

InfoBytes

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Federal Issues

CFPB Releases First Edition of Supervision and Examination Manual. On October 13, the Consumer Financial Protection Bureau (CFPB) released the first edition of its Supervision and Examiners Manual. The manual is intended to be used by CFPB examiners to monitor the compliance with federal consumer financial laws by banks, thrifts, credit unions and non-depository companies that provide consumer financial products and services. The manual incorporates examination procedures developed under the auspices of the Federal Financial Institutions Examination Council (FFIEC) for many of the laws now generally enforced by the CFPB, including TILA, RESPA, ECOA and the FCRA. The manual also will include procedures for examinations of specific business lines. The initial edition of the manual includes procedures for examination of mortgage servicing activities of covered institutions. As described in the manual, CFPB examiners will work to assess compliance with federal consumer financial laws, obtain information about activities and compliance systems or procedures, detect and assess risks to consumers and to markets for consumer financial products and services, coordinate with other federal and state regulators, and use, where possible, publicly available information and existing reports to federal or state regulators when examining institutions. [Click here for a copy of the manual.](#)

FRB Requests Public Comment on Implementation of Volcker Rule. On October 11, the Federal Reserve Board (FRB) announced that it is seeking public comments on a proposed regulation implementing the "Volcker Rule" requirements of section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 619 prohibits banking entities, subject to certain exemptions, from (i) engaging in short-term proprietary trading of any security, derivative, and certain other financial instruments for a banking entity's own account, (ii) owning, sponsoring, or having certain relationships with, a hedge fund or private equity fund, (iii) engaging in an exempted transaction or activity if it would involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties, or that would result in a material exposure to high-risk assets or trading strategies, and (iv) engaging in an exempted transaction or activity if it would pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States. Exempted activities include market making, underwriting, risk-mitigating hedging, and organizing, offering, and investing in a hedge fund or private equity fund subject to a number of conditions. The proposed rule imposes federal reporting requirements on banking entities with significant trading operations. The

proposed regulation, which was developed jointly by the FDIC, OCC, SEC and CFTC would require banking entities that engage in exempted activities to establish an internal compliance program to ensure and monitor compliance with the statute's prohibitions, restrictions, and implementing regulations. The deadline for comments is January 13, 2012. [Click here for a copy of the press release.](#) [Click here for a copy of the proposed rule.](#)

SEC Issues Guidance on Disclosure of Cybersecurity Risks. On October 13, the Securities and Exchange Commission's Division of Corporate Finance (Division) released CF Disclosure Guidance: Topic No. 2 - Cybersecurity, which outlines the Division's views regarding the criteria that publicly held companies should consider in determining what disclosures of cybersecurity risks should be made. The Guidance indicates that companies should weigh several risk factors including the history, probability and severity of incidents and the adequacy of measures taken to mitigate risks for actual or threatened attacks to determine the materiality of the risk and the resulting need to disclose. The Guidance further addresses the specific locations in annual reports and financial statements that certain cyber risk issues should be disclosed. While the Division notes that some incidents may call for greater factual disclosures, there is no requirement that a company provide a "roadmap" to those who may attempt to infiltrate its computer systems. [Click here for a copy of the announcement and guidance.](#)

FRB Requests Comments on Proposed Simplifications to Regulations D and J. On October 11, the Federal Reserve Board requested comments on proposed changes to Regulation D and Regulation J that will simplify the administration of reserve requirements and reduce administrative and operational costs for depository institutions and reserve banks. The proposed simplifications to Regulation D will create a common two-week maintenance period for all depository institutions, create a penalty-free band around reserve balance requirements, discontinue as-of adjustments related to deposit revisions, replace all other as-of adjustments with direct compensation, and eliminate the contractual clearing balance program. The proposed simplifications for Regulation J will eliminate references to as-of adjustments and clarify the handling of checks and funds transfers sent to the Federal Reserve Banks. Comments on the proposal are due within 60 days from the date of publication in the *Federal Register*. [Click here for a copy of the press release regarding the request for comment.](#)

Courts

Supreme Court to Review RESPA Section 8(b) Decision. On October 11, the United States Supreme Court granted a petition for a writ of certiorari in order to resolve whether unearned, unsplit fees violate Section 8(b) of the Real Estate Settlement Procedures Act (RESPA). *Freeman v. Quicken Loans, Inc.*, No. 10-1042 (U.S.). RESPA Section 8(b) provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." In *Freeman* (as reported in [InfoBytes, Oct. 7, 2011](#)), the United States Court of Appeals for the Fifth Circuit held that this provision prohibits the acceptance of unearned fees only when those fees are divided with a culpable third party, as in a kickback arrangement. That decision comports with decisions in the Fourth, Seventh, and Eighth Circuits. On the other hand, the Second, Third and Eleventh Circuits have held that the provision also applies to unearned fees retained by a single person. [Click here for details and case status.](#)

U.S. District Court Dismisses MERS Multi-District Litigation. On October 3, the United State District Court for the District of Arizona dismissed seventy-two cases in a multi-district litigation (MDL) action related to the formation and operation of Mortgage Electronic Registration Systems, Inc. and MERSCORP, Inc. (collectively,

