Mortgage Banking Update

PATTON BOGGS LLP | March 28, 2011

Powered by Patton Boggs' Mortgage Banking Team

IN THIS ISSUE:

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MORTGAGE CALL REPORT REQUIREMENTS

Join us for a Webinar on April 7, click here for registration information.

Beginning in May 2011, state mortgage licensees will be expected to comply with Mortgage Call Report submission requirements under the Federal Secure and Fair Enforcement for Mortgage Licensing Act (SAFE) Act and state SAFE Act statutes. Patton Boggs is hosting a complimentary webinar to explain and clarify the Mortgage Call Report preparation and submission process. Our panelists will also offer guidance on best practices for reporting and will assist licensees with navigating the submission process. We'll also examine how the Call Reports will be used by various regulatory agencies.

Panelists include:

- Haydn Richards, Associate, Patton Boggs LLP (moderator)
- Tim Lange, Senior Director, Policy with the Conference of State Bank Supervisors
- Rich Cortes, Principal Financial Examiner, Connecticut Department of Banking
- Tracy Hudson, Director, Nondepository Institutions, West Virginia Division of Banking

Title:	Mortgage Call Report Requirements
Date:	Thursday, April 7, 2011
Time:	2:00 PM - 3:30 PM EDT

After registering you will receive a confirmation email containing information about joining the Webinar.

"SKIN IN THE GAME": AGENCIES ANNOUNCE PROPOSED SECURITIZER RISK RETENTION RULES

The Office of the Comptroller of the Currency, the Federal Reserve, the Federal Deposit Insurance Corporation, the U.S. Securities and Exchange Commission, the Federal Housing Finance Agency and the Department of Housing and Urban Development (the Agencies), have released a joint proposed rule (Proposal or Proposed Rule) requiring certain financial institutions to retain a portion of the credit risk of the assets collateralizing securities. The Proposed Rule implements section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). It is intended to align the interests of the securitizer with those of the investor by providing securitizers with a direct incentive to monitor and ensure the quality of the underlying assets.

Generally, the Proposed Rule requires that a "sponsor" retain a base risk retention - an economic interest equal to at least five percent of the aggregate credit risk of the assets collateralizing an issuance of asset backed securities (ABS). The term "sponsor" includes any person who organizes and initiates a securitization transaction by selling or transferring assets, either directly or indirectly, to the issuing entity.

Exemption for Qualified Residential Mortgages

The Proposed Rule provides that a sponsor is exempt from the risk retention requirements with respect to any securitization transaction if all of the securitized assets collateralized are qualified residential mortgages (QRM). The proposal defines the term narrowly. Among other provisions, a mortgage could qualify as a QRM only if:

- the borrower pays at least a 20 percent down payment (the proposal imposes a combined LTV ratio cap for the QRMs of 75 percent on rate and term refinance loans and 70 percent for cash-out refinance loans);
- the borrower was not currently 30 or more days past due on any debt obligation and the borrower had not been 60 or more days past due on any obligation within the preceding 24 months, been a debtor in a bankruptcy proceeding, had property repossessed or foreclosed upon, engaged in a short sale or deed-in-lieu of foreclosure, or been subject to a federal or state judgment for collection of any unpaid debt within the preceding 36 months;
- the loan does not include negative amortization, interest-only features, or permit significant interest rate increases, which is defined as exceeding (a) two percent in any 12 month period; or (b) six percent over the life of the loan; and
- the borrower meets front-end and back-end debt-to-income ratios of 28 percent and 36 percent respectively.

Notably, loans made under several programs, such as FHA, VA, RHS and Farm Credit, as well as loans included in Fannie Mae and Freddie Mac securitizations (while these entities are in conservatorship), are exempt from the proposed QRM requirements.

Interestingly, although Dodd-Frank expressly provides for it, the Proposed Rule does not address the creation of a class of mortgages that are not QRMs but qualify for risk retention of less than 5 percent.

Permissible Forms of Risk Retention

The Proposed Rule sets forth permissible forms of risk retention, including disclosure requirements tailored to each permissible form of risk retention. The requirements are intended to provide investors with material information regarding the amount and form of risk actually retained and will include the assumptions used in determining the aggregate value of ABS to be issued. Among others, the following are proposed permissible forms of risk retention.

<u>Vertical Risk Retention</u>

Under this approach, a sponsor may satisfy its risk retention requirements by retaining at least five percent of each class of ABS interests issued as part of the securitization transaction, regardless of the nature of the class and regardless of whether the class of interests has a par value, was issued in certificated form or was sold to unaffiliated investors. A sponsor electing this approach must provide investors with the amount (expressed as a percentage and a dollar amount) of each class of ABS interests in the issuing entity that the sponsor will retain (or did retain) at closing as well as the amount (expressed, again, as a percentage and dollar amount) that the sponsor is required to retain under the proposed rules.

