

# WBSK MORTGAGE FINANCE NEWSLETTER

A PUBLICATION OF WEINER BRODSKY SIDMAN KIDER PC

## Illinois Predatory Pilot Program to Begin by Sept. 1, 2006

The Illinois legislature recently passed Illinois Senate Bill 304 which requires the Illinois Department of Financial and Professional Regulation (“DFPR”) to declare in writing an inception date for the Predatory Lending Database Pilot Program (“Pilot Program”). The Pilot Program was created in 2005 by the Illinois legislature’s passage of House Bill 4050.

Senate Bill 304 provides that the inception date must be no later than September 1, 2006, and it must be at least 30 days after the DFPR issues a declaration establishing the inception date. The inception date must be posted on the DFPR’s website, and the DFPR must communicate the inception date to all of its licensees. The Pilot Program will apply to all mortgage applications in the affected areas that are made or taken on or after the inception date. Importantly, the Illinois Governor has not yet signed Senate Bill 304 into law, but it is widely expected to be signed into law soon.

Senate Bill 304 also provides that none of the duties, obligations, contingencies or consequences of or from the Pilot Program will be imposed until the inception date. Additionally, the Pilot Program will remain in effect and operate for a total of four (4) years.

As enacted in 2005, Illinois House Bill 4050 requires the

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## Court Finds FCRA Section 1681m Retains Private Right of Action

**In a recent decision out of the Eastern District of Virginia, *Barnette v. Brook Road, Inc.*, a magistrate judge concluded that Congress did not intend to eliminate the private of action for violations of Section 1681m of the Fair Credit Reporting Act when it enacted the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”). Instead, the court determined that Congress engaged in a scrivener’s error when it drafted a provision in the FACTA that expressly states that private rights of action no longer exist to enforce certain reporting requirements under the FCRA.**

In so ruling, the Eastern District breaks rank with a half dozen other courts that have held that the statutory language is clear, and should be read as written. Specifically, at issue is whether 15 U.S.C. § 1681m(h)(8) of the FRCA, which states that enforcement of “section” 1681m is no longer available through a private right of action, should really be read to state “subsection” 1681m. Such a reading would only eliminate a private right of action as to the statute’s “counter offer exception,” but not for the entirety of § 1681m.

While acknowledging that every other court to address the issue has concluded that the FACTA eliminated the private right of action for § 1681m, the Barnette court focused on the fact that (1) prior to the 2003 amendments, the FCRA authorized a private right of action for violations of § 1681m, and that Congress did not express a “clear intent to alter the existing enforcement scheme;” (2) section 312(f) of the FACTA purportedly saved the private right of action; (3) the location of the § 1681m(h)(8) is not “logically located,” and renders superfluous other provisions in the same FACTA amendment; and (4) “common sense” suggests that some member of the legislature would have noted the withdrawal of the private right of action had that been the intent of Congress.

Based on these considerations, the Barnette court determined that Congress necessarily engaged in a scrivener’s error that requires correction. That correction includes substituting the word “subsection” for “section,” thereby requiring that § 1681m(h)(8) apply solely to subsection (h) and “not eliminat[e] the private right of action for violations of the remainder of § 1681m.”

The Barnette decision already has been rejected by one court in the Northern District of Illinois, on the ground that the Seventh Circuit already has found that the FACTA amendment abolishes the private right of action under § 1681m of the FCRA.

DFPR to maintain and administer a predatory lending database. Mortgage brokers and loan originators that originate residential mortgage loans secured by real property located in certain zip codes in Cook County must submit detailed information about the borrower, collateral and loan transaction to the DFPR. Upon the receipt of this information, the DFPR will evaluate it and determine whether credit counseling is appropriate for each borrower. Senate Bill 304 modifies title and closing agents' responsibilities as enacted in House Bill 4050 regarding recording mortgages secured by properties in the Pilot Program area. The title insurance company or closing agent must attach to the mortgage a certificate of compliance, as generated by the database. If the title insurance company or closing agent fails to attach the certificate of compliance, then the mortgage is not recordable.