MERS). The plaintiff borrowers in the consolidated actions claimed, among other things, that MERS' system is so defective that the underlying mortgage loans are unenforceable when MERS is listed as a beneficiary in the Deeds of Trust. Plaintiffs also alleged that the various participants in MERS formed a conspiracy to commit fraud and that the foreclosures were inappropriate due to MERS' presence as a party. The court disagreed. The court found that (i) MERS' role as a beneficiary was proper, (ii) the loans did not become unsecured because of a "split" between the holder of the promissory notes and the beneficiary of the deeds of trust, (iii) the MERS assignments were proper; (iv) MERS and MERS-appointed trustees have the power to foreclose; and (v) the plaintiffs were not injured by MERS and lacked standing to challenge the assignments. The court stated that "[a]s specifically agreed to by the Plaintiffs in their Deeds of Trust, MERS holds legal title to the secured interests and is the beneficiary or lienholder of record, as nominee or agent for Plaintiffs' lenders and the lenders' successors and assigns." Accordingly, the court dismissed the MDL action in its entirety with prejudice. [Click here for a copy of the opinion.](#)

State Common Law Claim for False Credit Reporting Preempted by FCRA. On October 3, the U.S. Court of Appeals for the Seventh Circuit ruled that the Fair Credit Reporting Act (FCRA) preempts any state common law claims relating to the filing of false credit reports. *Purcell v. Bank of America*, No. 10-3975 (7th Cir. Oct. 3, 2011). In this matter, the borrower sued Bank of America (BoA) after BoA allegedly falsely reported to the credit reporting agencies that she was delinquent on her loan payments. The borrower brought a claim under section 1681s-2(a) of FCRA and state law claims based on willful or malicious false filings. The FCRA claim was dismissed by the district court because that section did not provide a private right of action. The district court also dismissed the borrower's state law claims without prejudice, allowing them to be refiled in state court. Despite BoA's claims of FCRA preemption of the state law claims, the district court interpreted the provisions of §1681t(b), which provides that "no requirement or prohibition may be imposed under the laws of any State - (1) with respect to any subject matter regulated under...(F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies,..." to refer only to claims arising under state statutes, and not under state common law, regulations, judicial and administrative decisions. The Court of Appeals disagreed and in invoking *Erie R.R. v Tompkins*, 304 U.S. 64 (1938) held that "state 'laws' comprise all sources of legal rules, including judicial opinions." FCRA thus preempted the borrower's state law claims and as such BoA was entitled to dismissal with prejudice. [Click here for a copy of the opinion.](#)

Firm News

[Margo Tank](#) will be a presenter at a webinar entitled "E-Signatures for Financial Services Legal Counsel" on October 20 at 1 PM ET. To register for the free 90-minute presentation, [click here.](#)

[Benjamin Klubes](#) will be moderating a panel titled, "The Path Ahead for Housing Finance: Just Changing Lanes or Time for a New Road?" at George Washington University Law School's "Dodd-Frank's Future Direction: On Course or Off Track" symposium on October 21. BuckleySandler is a sponsor for this symposium.

[Benjamin Klubes](#) will be speaking at the ACI's 7th Annual Forum on Preventing, Detecting and Resolving Mortgage Fraud from October 24-25 in Washington, DC. Mr. Klubes' session is entitled: "The New and Complex World of HUD/FHA Lending Requirements: Using Lessons Learned from Investigations of Cases by the Agencies to Avoid Costly Penalties, Including Expulsion from the Program".

[Jonice Gray Tucker](#), [Robyn Quattrone](#), and [Liana Prieto](#) will be speaking at the Women in Housing & Finance Regulatory Taskforce Lunch in Washington, D.C. on October 25. Their presentation will focus on the current state of the Consumer Financial Protection Bureau including its structure, rulemaking efforts, and anticipated regulatory and enforcement priorities.

[Jerry Buckley](#) will participate in a panel discussion on Dodd Frank, the Settlement activities and related items at the FocusPoints Conference in Orlando Florida on October 26. the conference is sponsored by QBE First.

[Jonice Gray Tucker](#) will be speaking at the Fall Meeting of the ABA Banking Law Committee in Washington, D.C. on November 4. Ms. Tucker will be discussing enforcement trends related to mortgage servicing.

[Andrew Sandler](#) and [Benjamin Klubes](#) will be speaking at the 15th Annual CRA & Fair Lending Colloquium which will be held in Baltimore, Maryland from November 6-8, 2011. Mr. Sandler will be addressing "Hot, Hot, Hot Compliance Topics: Reform Impact, Oversight Trends, Enforcement Actions and More!" on November 7. Mr. Klubes will be moderating a panel on "Non-Mortgage Lending: The Fair Lending Dragon is Breathing Fire" on November 8. For further details on the colloquium please see www.cracolloquium.com.

[Margo Tank](#) and [John Richards](#) will participate in the ESRA Fall Conference in Washington, D.C. on November 9 and 10. For details on registration, accommodations, and agenda, please see <http://esignrecords.org/events/>.

[David Krakoff](#) will be participating in a panel at the International Association of Defense Counsel program on worldwide anti-corruption laws in Palm Springs in February 2012.

Firm Publications

[Jonice Gray Tucker](#) and [Valerie Hletko](#) authored [Fair Lending Refocused: Loan Modification and Loss Mitigation Outcome Reviews](#), which was published in the September 2011 issue of *LexisNexis Emerging Issues*.

Banking

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We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes.

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