Horizontal Risk Retention

Under this approach, a sponsor may satisfy its risk retention requirements by retaining an amount that is equal to at least five percent of the par value of all ABS interests in the issuing entity that are issued as part of the securitization transaction (exposing the sponsor to the credit risk of the entire pool of securitized assets). A sponsor electing this approach would be deemed to hold a “first-loss” position and could not be reduced in principal amount (other than through the absorption of losses) more quickly than more senior interests. In such position, the sponsor therefore remains available to absorb losses on the securitized assets. This sponsor would not receive any payments of principal made on a securitized asset (however, it may receive its proportionate, contracted-for share of scheduled payments of principal received on the securitized assets).

Similar to the vertical slice risk retention option, a sponsor electing this approach must provide investors with the amount of the eligible horizontal residual interest that will be retained by the sponsor at closing, the amount of the interest required to be retained by the sponsor in connection with the securitization transaction, and a description of the material terms of the interest (when such interest is allocated losses, may receive payments, material assumptions, methodologies used in determining the aggregate dollar amount of ABS interests, etc.), including those pertaining to any estimated cash flows and the discount rate used.

The proposal also includes a hybrid option, identified as L-shaped risk retention, and various other options tailored to specific securitizations such as commercial real estate loans (where such loans constitute at least 95 percent of the unpaid principal balance of the assets being securitized), revolving lines of credit, automobile loan securitizations, commercial paper securitizations, and the like.

The proposal is expected to be published in the Federal Register later this week. The full text of the Proposed Rule may be found here.

The Agencies are accepting public comment through June 10, 2011.

AMERICAN BANKERS ASSOCIATION PETITIONS FED FOR LO COMP RULE DELAY

The American Bankers Association (ABA) has submitted a letter to Federal Reserve Board Chairman Bernanke requesting a 90 day delay to the implementation of the TILA loan officer compensation rule. The ABA makes clear that it supports efforts to curb abusive practices, but that additional time is needed in order to further process the latest Fed guidance, and to obtain written and formal guidance from the Fed.

HUD RESPONDS TO FDIC’S REQUEST FOR COMMENT ON APPLICABILITY OF RESPA TO INSTANCES WHERE MORTGAGE LENDERS UTILIZE REPURCHASE FACILITIES

As reported in our November 29, 2010 Mortgage Banking Update, the United States Department of Housing and Urban Development (HUD) published in the Federal Register a Solicitation of Information on Changes in Warehouse Lending and Other Loan Funding Mechanisms (Notice). The Notice was in response to an inquiry from staff at the Federal Deposit Insurance Corporation (FDIC) as to how HUD would analyze coverage under the Real Estate Settlement Procedures Act (RESPA) when a mortgage lender obtains the funds to close a mortgage loan through a financing arrangement with a warehouse lender that involves a repurchase agreement.

In its March 11, 2011 letter to the FDIC, HUD advised that it has determined that a warehouse lending arrangement that involves a repurchase agreement "is not materially different from other forms of warehouse lending for purposes of analysis under RESPA."

In explaining its position in the letter, HUD first defined a "repurchase agreement" as a "contractual arrangement among distinct, unaffiliated entities, under which the mortgage lender agrees to sell a mortgage loan to an investor but uses the repurchase agreement with a warehouse lender as a financing mechanism." HUD also assumes that such agreements include "an absolute and unconditional obligation requiring the mortgage lender to repurchase the mortgage loan from the warehouse lender within a short period from the time that the warehouse lender provides financing, whether or not a default occurs."

Based on these assumptions, HUD advised that it will apply its RESPA regulations on "table funding" and "secondary market transactions," as set forth at 24 C.F.R. § 3500.2 and 24 C.F.R. § 3500.5(b)(7), respectively, in the same manner for a repurchase agreement as it would for a traditional warehouse line of credit.

Importantly, HUD also noted that:

- it will "look at whether the parties actually comply with the repurchase obligation requirement in the agreement, to assure that the agreement is not illusory."
- it "makes RESPA enforcement determinations based upon factual circumstances surrounding the transaction, including analysis under the RESPA statute and HUD's regulations of the real interests and functions of the parties to the financing arrangement, particularly when any arrangement involves an affiliate relationship or the warehouse lender directly or indirectly controls the activities of the mortgage lender."

