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ADMINISTRATION

FHFA Announces Expansion of HARP Program

The Federal Housing Finance Agency ("FHFA") announced on October 24 a significant expansion to the Home Affordable Refinance Program ("HARP"). FHFA intends that the broad outlines of these HARP revisions will make it easier for more borrowers to take advantage of HARP—the agency anticipates that the changes will lift existing barriers and double the number of borrowers that are able to refinance their homes under this program. The program enhancements were developed at FHFA's direction with input from lenders, mortgage insurers, and other industry participants.

To be eligible, loans must be held by Fannie Mae or Freddie Mac. The expanded program would require that borrowers have made on-time payments for the last six months and not more than one late payment in the past year. An important expansion to HARP is the removal of the current 125 percent loan-to-value ceiling for fixed-rate mortgages backed by Fannie and Freddie. Under the new changes, FHFA is eliminating certain risk-based fees for borrowers who refinance into shorter-term mortgages; and lowering fees for other borrowers. Also, the new expanded rules would permit an LTV above 80% (with no further cap) to meet the LTV qualification requirements for a fixed rate HARP refinancing (under current guidelines, loans must have an LTV below 125% to qualify).

In addition, the expansion would waive certain representations and warranties that lenders commit to when making loans that the government-sponsored enterprises (GSEs) own or guarantee; it would eliminate the need for a new property appraisal if there is a reliable automated-valuation-model estimate provided by the GSEs; and would extend the HARP end date until Dec. 31, 2013, for loans sold to Freddie and Fannie on or before May 31, 2009.

The October announcement by FHFA sets forth only a general overview, but the agency expects that it will issue formal operational details on the HARP changes by November 15. FHFA expects that lenders will implement these guidelines by January 1, 2012. [Read more.](#)



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REGULATORS

OCC Announces Independent Foreclosure Review for 24 Large Servicers

On November 1, the Office of the Comptroller of the Currency (OCC) announced that the independent foreclosure review required under the agency's enforcement actions taken back in April 2011 has begun. This new process is dubbed the "Independent Foreclosure Review" (IFR), and is focused on some of the the larger bank mortgage servicers and third-party servicer providers.

The [April enforcement actions](#) focused on unsafe and unsound practices related to residential mortgage loan servicing and foreclosure processing. Under these enforcement actions, large mortgage servicers were required to correct deficiencies in their servicing and foreclosure processes and to engage independent firms to conduct a multi-faceted independent review of foreclosure actions that occurred in 2009 and 2010. Independent consultants are charged with evaluating whether borrowers suffered financial injury through errors, misrepresentations, or other deficiencies in foreclosure practices and determining appropriate remediation for those customers. Where a borrower suffered financial injury as a result of such practices, the consent orders require that remediation be provided.

As part of these consent orders, the federal agencies and the fourteen mortgage servicers and their affiliates are identifying customers who were part of a foreclosure action on their primary residence during the period of January 1, 2009 to December 31, 2010. OCC announced that the IFR process provides homeowners the opportunity to request an independent review of their foreclosure process. If the review finds that financial injury occurred as a result of errors, misrepresentations, or other deficiencies in the servicer's foreclosure process, the customer may receive compensation or other remedy. Only primary residences will be eligible for the review process.

Under the IFR, homeowners meeting the initial eligibility criteria will be mailed notification letters with an enclosed Request for Review Form before the end of 2011. If a consumer receives a notification letter, they will be instructed to send in the Request for Review Form no later than April 30, 2012. A consumer's request will be reviewed for inclusion in the IFR, and if it meets the eligibility requirements, it will be reviewed by an independent consultant. OCC expects that reviews may take "several months," and the consultant will reach a determination of whether financial injury has occurred as a result of any errors, misrepresentations or other deficiencies in the foreclosure process. The consumer will thereafter receive a letter with the findings of the review and information about possible compensation or other remedy. The review process is free of cost to the borrower, and does not preclude the borrower from pursuing other options, such as litigation or modification.

The list of participating servicers includes: America's Servicing Co., Aurora Loan Services, Bank of America, Beneficial, Chase, Citibank, CitiFinancial, CitiMortgage, Countrywide, EMC, EverBank/EverHome Mortgage Company, GMAC Mortgage, HFC, HSBC, IndyMac Mortgage Services,

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MetLife Bank, National City Mortgage, PNC Mortgage, Sovereign Bank, SunTrust Mortgage, U.S. Bank, Wachovia Mortgage, Wells Fargo Bank, N.A., and Washington Mutual. Servicers that are not subject to this investigation are not required to engage in the process described above. [Read more.](#)

For more information, contact ABA's [Rod J. Alba](#).

