courses. SRR also has started approving

LOOKING AHEAD:

New RESPA Regulations for Mortgage Finance: Are You Ready?

February 23, 2010

Topic: New RESPA Requirements

Time: 1:00 – 2:30 p.m. EST

Patton Boggs participant:

Richard Andreano

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continuing education coursework so that mortgage loan originators can take such education to meet their annual license renewal requirements.

In certain instances, state regulatory agencies indicated their willingness to participate in a certification process which would allow mortgage loan originators to use previously completed education to satisfy the requirements of the SAFE Act. At the time of the conference, approximately 33 states indicated that they will move forward with the certification process. To the extent that an individual has completed a number of qualifying hours of education in the past, on May 1, 2010 the state regulatory agencies will be able to submit a certificate to the NMLS regarding the completion of such education. By August 31, 2010 mortgage loan originators seeking to make use of the certification process (rather than separately completing SAFE-compliant pre-licensure education) must have filed an MU4 using the NMLS and have completed all applicable education requirements. Thereafter, the regulatory agencies have until September 30, 2010 to submit confirmation of certification approvals and the mortgage loan originators must have completed the process by November 30, 2010.

Financial Institution Registration

Financial institutions (i.e., depository institutions and certain of their subsidiaries) also learned more about the registration process for their mortgage loan originators. With the anticipated rollout of functionality in the NMLS for financial institutions, it is anticipated that financial institutions will be required to establish an NMLS record for themselves (i.e., each entity will be required to complete a record similar to those that state-licensed entities now complete). Although the record will not be as lengthy as those completed by state-licensed entities, the requirement for completion of the record will, to some degree, allow companies to manage their registered mortgage loan originators. It also will incorporate functionality for those companies to confirm that registered individuals are, in fact, employees of the financial institution.

SRR is working with financial institutions in order to accommodate them such that they will be able to “batch upload” information into the NMLS. This “batch upload” process will mean that the financial institutions will not need to individually create each MU4 for their registered loan originators. Instead, to the extent that they can include the appropriate information in a manner capable of linking to the NMLS, such information will be ported into the NMLS and will populate individual NMLS records. All registered mortgage loan originators will still be required to attest to the accuracy of their individual licensing record, however, their employer will have the ability to streamline the population of the information in their individual record.

Cooperative Examination Process

Another hot topic at the conference was the discussion of the new examination protocol in which state regulatory agencies are cooperating and performing joint examinations. At the time of the conference, one

multistate examination had been completed and another examination of a licensee, including approximately 30 participating regulatory agencies, was underway. Chuck Cross, Vice President of Mortgage Regulatory Policy with the Conference of State Bank Supervisors, indicated that the regulatory agencies have identified between 1,400-1,500 multistate mortgage entities (MMEs), which they define as any state-licensed mortgage company that operates in more than one jurisdiction. He indicated that during the next 12-24 months, the regulatory agencies would be focusing on the top 100 MMEs and they intend to perform a multistate examination on each such entity during that time period. Although such multistate examination may not be on-site, MMEs should anticipate that, at minimum, they will receive information requests in connection with the electronic screening of information through the Compliance Analyzer software engine sponsored by ComplianceEase.

As noted elsewhere in this Mortgage Banking Update, SRR will release its Licensee Examination File (LEF). Once the LEF file is released, licensees should encourage their information technology departments to begin ensuring that their loan origination software can interface with the LEF file and deliver the information required by the LEF.

Miscellaneous Updates

The NMLS Conference also served as an opportunity to discuss what will be required with Mortgage Call Reports, a functionality to be implemented during 2010. Under the SAFE Act, state-licensed entities will be required to deliver mortgage call reports to the NMLS. Such mortgage call reports will be delivered to the NMLS on a quarterly basis and will be filed on a state-by-state basis (as opposed to one mortgage call report that summarizes all activity conducted by the entity). Mortgage Call Reports will be filed in each state where the company had activity during the previous quarter and will also include detailed quarterly financial information, including information pertaining to warehousing ability. It is anticipated that the Mortgage Call Report will distinguish between products involving forward and reverse mortgage loans, identify whether loans are made or brokered and also may touch on mortgage servicing activity.

The NMLS celebrated the launch of NMLS Consumer Access, available at www.nmlsconsumeraccess.org. That website, which launched during January 2010, now provides a public repository of information regarding all mortgage loan originators that have a record in the NMLS. The website allows users, including members of the public, to verify the licensure status for their mortgage loan originators as well as the companies with whom they are conducting business. It is anticipated that in the next phase of the development of the Consumer Access website, increased functionality will be added, including the addition of publicly available disciplinary actions against licensees.