For more details on Illinois House Bill 4050, see the July 2005 and March 2006 editions of the WBSK Mortgage Finance Newsletter. ■

## **Massachusetts Amends Payoff Statement and Mortgage Discharge Rules and Removes Loan Disclosure Requirements**

Chapter 63 of Massachusetts Acts of 2006 (Chapter 63) amends that state's mortgage laws governing pay-off statements and releases and discharges of mortgages, as well as loan application disclosures and the rules regarding the expiration date of mortgages.

Chapter 63 revises, as well as adds, new definitions to Massachusetts' laws on mortgages, including the addition of a definition of an "authorized person" as one that is allowed to act on behalf of a borrower pursuant to a written document signed by the borrower. Such an authorized person may request a payoff statement on behalf of a borrower.

### **PAYOFF STATEMENTS**

Chapter 63 adds new provisions regarding mortgage loan payoff statements. Upon the written request of a borrower or "authorized person", a lender, servicer or note holder that is receiving payments under a mortgage loan (hereinafter, "the lender") must provide a written payoff statement sufficient to enable the borrower or authorized person to conclusively make full payment of the loan as of a certain date no more than 30 days from the date of the request. The lender must provide a written payoff statement within five days of the date of the request, and must specify an amount certain, as of the payoff date specified in the request, that will satisfy the mortgage.

The payoff statement must also include any additional amounts due, or a formula or method for calculating the amount that may be due, such as a reference to a per diem amount, in the event the payoff is received later than the payoff date specified in the payoff request. The payoff statement, however, may condition the payoff amount, or any additional payoff amount due beyond the specified payoff date, on any escrow or other disbursements that the lender may be permitted or required to make between the payoff date and 30 days thereafter. In the event additional amounts are stated as due, the payoff statement must specify the nature, amount and anticipated payment date for the disbursements, if known or reasonably ascertainable by the lender. The lender may impose a time limitation on the validity of the payoff state-

ment of no less than 30 days from the date of issuance. The law states that a borrower may request one payoff statement without charge during any 6-month period, but provides that for each additional request for a payoff statement made during such 6-month period, the lender may assess a reasonable charge. The law goes on to state that, unless prohibited by law or the respective loan documents, the lender may charge a reasonable fee for the cost of delivery of the payoff statement and the fee may be added to the payoff amount.

If a lender provides an inaccurate payoff statement, it may issue a corrected payoff statement. If the person receiving the payoff statement has a reasonable opportunity to act upon the corrected payoff statement before making payment, the corrected statement shall supersede the earlier statement. Notwithstanding the issuance of a corrected payoff statement, a lender that provides a payoff statement with an erroneous payoff amount may not deny the accuracy of the payoff amount against any person that reasonably and detrimentally relies upon the erroneous payoff amount and the lender shall be bound by the payoff statement. Nevertheless, a lender shall not be precluded from recovering from the borrower amounts that may be due and remaining unpaid under the mortgage loan, notwithstanding the omission of such amounts from the payoff statement.

A lender who fails without reasonable cause to provide a timely payoff statement may be held liable to the borrower for the greater of \$500 or the borrower's actual damages, plus reasonable attorney's fees and costs. If the borrower makes payment in accordance with the payoff statement, the lender must record or provide a proper discharge of the mortgage.

### **DISCLOSURES**

Currently, Massachusetts law requires lenders to provide on applications for mortgage loans statements regarding: (i) the ap-

proximate expiration date of the note, (ii) the rate of interest charged, and (iii) that, as of the expiration date of the note, the lender may: (a) demand payment of the note, (b) rewrite the note at a greater or lesser rate of interest, or (c) allow payments to be made on the note at the same, greater or lesser rate of interest. Chapter 63 removes these loan application disclosure requirements and also repeals the requirements that first mortgage lenders make the following state-mandated disclosures:

- (i) a statement aiding prospective borrowers in understanding the mortgage application and approval process,
- (ii) a statement of all verification information required to make a decision on the application,
- (iii) a good faith estimate (GFE) of all charges for “settlement services”,
- (iv) the uniform one-page worksheet that allows borrowers to calculate the charges and fees the borrower is likely to incur in connection with the mortgage transaction,
- (v) a copy of the most recent publication, currently entitled “Settlement Costs”, available from HUD;
- (vi) a “CHARM” booklet in connection with variable rate loans, and
- (vii) a written notice to a mortgage borrower whose application has been determined to be substantially complete, immediately upon the making of such determination.