Agencies Update Flood Insurance Q&As

The federal banking agencies -- along with the Farm Credit Administration and National Credit Union Administration -- on Friday, October 14, issued guidance that updates the interagency questions and answers on flood insurance published on July 21, 2009. The guidance also asks for comments on three proposed updates to Q&As related to the forced placement of flood insurance.

Two of those Q&As have been significantly changed based on ABA comments. ABA in 2009 urged the agencies to reconsider the proposed forced-placement guidance because it undermined the National Flood Insurance Reform Act's essential purpose -- ensuring that borrowers maintain continuous flood insurance coverage throughout the life of the loan.

The guidance also finalizes two Q&As that had been proposed previously - one relating to forced placement and the other to insurable value. The agencies followed ABA's recommendations by finalizing an "insurable value" definition that gives banks the necessary flexibility to determine and document an appropriate insurable value for property securing a loan in a flood zone.

There will be a 45-day comment period on the proposed updates and other issues after their publication in the Federal Register.

[Read more.](#) [Read the guidance and the proposed updates.](#)

For more information, contact ABA's [Ginny O'Neill](#).

CFPB Issues Examination Manual

On October 13, the Consumer Financial Protection Bureau posted online its supervision and examination manual. The manual lists three main principles that will guide bureau exams: (1) focusing on risks to consumers; (2) analyzing available data about supervised entities; and (3) enforcing consumer financial law consistently.

The manual says, among other things, that examiners will review available information and request documents to develop the scope and focus for the onsite exam; observe daily business, conduct interviews and review added

information at the institution; and seek cooperation from the institution to correct any problems. “The CFPB considers all supervisory information, including examination reports and ratings, highly confidential,” it says.

The Dodd-Frank Act gives the CFPB the authority to supervise banks with more than \$10 billion in assets for compliance with consumer regulations. The agency also is authorized to supervise nonbanks, but not until it has a permanent director.

Finally, the manual clarifies the CFPB’s interpretation of the grant of supervisory authority under the Dodd-Frank Act over mortgage servicing operations generally, and the Act’s requirement that the agency assess whether the servicers are following the law. The [Mortgage Servicing Examination Procedures](#) released in connection with this manual describe the types of information that the agency’s examiners will gather to evaluate mortgage servicers’ policies and procedures, assess whether servicers are in compliance with applicable laws, and identify risks to consumers in servicing operations. The CFPB states that it will initially focus on loans in default where consumers are struggling to make payments; the CFPB will, however, be conducting examinations of mortgage servicing practices as part of its supervision program.

[Read and download the manual.](#)

For more information, contact ABA’s [Rod J. Alba](#).

ABA Suggests Improvements For CFPB Investigation Rules

ABA and three other trade groups offered suggestions on how the Consumer Financial Protection Bureau (CFPB) can improve its interim final rules on conducting investigations and administrative adjudication proceedings under the Dodd-Frank Act.

In a [joint comment letter](#) dated September 26, the groups stated that investigation rules should be amended so that time extensions to file a petition modifying or setting aside a civil investigative demand will be liberally granted. Those rules also should be revised to limit the scope of civil investigative demands and require that the CFPB confer with respondents to set expectations on what they are required to produce.

The adjudication rules should be changed to give respondents at least 20 days to file an answer and 30 days to file a notice of appeal. They also should be amended to permit time extensions or other postponements or adjournments for showing good cause.

ABA, Consumer Bankers Association, The Financial Services Roundtable, and Mortgage Bankers Association signed the letter.

For more information, contact ABA’s [Ginny O’Neill](#).

ABA Urges HUD to Withdraw Farm Credit-FHA Proposal

On October 25, ABA urged the Department of Housing and Urban Development to withdraw a proposed rule that would make Farm Credit System institutions eligible for Federal Housing Administration mortgage insurance programs.

“There is no reasonable rationale for the rule’s implementation, as HUD has demonstrated no actual dearth of home mortgage credit in rural areas ... ,” ABA said in a letter. “The rule’s only meaningful impact would be to provide further taxpayer exposure, through the FHA fund, to an already government-advantaged government sponsored enterprise.”

[Read ABA's letter.](#) For further information contact ABA's [Joe Pigg](#) or [John Blanchfield](#).