Also at the conference, Jim Beavers with the United States Department of Housing and Urban Development (HUD) advised that each state regulatory agency has been sent a letter critiquing whether its laws and/or regulations

adequately meet the standards of the SAFE Act. He mentioned that, in a number of instances, minimal changes will be required because states followed the Model State Law and enacted laws that mirrored or exceeded the SAFE Act. In a number of other instances, however, legislative and/or regulatory changes will be required to ensure that a state is in compliance with the SAFE Act. Items within state law that Mr. Beavers indicated could potentially be an issue for HUD include exemptions for manufactured housing lenders, de minimis exemptions and whether varying definitions of origination comply with the SAFE Act.

FTC PROPOSES RULE TO REGULATE MORTGAGE ASSISTANCE RELIEF PROVIDERS

The Federal Trade Commission (FTC) [recently proposed](#) a rule to regulate providers of Mortgage Assistance Relief Services (MARS). At the time this article was written the proposed rule had not appeared in the *Federal Register*. The proposed rule would prohibit MARS providers from making certain statements or representations to consumers, require MARS providers to make certain disclosures, prohibit MARS providers from collecting advance fees for services and impose recordkeeping and compliance monitoring requirements. The proposed rule also contains a prohibition on assisting or facilitating a MARS provider that is violating the rule. Comments on the proposed rule are due by March 29, 2010.

Background. Pursuant to authority under the 2009 Omnibus Appropriations Act (Appropriations Act), as clarified by the Credit Card Act, on June 1, 2009 the FTC published in the *Federal Register* two advanced notices of proposed rulemaking regarding mortgage loans. One notice addressed acts and practices in connection with the advertising, origination and servicing of mortgage loans. The other notice addressed the acts and practices of for-profit companies that offer to work with lenders or servicers on behalf of consumers seeking to modify the terms of their mortgage loans or avoid foreclosure. The proposed rule results from the later notice.

Scope. The proposed rule would apply to for-profit providers of MARS in connection with dwelling loans. As noted above, the proposed rule includes a prohibition on assisting or facilitating a MARS provider that is violating the rule. The prohibition could apply to entities such as lead generators. Excluded from the proposed rule are depository institutions that are not subject to the jurisdiction of the FTC, loan holders, loan servicers and agents of loan holders or loan servicers (provided the agent does not claim, demand, charge, collect or receive any money or other valuable consideration from the consumer for the agent's benefit). However, the FTC requests comments on whether servicers have engaged in conduct that warrants their being covered by the rule. The proposed rule contains limited exceptions from certain of the proposed requirements for attorneys.

A dwelling loan is defined by the proposed rule as a loan secured by a residential structure containing four or fewer units, whether or not that

structure is attached to real property, that is primarily for personal, family or household purposes. Thus, a dwelling loan would include a loan secured by an individual condominium unit, cooperative unit, mobile home or trailer, if used as a residence.

MARS. The proposed rule defines MARS as any service, plan or program offered or provided on behalf of a consumer in exchange for consideration that is represented, expressly or by implication, to assist or attempt to assist the consumer with any of six specified types of activities. The specified activities are:

1. Negotiating, obtaining or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments or fees.
2. Stopping, preventing or postponing any foreclosure sale for or repossession of a dwelling, or otherwise saving a dwelling from foreclosure or repossession.
3. Obtaining any forbearance or modification in the timing of payments from any loan holder or servicer on any dwelling loan.
4. Negotiating, obtaining or arranging any extension of the period of time within which the consumer may (a) cure his or her default on a dwelling loan, (b) reinstate his or her dwelling loan, (c) redeem a dwelling or (d) exercise any right to reinstate a dwelling loan or redeem a dwelling.
5. Obtaining any waiver of an acceleration clause or balloon payment contained in any promissory note or contract secured by any dwelling.
6. Negotiating, obtaining or arranging (a) a short sale of a dwelling, (b) a deed-in-lieu of foreclosure or (c) any other disposition of a dwelling other than a sale to a third party that is not the dwelling loan holder.

Prohibited Statements or Misrepresentations. A MARS provider would violate the proposed rule by representing that a consumer cannot or should not contact or communicate with his or her lender or servicer. A MARS provider also would violate the proposed rule by misrepresenting, expressly or by implication, any aspect of the MARS, including without limitation:

1. The likelihood of negotiating, obtaining or arranging any represented service or result.
2. The amount of time it will take the MARS provider to accomplish any represented service or result.
3. That the MARS provider is affiliated with, endorsed or approved by, or otherwise associated with any governmental agency or entity, any nonprofit housing counselor agency or program or the maker, holder or servicer of the consumer's loan.
4. The consumer's obligation to make scheduled periodic payments or any other payments pursuant to the terms of the consumer's existing loan.
5. The terms or conditions of the consumer's loan, including but not limited to the amount of debt owed.