Note that, per federal RESPA requirements, lenders must nevertheless provide Massachusetts borrowers with a GFE and the HUD Settlement Cost Booklet. Massachusetts law, however, will no longer impose this requirement. Also, the Massachusetts

## FCC Junk Fax Rules Become Effective August 1, 2006

On July 9, 2005, the Junk Fax Prevention Act of 2005 (the Junk Fax Prevention Act) amended the Telephone Consumer Protection Act of 1991 (TCPA) regarding the sending of unsolicited advertisements by facsimile. The Junk Fax Prevention Act authorized the FCC to promulgate rules to implement its provisions. On April 5, 2006, the FCC issued a report containing final rules adopted and promulgated under the Junk Fax Prevention Act, which were published on May 3, 2006. Among other things, the rules codify the existing business relationship exception to the general ban on unsolicited facsimile advertisements. The final rules shall take effect on August 1, 2006. For more information on the Junk Fax Prevention Act, please see the August 2005 and April 2006 editions of the WBSK Mortgage Finance Newsletter.



Truth-in-Lending Act and regulations thereunder will continue to require lenders to provide Massachusetts borrowers with the “CHARM” booklet in connection with variable rate transactions.

Additionally, Chapter 63 repeals the state law requirement that lenders provide Massachusetts mortgage loan applicants with a notice of the right to receive a copy of an appraisal. Lenders must nevertheless provide Massachusetts mortgage loan applicants with such a notice pursuant to the federal Equal Credit Opportunity Act and regulations thereunder.

### STATED TERM OF MORTGAGES

Due to changes made by Chapter 63 to Massachusetts’ mortgage law, lenders may wish to review the mortgage loan security instruments they utilize. For instance, for the reasons outlined below, in connection with a mortgage with a forty year term, or a term that may run for an indefinite period (such

as a tenured-based reverse mortgage), lenders may wish to ensure that the maturity date is stated and set forth in the mortgage security instrument document.

Currently, Massachusetts law provides that a power of sale in a mortgage may not be exercised, and no foreclosure action may be initiated, in connection with a mortgage after the expiration of fifty years from the recording of the mortgage unless an extension of the mortgage is recorded within the last ten years of the mortgage. In the case of an extension of the mortgage, the period shall continue until ten years after the recordation of the extension if the mortgage is not satisfied.

Chapter 63 amends this provision to provide that a power of sale in a mortgage may not be exercised, nor proceedings for foreclosure initiated, in connection with a mortgage after the expiration of: (i) in the case of a mortgage in which no term of the

mortgage is stated, 35 years from the recording of the mortgage or, (ii) in the case of a mortgage in which the term or maturity date of the mortgage is stated, 5 years from the expiration of the term or from the maturity date, unless an extension of the mortgage is recorded before the expiration of such period. In the case of an extension of the mortgage, the period shall continue until 5 years after the extension of the mortgage. Upon the applicable expiration date, the mortgage shall be considered discharged.

#### **DISCHARGE OF MORTGAGES**

Chapter 63 provides that a deed of release, or written acknowledgment of payment or satisfaction of the debt secured by a mortgage is binding upon the entity issuing such release. Such a release is entitled to be recorded or filed, without further action of the entity issuing it.

Mortgage servicers may proffer for recordation a release of mortgage, however, a release proffered for recording by a servicer must be accompanied by additional documentation showing that the servicer has authority to release the mortgage. Chapter 63 also establishes new rules for a borrower's unilateral release of a fully paid mortgage under certain circumstances.