ABA Officers Discuss Exam Issues with FDIC

On September 29, ABA executive officers met with FDIC Acting Chairman Marty Gruenberg and several senior FDIC staff members to discuss persistent regulatory examination issues and other key topics. The bankers gave officials a [report](#) on bank exam experiences gleaned from 700-plus surveys filed since June under the ABA and state bankers associations’ Regulatory Feedback Initiative.

In the meeting, the ABA executive officers raised concerns about the need to better understand the standards that the FDIC uses to refer discrimination cases to the Justice Department. The report raises specific concerns about HMDA-related examination issues, and cites banker narratives reporting increased examination attention in this sector.

Acting Chairman Gruenberg and the staff members said they wanted to continue discussions with ABA on each of those subjects.

Supreme Court to Hear RESPA Case

The U.S. Supreme Court has agreed to consider whether the Real Estate Settlement Procedures Act bars mortgage lenders from charging “unearned fees” in connection with mortgage loans. The case -- Freeman v. Quicken Loans Inc. -- centers on a group of lawsuits from Louisiana in which borrowers alleged Detroit-based Quicken charged them loan-discount fees but did not provide reduced interest rates in return.

The New Orleans-based 5th U.S. Circuit Court of Appeals ruled last year that RESPA bars lenders and other service providers from paying or receiving kickbacks, but it does not bar unearned fees charged by a single party. Quicken said the fees were legal and denied allegations that they

were unearned.

The high court's decision is likely to set a precedent for whether RESPA will be applied as a blanket prohibition on unearned fees or a more limited statute barring kickbacks.

For more information, contact ABA's [Rod J. Alba](#).

Appraisal Independence Rule

The Philadelphia Federal Reserve has published an article on the recently finalized interim final rule on valuation independence. This article, published in Consumer Compliance Outlook, reviews the requirements of the new appraisal independence rules and also touches upon the long-standing prudential appraisal regulations and guidelines of the federal banking agencies, including the recently revised Interagency Appraisal and Evaluation Guidelines issued by the agencies in December 2010.

The publication is found [here](#).

FAIR LENDING

Supreme Court Ruling May Affect Mortgage Discrimination Lawsuits

Two recent federal court decisions suggest that the Supreme Court's recent decision in *Wal-Mart Stores v. Dukes* may make it more difficult for plaintiffs to bring lawsuits alleging fair lending claims as class actions. The two cases - *In re: Wells Fargo Residential Mortgage Lending Discrimination* (Northern District of California) and *Rodriguez v. National City Bank* (Eastern District of Pennsylvania) – each declined to certify a class of plaintiffs on the basis that the claims lacked the necessary “commonality” or “typicality” required under the Supreme Court's decision in *Dukes*.

In order to allow a case to proceed as a class action, a plaintiff must demonstrate that his or her claim (and, crucially, the claims of each member of the class that they seek to represent) depends upon a “common contention” for resolution. The Supreme Court in *Dukes* explained that “this does not mean merely that they have all suffered a violation of the same provision of the law.” Rather, this requirement means that a plaintiff must demonstrate that “the class members have suffered the same injury” which is “of such a nature that it is capable of classwide resolution,” i.e, it depends on a common set of facts shared by each class member, and that a determination of the truth or falsity of those facts will resolve the claims in one stroke.

The application of the Supreme Court's decision in *Dukes* to cases alleging fair lending claims has apparently raised the bar for plaintiffs who seek to certify their case as a class action. The district courts in *In re:*

Wells Fargo and Rodriguez both rejected attempts to certify large classes of plaintiffs on the grounds that the plaintiffs could not establish that the factual foundation for the claims were sufficiently “common” so as to allow a small number of class plaintiffs to represent literally millions of borrowers. As was the case in *Dukes*, both courts focused on the fact each bank accorded its loan officers a certain amount of discretion when pricing loans. Both courts found that, as the Supreme Court recognized in *Dukes*, where persons who are afforded discretion exercise that discretion differently, commonality is not established. Indeed, as noted in the Rodriguez decision, a viable class alleging a fair lending cause of action would probably be limited to borrowers who could show a disparate impact that is tied to loans approved by a specific loan officer or, at a minimum, a group of loan officers working for a specific supervisor.

ABA will continue to monitor judicial developments. For more information, contact ABA's [Greg Taylor](#).

CONGRESS

Cordray Approved by Senate Banking Committee

On October 6, the Senate Banking Committee voted to approve the nomination of former Ohio Attorney General Richard Cordray to lead the Consumer Financial Protection Bureau (CFPB). The Senate Banking Committee approved Cordray's nomination in a 12-10 party-line vote.