6. The terms or conditions of any refund, cancellation, exchange or repurchase policy for a MARS, including but not limited to the likelihood of obtaining a full or partial refund, or the circumstances in which a full or partial refund will be granted.
7. That the MARS provider has completed the represented services, or otherwise has a right to claim, demand, charge, collect or receive payment or other consideration.

Required Disclosures. In any commercial communication for MARS, a MARS provider must include a clear and prominent statement that the provider is a for-profit business not associated with the government, and that the offer is not approved by the government or the consumer's lender. Additionally, before a consumer enters into any agreement for the purchase of any MARS, a MARS provider would be required to disclose in a clear and prominent manner in every communication directed to the consumer that promotes the sale of any MARS (1) the total cost of the provider for the service, (2) that the provider is a for-profit business not associated with the government, and that the offer is not approved by the government or the consumer's lender and (3) in certain cases in which the provider advertises any specific MARS service or result, that even if the consumer buys the service the lender may not agree to change the consumer's loan.

The proposed rule sets forth certain requirements for the disclosures, including requirements to satisfy the clear and prominent standard for text, audio, video and interactive media.

Advance Fee Prohibition. The proposed rule would prohibit a MARS provider from requesting or receiving payment of any fee or other consideration until the provider has (1) achieved all of the results (a) the provider represented, expressly or by implication, to the consumer that the MARS would achieve and (b) that are consistent with consumers' reasonable expectations about the MARS, and (2) provided the consumer with documentation of such achieved results. Addressing the condition that the results are consistent with the consumer's reasonable expectations, the FTC explains that some MARS providers that purportedly help the consumer to sell the property "short" conceal the actual sale price amount from the lender, leaving the consumer liable for the difference and owing taxes on a larger forgiven balance than necessary. The FTC advises that this would not be considered a beneficial result for the consumer and, therefore, the MARS provider could not collect a fee for it.

Additionally, in cases in which a MARS provider represented, expressly or by implication, that it will negotiate, obtain or arrange a modification of any term of any dwelling loan, the provider would be prohibited from requesting or receiving any payment or other consideration until it has (1) obtained a mortgage loan modification for the consumer that meets certain criteria and (2) provided the consumer documentation of the mortgage loan modification in the form of a written offer from the loan holder or servicer to the consumer. A number of states have advance fee prohibitions regarding MARS-related services.

The FTC requests comments on alternative approaches, such as permitting minimal up front fees, providing for arrangements in which fees would be placed in escrow, and granting consumers a right to rescind an agreement for MARS within a period after execution of the agreement.

Assisting and Facilitating Prohibition. The proposed rule would prohibit a person from providing substantial assistance or support to any MARS provider when that person knows or consciously avoids knowing that the provider is engaged in any act or practice that violates the rule. The FTC advises activities that might constitute substantial assistance or support include the provision of consumer leads, contact lists, advertisements or promotional materials and support provided by payment processors or other entities providing essential backroom operations. The FTC also explains that the “consciously avoids knowing” standard is intended to capture a situation in which actual knowledge cannot be proven, but there are facts and evidence that support an inference of deliberate ignorance on the part of a person that a MARS provider is engaged in an act or practice that violates the proposed rule.

Waiver Attempt Prohibited. The proposed rule would prohibit any attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under the rule.

Recordkeeping. The proposed rule would require that MARS providers maintain various specified records for 24 months from the date the record is produced.

Compliance Efforts. The proposed rule would require that a MARS provider:

1. Take reasonable steps sufficient to monitor and ensure that all employees and independent contractors comply with the rule. Such steps would need to include the monitoring of sales presentations with customers and include, at a minimum, the following: (a) performing random, blind tape recording and testing of the oral representations made by persons engaged in sales or other customer service functions, (b) establishing a procedure for receiving and responding to consumer complaints and (c) ascertaining the number and nature of consumer complaints regarding transactions in which all employees and independent contractors are involved.
2. Investigate promptly and fully any consumer complaint received.
3. Take corrective action with respect to any employee or independent contractor whom the MARS provider determines is not complying with the rule, which may include training, disciplining or terminating such person.

Enforcement. The proposed rule could be enforced by the FTC and, pursuant to authority granted under the Appropriations Act, a state.

Comments. The FTC requests comments on various aspects of the proposed rule and issues presented by the rule. The FTC notes that as a

general matter mortgage brokers are covered by the proposed rule to the extent that they market MARS, and the FTC solicits comment on how the proposed rule should treat offers from mortgage brokers to work with lenders to negotiate new loans or refinance existing loans. The FTC also seeks comment on the exemption from the proposed rule for servicers, including whether servicers have engaged in covered conduct that warrants encompassing them within the proposed rule.