#### **EFFECTIVE DATES**

The amendments with respect to Disclosures become effective July 1, 2006 and the remainder of Chapter 63 becomes effective on October 1, 2006 and applies to all mortgages, whether recorded before, on or after October 1, 2006, except that the term of a mortgage which, as a result of the rules on the stated term of mortgages, would expire within one year after October 1, 2006, shall be extended until October 1, 2007. ■

## **Arizona Restricts Unauthorized Use of Mortgage Companies' Names in Solicitations**

Recently enacted Arizona Senate Bill 2081 restricts mortgage companies from referencing the trade name or trademark of other mortgage companies in solicitations for the offering of services or products without the consent of the entity referenced in the solicitation. The Governor of Arizona signed this bill into law on April 17, 2006.

Without the consent of the other mortgage company referenced in the solicitation, Arizona Senate Bill 2081 generally prohibits one from referencing an existing mortgage company, loan number, loan amount or other specific loan information when such information appears on the outside of an envelope, is visible through the envelope window or appears on a postcard in connection with advertisements that include or contain a solicitation for goods and services. The solicitation, however, may contain the trade name of another mortgage company when such use is limited to comparing the services and products offered by this mortgage company to the products and services offered by the mortgage company making the solicitation.

While Arizona Senate Bill 2081 generally prohibits references to the trade name or trademark of other mortgage companies in solicitations, it permits such references without the consent of the particular mortgage company referenced when the solicitation discloses all of the following: (i) the name, address and telephone number of the mortgage company making the solicitation; (ii) that the mortgage company making

the solicitation is not affiliated with the mortgage company referenced in the solicitation; (iii) that the loan solicitation is not authorized or sponsored by the mortgage company referenced in the solicitation; and (iv) that any loan information referenced was not provided by the mortgage company referenced in the solicitation.

Arizona Senate Bill 2081 provides that the only manner by which to reference a loan number, loan amount or other loan specific information that is publicly available in a solicitation for the purchase of products and services is by disclosing the required information above. These requirements do not apply, however, to communications by a mortgage company or its affiliates with a current customer of the mortgage company or with a person who was a customer of the mortgage company during the eighteen (18) months immediately preceding the solicitation.

Even when the required disclosures are provided, Arizona Senate Bill 2081 prohibits mortgage companies from referencing other mortgage company's customer's information, such as the loan number, loan amount or other specific loan information in solicitations for the purchase of services or products, when this information is not publicly available. Importantly, mortgage companies must also refrain from using the name of another mortgage company or a name similar to another mortgage company in solicitations directed to consumers if such use may cause a reasonable person to be confused, mistaken or deceived as to either of the following: (i) the other mortgage company's sponsorship, affiliation, connection or association with the mortgage company using the name; or (ii) the other mortgage company's approval or endorsement of the mort-

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## States Licensing Update

### INDIANA – Changes to the Uniform Consumer Credit Code

Effective July 1, 2006, the Indiana Uniform Consumer Credit Code has been amended to require a Loan License in order to: (1) make consumer loans (which include subordinate-lien loans secured by residential real property in Indiana); (2) take assignment of consumer loans; and (3) undertake direct collection of payments from or enforce rights arising from consumer loans. As a result of this change, entities that take assignment and/or purchase consumer loans and entities that service those loans must hold a Loan License. Importantly, however, such activity will only subject an entity to licensing if the entity is engaged in such activity at a location within the state of Indiana. Thus, effective July 1, 2006, to the extent that an entity will purchase and/or take assignment of Indiana consumer loans in the secondary market from locations within Indiana and/or service consumer loans from locations within Indiana, a Loan License will be required in order to engage in such activity.

### IOWA – Amendments to Mortgage Banker License Requirements

Effective July 1, 2006, a Mortgage Banker License will be required in order to make and/or service subordinate-lien loans in amounts in excess of \$25,000 secured by residential real property within the state of Iowa. Previously, the Mortgage Banker License was not required in order to make and/or service such loans so long as an entity did not hold itself out as a Mortgage Banker or advertise that it was a “Mortgage Banker.” In addition, individual Loan Officer Registrations must be renewed annually on or before June 1.