Cordray's nomination must now go to the full Senate for final approval. If approved, Cordray would formally become the Director of the CFPB, and would replace Raj Date who currently is the Bureau's acting head until a Director is confirmed. Senate Republicans have repeatedly stated that they will not support Cordray's nomination without several changes to the CFPB, while most Democrats and the Obama Administration support confirmation.

For more information, contact ABA's [Joe Pigg](#).

Senate Approves Higher Conforming Loan Limits

A bill passed the Senate on Thursday, October 20, that would remove the existing limits for conforming loans backed by the federal government and reinstate the higher \$729,750 threshold until 2013. Lawmakers adopted the amendment to a federal spending measure by a count of 60 to 38, giving backers of the bill the supermajority needed to avoid wrangling over the issue. Multiple news outlets reported that Congress had allowed the higher limits for conforming loans to ease in October, despite a massive lobbying effort by companies and trade groups.

Read more [here](#). For more information, contact ABA's [Joe Pigg](#).

Rep. Garrett Unveils GSE Reform Proposal

On October 27, Rep. Scott Garrett (R-NJ), Chairman of the Financial Services Subcommittee on Capital Markets and Government-Sponsored Enterprises, unveiled a proposal to reform the secondary mortgage market, including Fannie Mae and Freddie Mac.

The proposal aims to ensure robust private investment in the U.S. mortgage market without a government guarantee while facilitating continued standardization, legal certainty, and the transparency necessary to ensure healthy secondary market development in the absence of Fannie and Freddie.

Garrett's reform proposal seeks to promote standardization and uniformity in securitization by directing FHFA to create several categories of mortgages with uniform underwriting standards for each. FHFA would then be directed to develop standard and uniform securitization agreements and representations and warranties. The bill would provide FHFA with authority to ensure underwriting and securitization standardization compliance.

Importantly, the bill would abolish the risk-retention provisions included in Dodd-Frank (and currently subject to a proposed rulemaking by FFIEC agencies). Garret's proposal would codify numerous elements designed to enhance legal certainty, including: removing conflicts of interest between servicers and investors, clarifying rules concerning the eligibility of obtaining second lien mortgages, requiring mandatory arbitration on disagreements between investors and issuers on reps and warrants, allowing for the appointment of an independent third party to act for the benefit of investors in mortgage-backed securities, and standardizing servicer accounting and reporting for restructuring, modification or work-out of loans used as collateral.

Finally, the bill proposes to enhance transparency and disclosure by increasing the quality of loan level information that investors can use to evaluate the value of the mortgages, and increasing disclosures of loan pricing history on securitization deals.

"Now that we have taken the important step of introducing a series of bills to wind down the government-backed mortgage twins, it's time to start thinking about the ways we can jumpstart the private market to step in once they're gone," said Garret.

[Read more here.](#) For more information, contact ABA's [Joe Pigg](#).

Sen. Johnson: GSE Reform Will Not Begin This Year

Senate Banking Committee Chairman Tim Johnson (D-SD) confirmed during a hearing on October 20, that reform of the housing finance system will not be undertaken in the coming months, stating that Committee work

on legislation likely will take place “next year.”

“I firmly believe that we need to reform our housing-finance system but I am concerned about the unintended consequences for our housing market and economy that could result,” Chairman Johnson said. “A new system that eliminates the most popular and stable mortgage product in the country would be a step backward.”

For more information, contact ABA’s [Joe Pigg](#).

ABA: GSE Reform Should Not Include FHLBs

Proposals to improve housing finance by changing Fannie Mae, Freddie Mac and the government-sponsored enterprises as a group should not include modifications to the Federal Home Loan Bank System, ABA community banker Anthony Costa told the House Financial Services’ Oversight and Investigations Subcommittee.

“Great care must be taken with any reform of the secondary mortgage market to protect the traditional business of the FHLBs and access to liquidity by their members. Failure to do so will have a detrimental effect on mortgage funding and home ownership for many years to come,” said Costa, who is chairman and co-CEO, Empire State Bank, Newburgh, N.Y.

He emphasized that the FHLBs are essential in enabling community banks to meet the needs of their communities, especially low-and-moderate-income communities, under all economic conditions. Costa also noted that the FHLB System performed exactly as intended during the financial crisis.