NEW SEC REGISTRATION REQUIREMENTS FOR FUND MANAGERS

Among the many changes brought about by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), are new rules flowing from Title IV, the Private Fund Investment Advisers Registration Act of 2010. The Dodd-Frank Act will have a significant impact on advisers to private funds (including fund managers and general partners), many of whom will become subject to Securities and Exchange Commission (SEC) registration, recordkeeping and/or reporting requirements under the Investment Advisers Act of 1940 (the Advisers Act). The Dodd-Frank Act eliminates the exemption which has been historically relied upon by most fund managers to avoid SEC registration – the "private adviser exemption" contained in section 203(b)(3) of the Advisers Act. The private adviser exemption exempted an investment adviser from registration if it (i) had fewer than 15 clients in the preceding 12 months, (ii) did not hold itself out to the public as an investment adviser and (iii) did not act as an investment adviser to a registered investment company (e.g., a mutual fund) or a business development company.

Prior to the Dodd-Frank Act, an adviser to private funds (i.e., a fund manager or general partner) was generally exempt from SEC registration so long as 14 or fewer private funds (i.e., "3(c)(1)" or "3(c)(7)" funds) were advised, since each private fund, as opposed to the investors in each fund, counted as a single client. Private fund managers who previously relied on this exemption will now be required to register with the SEC under the Advisers Act if they have more than $100 million of aggregate assets under management, unless they qualify for an exemption from registration. If a fund manager is not able to avail itself of one of the new exemptions, it must be registered with the SEC by July 21, 2011, the effective date of these new provisions of the Dodd-Frank Act. Fund managers required to register are advised to complete and file their Form ADV by late May in order to ensure an effective registration by the July 21 deadline.

The Dodd-Frank Act creates new exemptions from registration and/or exclusions from the definition of an investment adviser under the Advisers Act upon which a fund manager may be able to rely:

- advisers who solely advise private funds and who have less than $150 million in aggregate assets under management (AUM) in the United States;
- advisers solely to venture capital funds;
- advisers solely to small business investment companies (SBICs);
- non-U.S. advisers with less than $25 million in aggregate AUM from U.S. clients and private fund investors having fewer than 15 such clients and investors; and
- family offices.

In October and November of 2010, the SEC proposed new rules to implement certain provisions of the Dodd-Frank Act. However, final rules have not yet been released. The SEC's proposed rules implement the statutory exemptions and exclusions described above. Fund managers who are able to rely on the $150 million threshold exemption or venture capital fund exemption should note, however, that they will nevertheless be subject to SEC reporting requirements, and will be required to file a subset of Form ADV no later than August 20, 2011.

Additional information concerning the new regulatory framework, the new registration and reporting requirements and the SEC's proposed rules can be found on our website. Our original client alert describing the changes in this area brought about by the Dodd-Frank Act can be found here, and our most recent client alert summarizing the SEC's proposed rules can be found here. For more information please contact Kevin Boardman, a partner in our Private Capital and Investment Funds practice group, at (214) 758-3570 or kboardman@pattonboggs.com.

FREDDIE MAC ISSUES BULLETIN REVISING SERVICING REQUIREMENTS

On March 23, 2011, Freddie Mac issued Bulletin 2011-5: Servicing (Bulletin) amending its servicing requirements. Among other provisions, Freddie Mac has modified its Single-Family Seller/Servicer Guide (Guide) to include changes related to conducting a foreclosure on a mortgage registered with Mortgage Electronic Registration Systems, Inc. (MERS), foreclosure sale postponements, foreclosure and bankruptcy referrals and requirements for servicer interaction with state Housing Finance Agencies (HFAs). Unless otherwise noted, these changes are effective immediately.

MERS Foreclosures Prohibited

Perhaps the most dramatic announcement is that relating to servicer interaction with MERS. Effective April 1, 2011 (Effective Date), the Bulletin prohibits servicers from foreclosing in the name of MERS for mortgages that are referred to foreclosure on or after the Effective Date. Instead, servicers must prepare an assignment of the relevant security interest from MERS to the servicer. Thereafter, the servicer must foreclose in its own name and then take title in Freddie Mac's name. Finally, as is presently required in the Guide, the servicer must record the prepared assignment where required by law. State recording fees will remain the servicer's obligation. Such fees may not be charged to Freddie Mac, are not considered part of the Freddie Mac allowable attorney fees and may not be billed to the borrower.