### KENTUCKY – License Exemption for HUD/FHA-approved Entities Narrowed

Presently, entities that are approved by the Department of Housing and Urban Development enjoy an exemption from licensure under the Mortgage Loan Company License and/or the Mortgage Loan Broker License, provided that those entities register with the Kentucky Office of Financial Institutions. Effective July 11, 2006, this exemption will narrow, in that any entity relying upon such exemption must annually fund or broker a minimum of twelve (12) Federal Housing Administration-insured loans on Kentucky properties in order to maintain that exemption. Entities that rely upon this exemption will be required to annually provide a list of funded or brokered Federal Housing Administration-insured loans to the Office of Financial Institutions on or before January 15. As was previously the case, branches of exempt entities that are approved by the Department of Housing and Urban Development also are exempt from licensing; however, those branches also must annually fund or broker a minimum of 12 Federal Housing Administration-insured loans on Kentucky properties in order to maintain such exemption.

### OKLAHOMA – New Continuing Education Requirements

Effective November 1, 2006, individuals that are licensed as a mortgage loan originator under the Mortgage Broker Licensure Act must fulfill certain continuing education requirements in order to renew their mortgage loan originator license. Mortgage loan originators must fulfill the same continuing education requirements as Mortgage Broker Licensees; they must complete 16 hours of approved continuing education prior to license renewal.

gage company using the name or of that other mortgage company's services or products.

Through its imposition of additional requirements, Arizona Senate Bill 2081 likely will act as a deterrent to those businesses considering solicitations that use the name of another mortgage company. Such solicitations often include advertisements for refinancing mortgage loans or bi-weekly payment programs. Other states currently are considering similar legislation.

## Indiana Court Rejects Document Prep Fees

A national bank may not charge a fee for preparing a deed and mortgage in Indiana unless the work is done by licensed attorneys, the Indiana Court of Appeals ruled recently. In making its ruling, the court determined that the Indiana Supreme Court's authority to regulate the unauthorized practice of law is not preempted by the National Bank Act.

In *Charter One Mortgage Corp. v. Condra*, Charter One charged plain-

tiff Kyle Condra a \$175 document preparation fee for preparing the deed and mortgage for his mortgage loan. The documents were prepared by Charter One's agents or employees, none of whom were licensed to practice law. Condra filed a putative class action alleging that Charter One's actions constituted the unauthorized practice of law under Indiana law and that the fee itself represented unjust enrichment.

Charter One moved to dismiss plaintiff's claim, contending that as an operating subsidiary of a national bank, Charter One Bank, N.A., it was governed by the regulations promulgated by the Office of the Comptroller of the Currency ("OCC") and that these regulations preempted applicable Indiana state law. The trial court denied Bank One's motion to dismiss but certified the issue for interlocutory appeal.

In its May 12, 2006, decision, the Indiana Court of Appeals noted that the Indiana Constitution gave the Indiana Supreme Court the power to supervise and regulate the practice of law. The appellate court also noted that under the Indiana Supreme Court's ruling in *Miller v. Vance*, bank employees who are not licensed attorneys may prepare

mortgage instruments without committing the unauthorized practice of law if (1) they do not give advice or opinions with regard to legal issues concerning the documents and (2) the bank does not charge a separate fee for the preparation of the mortgage documents. The issue in *Condra* was whether Charter One's charging a fee made its conduct the unauthorized practice of law.

Charter One argued that (1) OCC regulations specifically authorized it to charge "non-interest charges and fees" and (2) this specific authorization preempted the Indiana law at issue.

The Indiana Court of Appeals rejected that argument, stating the Indiana law at issue did not prohibit the bank from imposing non-interest charges. Rather, it merely required that if the bank wanted to impose such fees, then it needed to have a licensed attorney prepare the documents. The court stated that its decision also was supported by an exception in the OCC regulations permitting the states to regulate laws relating to the acquisition and transfer of real property provided that those laws only incidentally affected the exercise of a national bank's real estate lending powers. ■

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