LENDERS UPDATE™

A MONTHLY SERVICE TO THE MORTGAGE LENDING INDUSTRY

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The purpose of the Lenders Update is to provide a "heads-up" of new legislation and regulations affecting the mortgage lending industry. We try to provide brief summaries of new matters so our readers can judge whether the subject impacts their operations. We recommend that our readers review the entire new material in detail where relevant. For your convenience, the applicable statute, regulation or cases can be easily identified in the summary. Our Update includes changes in legislation available to Alt & Associates by March 15, 2005

NATIONAL ISSUES

FHA CREDIT WATCH TERMINATION

The Department of Housing and Urban Development finalized, and published in the Federal Register, its final rule amending 24 CFR §§202.3(c)(2) and 202.3(e). The final rule implements an interim rule initially published by HUD on December 17, 2004. As most people involved with HUD programs now know, a lender who has excessive claim rates or defaults, may be placed on a credit watch by HUD and ultimately have its HUD approval terminated.

FHA DEREGULATES CLOSING COSTS

On **January 27, 2006**, the Fair Housing Administration issued its Mortgagee Letter 2006-04. The purpose of the letter is to terminate FHA's specific limitations on closing costs collected from borrowers in FHA loans. Now the rule is, lenders can charge borrowers customary and reasonable costs. Customary fees such as underwriting fees may be allowed. Please be aware that third party charges are still limited to "actual" third party charges with no mark-up.

STATE ISSUES

CALIFORNIA

As we have previously reported, Senate Bill 833 regarding the use of unsolicited faxes in California has been under Court review. Now, a Federal District Court in Sacramento has upheld the law to the extent that it bans unsolicited faxes within the state. However, the Court found that the portion of the law that bans faxes sent outside the state was preempted by Federal law. The Court found that SB 833 "suffers from constitutional infirmity with respect to its interstate reach, the protections afforded California consumers for intrastate facsimile transmissions remains inviolate."

Therefore, California SB 833, now makes it unlawful for a person or entity , if located in California and/or if the recipient is located in California, to use any device to send, or cause any other person or entity to use a device to send, an unsolicited advertisement to a telephone facsimile machine.

"Unsolicited Advertisement" means any material advertising the commercial availability or quality of any property, goods, or services that is transmitted to any person or entity without that person's or entity's prior express invitation or permission. Prior express invitation or permission may be obtained for a specific or unlimited number of advertisements and may be obtained for a specific or unlimited period of time.

The statute was originally drafted to include any solicitation from California to parties out of state. However, as indicated above, the Court has found this specific provision of SB 833 unconstitutional. There may be further litigation concerning this issue.

In addition, the statute requires that the facsimile must contain, in the margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of the business, other entity, or individual.

A violation of this provision entitles the violated party to injunctive relief against further violations and actual or statutory damages of $500 per violation, whichever amount is greater. If a court finds that a defendant willfully or knowlingly violated this subdivision, the court may, in its discretion, increase the amount of the award to an amount equal to not more that three times the amount otherwise available.

INDIANA

On January 19, 2006, the state of Indiana adopted new regulations effective **February 18, 2006** relative to loan brokers. As we know brokers, as well as loan originators, in Indiana are required to be licensed under the Loan Broker's Act. Certain exemptions exist for HUD, Fannie Mae, VA or Freddie Mac approved companies.

The new regulations are identified as 710 IAC 1-22 et seq. Among the numerous changes are the following:

- Indiana now defines a "loan broker" to include an entity utilizing the Internet to collect information from potential borrowers and submitting that to lenders to make decisions as to whether to make the loan to those potential borrowers.
- Originator, means any person who has access to that information.
- Origination activities do not include;
    - filing or collation of paperwork,
    - receptionist duties in which no loan terms or conditions are communicated either to or with borrowers or prospective borrowers,
- An originator must be an employee of a loan broker and cannot be an independent contractor.
- Brokers may only pay fees to originators as employees of the loan broker.

- With each initial license application, and with each subsequent renewal, loan brokers must submit a separate registration form for each originator employed by that loan broker. Originators may not be registered by more than one loan broker licensee.
- When an originator is terminated, the loan broker must return the originator's original registration documents to the securities division within 5 business days.
- A loan broker must conduct an investigation of each applicant for origination registration. This must include a criminal records check based on the fingerprints of the applicant as well as a civil records check.
- For purposes of education requirements, only live instruction courses are acceptable for broker and originator licensing or registration. The regulation sets out a comprehensive list of instruction courses that must be completed by each applicant for an initial or renewal license or certificate of registration.
- At or before the time an application for a loan is made to a loan broker, the loan broker shall enter into a separate, signed and written loan broker agreement with the potential borrower. The regulation again provides a comprehensive list of the topics to be included in this agreement.
- Finally, in connection with the application for credit and on behalf of the borrower, certain fees may be collected before the closing of the loan:
    - appraisal fees,
    - credit report fees,
    - title examination or title insurance fees, and
    - other bona fide third party fees actually and reasonably paid on behalf of the borrower.