Foreclosure Sale Postponements Limited

The Bulletin limits the circumstances under which services may postpone foreclosure sales. Servicers are now permitted to postpone foreclosure sales so long as (1) such sale is handled by designated counsel and (2) the newly scheduled foreclosure sale is within Freddie Mac's stated foreclosure timeline. If, instead, circumstances exist that would result in the servicer's inability to foreclose within this stated timeline, then the servicer is required to obtain Freddie Mac's prior written approval in order to postpone the foreclosure sale. The revised Guide includes a description of the information Freddie Mac requires to evaluate such requests.

Additional Requirements for Foreclosure and Bankruptcy Referrals

With respect to foreclosure and bankruptcy referrals, the Bulletin prohibits servicers from (1) charging Freddie Mac, trustees or attorneys for servicing obligations compensated by the servicing spread, (2) making arrangements with attorneys or trustees whereby the servicer receives any financial or other benefits, directly or indirectly, from the attorneys or trustees, (3) requiring attorneys or trustees to use specified vendors, outsourcing companies, and the like (except for connectivity and invoice-processing systems used by the servicer), and (4) allowing service providers, vendors, outsourcing companies or others to influence the selection of foreclosure counsel and trustees. Freddie Mac reserves the right to exercise various remedies, including refusing to reimburse the servicer for attorney and trustee fees, for non-compliance.

Revised Requirements for Servicer Interaction with Housing Finance Agencies

Finally, the Bulletin enacts new requirements for servicer interaction with Housing Finance Agencies (HFAs) that provide mortgage assistance, such as unemployment mortgage assistance and subsidy and mortgage reinstatement programs, to borrowers. The Bulletin, among other provisions: (1) eliminates various documentation requirements, including the requirement for servicers to obtain a copy of the HFA approval letter, note, mortgage or other agreement describing the terms of financial assistance provided to the borrower; and (2) revises the requirement (for borrowers enrolled in an unemployment mortgage assistance program) that servicers notify the HFA of changes to the borrower's monthly payment amount at least 45 days prior to that change to include an alternative which allows the servicer to instead provide such notice pursuant to a written agreement between itself and the HFA.

The full text of the Bulletin may be found here.

DID YOU KNOW?

- **Indiana Extends Loan Modification Licensing Deadline**
  The Indiana Department of Financial Institutions has amended its regulations such that individuals who conduct loan modification and/or loss mitigation efforts on behalf of their mortgage servicer employers and who do not conduct those activities outside the scope of their employment will not be required to be individually licensed until July 1, 2012.
- **Virginia Exempts Housing Counselors**
  Effective July 1, 2011, Virginia law will be amended such that a mortgage loan originator license will not be required for individuals who assist borrowers that are in default or in foreseeable likelihood of default on a residential mortgage loan by offering or negotiating the terms of such loan, who do not otherwise engage in those activities, and who are employed by housing counseling organizations that are certified or approved by the United States Department of Housing and Urban Development.

LOOKING AHEAD:

MBA's National Technology in Mortgage Banking Conference & Expo 2011
"Regulatory Deep Dive"
Hollywood-Ft. Lauderdale, FL
March 28, 2011
3:00 p.m. - 4:15 p.m. ET
Patton Boggs Participant: **Richard Andreano**

ABA Real Estate Lending Conference
TILA & RESPA Update
Baltimore, MD
April 10 - 12, 2011
3:15 p.m. - 4:30 p.m. ET
Patton Boggs Participant: **Richard Andreano**

Housing Wire's REThink Symposium
“Dodd-Frank and The New Regulatory Regime”
Pinehurst, NC
May 10, 2011
8:45 a.m. - 10:00 a.m. ET
Patton Boggs Participant: **Michael Waldron**

Legal Issues and Regulatory Compliance Conference 2011
Boca Raton, FL
May 15-18, 2011
Patton Boggs Participants: **Richard Andreano** | **John Socknat** | **Michael Waldron** |**Haydn Richards** | **Heather Hutchings** | **Reid Herlihy** | **Jaynacia Abraham**

Richard Andreano will be participating in two events during the conference. On May 16 from 1:30 p.m. to 2:45 p.m., and May 18th from 8:30 a.m. to 10:15 a.m., he will take part in the "Regulatory Panel 2: New Challenges in Loan Originator Compensation Requirements," and on May 16 from 4:45 p.m. to 5:45 p.m., he will participate in the "Loan Originator Compensation Roundtable." John Socknat will be participating in “Workshop 3: State Law Developments” on May 15 from 2:45 p.m. - 3:45 p.m.

California Land Title Association 104th Annual Convention
The Changing Regulatory Landscape: The New Bureau of Consumer Financial Protection (CFPB) and its impact on Lender and Settlement Agent Practices
Napa, CA
May 23, 2011
9:00 a.m. – 10:00 a.m. PT
Patton Boggs Participant: **Richard Andreano**