NEWS FROM THE HILL: SENATE BANKING COMMITTEE CONSIDERS “VOLCKER RULE”

On February 2 and 4, 2010, the Senate Banking Committee held two hearings examining the President’s recently announced proposal to limit the scope of proprietary trading activities and the size of bank holding companies via a “Volcker rule.”

There appeared to be a lack of political traction for the Volcker rule. Chairman Christopher Dodd (D-CT) noted the need to move forward on regulatory reform legislation and appeared opposed to including the Volcker rule in a bill because of its adverse impact on the process of passing legislation in the near future. Ranking Member Richard Shelby (R-AL) expressed skepticism that the Volcker rule addressed the heart of the problem of systemic risk. Highlights of the discussion included:

- **Need for Further International Consensus on the Volcker Rule.** A witness emphasized the need for international consensus on regulatory reform proposals with the increasing convergence of businesses. The G20 has not yet reviewed the Volcker rule.
- **Lack of Detail in the Administration’s Definitions.** Concern was expressed over the lack of a clear definition of “proprietary trading,” among other terms.
- **Interconnectedness as the Root Source of Systemic Risk, Rather Than Institution’s Market Share/Size.** Several witnesses emphasized that regulators should focus on the interconnectedness of firms as an indication of systemic risk of a financial institution, rather than the Volcker rule’s emphasis on the size of an institution’s market share of liabilities.

Sen. Dodd indicated that he would like to hear more on how the Administration’s proposals will be applied to help consumers. Sen. Charles Schumer (D-NY) expressed strong support for creation of a Consumer Financial Protection Agency (CFPA). Sen. Schumer compared the U.S. system with the system in Canada, pointing out that Canada has a consumer protection agency and a less than 1 percent foreclosure rate, as compared to a 10 percent rate in the U.S. Paul Volcker, Chairman of the President’s Economic Recovery Advisory Board, responded that in Canada the mortgage market is dominated by commercial banks and, thus, they have an incentive to apply more conservative practices. Additionally, he noted that there is no Fannie Mae or Freddie Mac in Canada and no

political pressure to push down mortgage rates. Volcker also indicated he did not know much about Canada's Consumer Protection agency and its past effects on the Canadian mortgage market. Sen. Schumer interpreted this answer as an indication Volcker is neutral on the CFPB proposal.

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

STATE MORTGAGE REGULATORS ANNOUNCE STANDARDIZED LOAN PORTFOLIO DATA FORMAT

The Multistate Mortgage Committee (MMC) of the Conference of State Bank Supervisors and American Association of Residential Mortgage Regulators recently announced the launch of a new loan file data format, known as the Licensee Examination File (LEF). The LEF will provide a standardized format to prepare loan data for electronic submission to state regulators during an examination. Further information regarding the LEF format will be available on February 22, 2010 through the website: www.RCCertify.org.

Since last year, the MMC has been conducting pilot examinations using ComplianceAnalyzer® software, which was created by ComplianceEase®. Under the pilot examination program, lenders can electronically submit loan data through an online portal developed by ComplianceEase®, which can be found at www.RegulatorConnect.org. The MMC further announced that all lenders will be expected upload loan portfolio data to the various state regulators by 2011.

DID YOU KNOW?

- Entities that are exempt from the Ohio Mortgage Broker Act as “Mortgage Bankers” (due to HUD, FNMA, FHLMC or VA approval) or “Credit Union Service Organizations”, and were in operation as of January 1, 2010, must obtain a letter of exemption from the Ohio Division of Financial Institutions (ODFI) by May 1, 2010. In order to obtain the letter of exemption, the entity must submit a Mortgage Broker Act Exemption Application through the NMLS. Among the application requirements is a surety bond in an amount based on the entity's origination volume for the previous year, with a minimum amount of \$50,000. Additionally, mortgage loan originators operating on behalf of such exempt entities must be licensed in Ohio by May 1, 2010. According to informal advice obtained from the ODFI, in order to satisfy these requirements, exempt entities and mortgage loan originators must submit completed applications no later than April 30, 2010.

- The Department of Housing and Urban Development extended the deadline within which to comment on its proposed rule addressing its responsibilities under the SAFE Act to March 5, 2010. Publication of the extension appeared in the February 17, 2010 edition of the *Federal Register*.

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. You may receive this industry update from other people, which often occurs. To SUBSCRIBE or change your address, e-mail mortgagebanking@pattonboggs.com.