NEW JERSEY

For purposes of the New Jersey Home Ownership Security Act of 2002, the annual adjustment to the amount of a "High-Cost" loan was announced by the New Jersey Department of Banking. The maximum principal amount is now $383,682.60. The applicable loan amount in 2005 was $365,674.13.

MARYLAND

We have previously reported on the Montgomery County Discriminatory Lending Law which has effects similar to anti-predatory lending laws.

On March 7, 2006 a Montgomery County Circuit judge issued an injunction delaying the effective date of this new law, local ordinance 36-04. A hearing on the merits of the lawsuit, in which the American Financial Services Association is the plaintiff, was scheduled for July 6, 2006. The ordinance is delayed from implementation until the hearing.

On a related matter, the Office of Thrift Supervision has issued its opinion concerning the ordinance. Not surprisingly, the OTS states that Federal law preempts the application of the ordinance to federal savings associations. The OTS believes that the ordinance will infringe on the mortgage lending activities of federal savings associations.

SOUTH DAKOTA

On **February 21, 2006** South Dakota's Governor signed into law Senate Bill 133. The new law states that, in addition to the finance charge, a creditor may contract for certain additional charges in connection with an Installment Sales Contract if the charges are itemized and disclosed to the buyers. The new allowable charges are as follows:

- Office fees and taxes;
- Charges for guaranteed asset protection waivers, or credit life, accident, health, loss of income, property, or liability insurance, provided such insurance is optional and the consumer is so informed in writing, and
- Charges for debt cancellation contracts and debt suspension contracts under certain conditions.

WASHINGTON

Washington HB 2340 became effective **January 1, 2007** with new amendments to the Broker Practices Act.

There are five major changes under this new broker law:

- As of January 1, 2007 all loan originators must be licensed. To obtain a license, loan originators must take an examination and must thereafter meet annual continuing education requirements.
- The new broker act significantly expands individual liability for designated brokers and owners who have supervisory authority. Under the new act, a designated broker or owner who has supervisory authority can be held liable for the actions of the company, as well as the actions of its employees and independent contractors. According to the words of the act, a designated broker or owner with supervisory authority can be held liable if "*by the exercise of reasonable care and inquiry*" such person "*should have known of the conduct, at a time when its consequences can be avoided or mitigated and fails to take reasonable remedial action.*" The act authorizes the Director to impose fines, order restitution or deny, suspend, or revoke a license for violations of the act.
- In keeping with the trend of increased liability, the scope of the act has been expanded to include non-broker business activity and lists many additional federal laws and regulations with which a licensee must comply. By expanding the scope of the act to include non-broker business activity, all licensee activities, including non-loan related activities, could be subject to violation under the act. Some of the additional federal laws listed under the act are the Gramm-Leach-Bliley Act, the Home Mortgage Disclosure Act (HMDA), the Telemarketing and Consumer Fraud and Abuse Act, and the Federal Trade Commission Telephone Sales Rule.
- Under the new act, the Washington Department of Financial Institutions may conduct an audit during the first 5 years of licensing, as opposed to only the first 2 years of licensing under the old act.
- The new act closes the "loophole" that some Consumer Loan Companies were using to avoid regulation. Under the new act, a Consumer Loan licensee is only exempt from the Broker Practices Act if it is doing business under the Consumer Loan Act. By creating an exemption for Consumer Loan licensees only if they are doing business under the Consumer Loan Act, the new Broker Practices Act ensures that these companies are regulated, thus closing the "loophole" that originally allowed CLA licensees to make

loans with rates under 12% APR, then claim the CLA exemption from broker licensing, and then, arguably, be otherwise unregulated.

WISCONSIN

On **March 14, 2006**, the Governor signed into law Wisconsin AB 456. The new statute provides that prepayment penalties may not be included in variable rate loans unless:

- The lender makes variable rate loans without prepayment penalties and the lender provides the borrower a written statement that the lender makes these alternative loans,
- The borrower acknowledges at the time of the loan offer, receipt of the disclosure relative to available variable rate loans without prepayment penalties,
- The penalty is limited in application to a prepayment that is made within 3 years of the date of the loan, and
- The prepayment is not made in connection with the sale of a dwelling or mobile home securing the loan.