“As the crisis took hold and interbank lending froze, the FHLBs were the first available source of funding for U.S. financial institutions, preventing far greater losses and potential institutional failures,” he said. “As members had more need for liquidity, FHLBs increased the availability of advances from about \$650 billion to over \$1 trillion at the peak of the crisis. This proves the flexibility of the system and its ability to withstand crises.”

[Read more.](#) [Read the testimony.](#)

Senate Bill Would Require Cost-Benefit Analysis For Regulations

Senate Banking Committee Ranking Member Richard Shelby (R-AL) and Committee Republicans introduced a bill (S. 1615) that would require financial regulators to justify proposed rules by providing detailed cost-benefit analyses, including effects on economic growth and net job creation. The bill would prevent regulators from promulgating a rule if the analysis showed that the regulation’s costs outweighed its benefits.

“My colleagues and I are simply proposing that each financial regulator determine whether the economic cost of a new regulation exceeds its economic benefit,” Sen. Shelby [said](#). “If it does, then the regulation should

not be implemented.”

ABA has been advocating for increased accountability on agencies regarding the economic analyses they perform on regulatory activity. These demands have been particularly loud in the area of mortgage-related regulations, where ABA has noted that agencies are failing to perform adequate studies of the impact brought by regulatory proposals.

For more information, contact ABA's [Joe Pigg](#).

House Panel Pushes Back on ‘Regulatory Uncertainty’ Issue

If you ask community bankers, small-business owners and other Americans on Main Street, they will tell you that regulatory uncertainty is hurting job creation, according to a blog posted Thursday, October 27, on the House Financial Services Committee’s website.

The panel’s blog post refutes an argument made earlier this week by Jan Eberly, Treasury assistant secretary for economic policy, who said on the agency’s website that economists have found no hard evidence that regulatory uncertainty is holding back business investment and hiring.

“Dr. Eberly cites a survey of economists to back up this claim. One of the biggest failures of the Obama Administration is its determination to rely upon theoretical academics rather than listen to those who deal with the reality of the Administration’s actions,” the committee says.

The panel cites a Gallup poll released Monday, October 24, that shows small-business owners view government regulations as the biggest economic hurdle they face. The panel also notes that “if you ask community bankers about the impact regulations have on their ability to lend to local businesses ... you will hear horror stories,” and quotes ABA community banker Tom Boyle, who testified on the issue in June.

“Each new regulation ... adds another layer of complexity and cost of doing business. The Dodd-Frank Act will add an additional, enormous burden, has stimulated an environment of uncertainty, and has added new risks that will inevitably translate into fewer loans to small businesses,” says Boyle, vice chairman at State Bank of Countryside, Countryside, Ill.

[Read the committee’s blog post.](#) [Read Eberly’s blog post.](#)

OTHER NEWS

Kelly: ABA Leadership Galvanized to Meet Reg Burden Challenge

ABA’s leadership is galvanized as one to work tirelessly for bankers and the industry during this time of regulatory overreach, newly elected ABA Chairman Albert “Kell” Kelly said at the ABA’s annual convention in San

Antonio, on October 26.

Kelly, a long-time political activist in his home state of Oklahoma, said that ABA under his leadership will take an aggressive, offensive approach to legislative and regulatory advocacy.

He noted that Washington policymakers seem to have forgotten -- or are overlooking -- the critical role that banks play in their communities and in the overall economy. Bankers nationwide must remind them by working in unison to send a loud, clear message.

"We need to show we are a united industry, that we stand together," Kelly said. He added that bankers can be proud of their grassroots efforts under the powerful ABA-state bankers associations alliance that has produced hundreds of thousands of letters, e-mails and phone calls, along with Washington fly-ins and countless meetings with lawmakers.

But more work needs to be done, he said. It is time to become even more passionate and dedicated to the grassroots advocacy that will shape the banking industry's future. "We are the ones that have to make a difference. It is up to us," Kelly said.

Keating: "We Must Fight Back as a Unified Industry"

On October 25, ABA President and CEO Frank Keating also vowed aggressive advocacy at the ABA Annual Convention, emphasizing that in a time of regulatory overkill, the industry must stand strong and united.

"We need to stand up and oppose oppressive, destructive regulations. We must fight back as a unified industry," he said, emphasizing that banks must be direct, noisy and visible. "When people kick us in the shins, we will kick back."

He also echoed ABA Chairman Steve Wilson's message that bankers should always proudly tell the industry's very positive story. Banking is an industry that is indispensable because of the vital role it plays in creating jobs, supporting the economy and in growing communities across the nation, Keating said.

"We are a caring industry and we need to make sure people know that," he said.