Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

April 26, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Proposes Changes to Qualified Mortgage and Mortgage Servicing Rules. On April 19, the CFPB proposed a rule to amend and clarify certain provisions of its final qualified mortgage rule and final mortgage servicing rule. The proposal addresses (i) preemption issues with regard to Regulation X's servicing provisions, (ii) the small servicer exemption from certain of the new servicing standards, (iii) the use of government-sponsored enterprise and federal agency purchase, guarantee, or insurance eligibility for determining qualified mortgage status, and (iv) the determination of debt and income for purposes of originating qualified mortgages. With regard to small servicers, the proposal would clarify which mortgage loans to consider in determining small servicer status and the application of the small servicer exemption to servicer/affiliate and master servicer/subservicer relationships. It would exclude from consideration mortgage loans voluntarily serviced for an unaffiliated entity without remuneration, reverse mortgages, and mortgage loans secured by a consumer's interest in timeshare plans. With regard to debt-to-income ratio assessments for purposes of offering qualified mortgages, the rule would amend language related to employment record and income, obtaining business credit reports and other issues related to self-employed borrowers, and the treatment of Social Security and rental income.

Federal Regulators Target Payday Loans, Deposit Advance Products. On April 24, the CFPB published a white paper on payday loan and deposit advance products that claims to show those products lead to a "cycle of high-cost borrowing." On April 25, the FDIC and the OCC proposed guidance relating to deposit advance products based on similar concerns. The CFPB paper reflects the results of what the CFPB characterizes as a year-long, in-depth review of short-term, small-dollar loans, which began with a January 2012 field hearing. Although it acknowledges that demand exists for small dollar credit products, that such products can be helpful for consumers, and that alternatives may not be available, the CFPB concludes that such products are only appropriate in limited circumstances and faults lenders for not determining whether the products are suitable for each customer. The CFPB paper does not propose any rule or guidance, but is instead intended to present a clear statement of CFPB concerns. The paper notes that a related CFPB study of online payday loans is ongoing. The FDIC and OCC proposed guidance outlines the agencies' safety and soundness, compliance, and consumer protection concerns about deposit advance products, and sets forth numerous expectations, including with regard to consumer eligibility, capital adequacy, fees, compliance, management oversight, and third-party relationships. For example, under the guidance the agencies would expect banks to offer a deposit advance product only to customers who (i) have at least a six month relationship with the bank, (ii) do not have any delinquent or adversely classified credits, and (iii) meet specific financial capacity standards. The guidance also would require, among other things, that (i) each deposit advance loan be repaid in full before the extension of a subsequent loan, (ii) banks refrain from offering more than one loan per monthly statement cycle and provide a cooling-off period of at least one monthly statement cycle after the repayment of a loan before another advance is extended, and (iii) banks reevaluate customer eligibility every six months.

CFPB Announces Organization, Senior Personnel Changes. On April 22, the CFPB announced the creation of the Office of Financial Institutions and Business Liaison, which will interface with bank and nonbank trade associations, financial institutions, and other businesses. The new office will be led by Dan Smith, who previously served as the Director for Industry and State Relations at Freddie Mac. The CFPB also announced that Catherine Galicia will serve as Assistant Director for Legislative Affairs. Ms. Galicia most recently served as Senior Counsel for the Senate Committee on Banking, Housing and Urban Affairs, where she helped draft the consumer protection provisions of the Dodd-Frank Act. She replaces Lisa Konwinski, who will become Deputy Associate Director for External Affairs. In addition, Hubert "Skip" Humphrey will transition from his role as Assistant Director in the Office of Older Americans to Senior Liaison Officer, focusing on expanding the Office's efforts to build strong working relationships with state, local, public and private organizations.

CFPB Issues Final Preemption Determination for Maine, Tennessee Unclaimed Gift Card Laws. On April 19, the CFPB issued a final preemption determination regarding whether the Electronic Fund Transfer Act (EFTA) and Regulation E preempt certain unclaimed gift card laws in Maine and Tennessee. The EFTA, as implemented by Regulation E, generally prohibits any person from issuing a gift certificate, store gift card, or general-use prepaid card with an expiration date, though under certain conditions, the card may have an expiration date so long as it is at least five years after the date of issuance (or five years after the date that funds were last loaded). The CFPB determined that the Maine law does not interfere with a consumer's ability to use a gift cards at point-of-sale for at least as long as guaranteed by the EFTA and Regulation E because it requires the issuer to honor the gift card on presentation indefinitely even if the unused value has been transferred to the state. For Tennessee, the CFPB reached the opposite conclusion because the Tennessee provision permits issuers to decline to honor gift cards as soon as two years after issuance. According to the CFPB, the Tennessee law is inconsistent with federal law because, in effect, the provision allows funds to expire sooner than is permitted under EFTA and Regulation E.

Senators Raise Concerns about CFPB's Data Collection. On April 23, the Senate Banking Committee held a hearing during which CFPB Director Richard Cordray testified on the CFPB's semiannual report to Congress. A substantial portion of the hearing focused on the CFPB's collection and use of data. Republican committee members led by Ranking Member Mike Crapo (R-ID) criticized the CFPB's data collection efforts and its developing ability to "watch" consumers, and questioned the CFPB's legal authority to collect data that could be reverse engineered to connect with specific consumers. Mr. Cordray explained that "big data" is the cutting edge of research in every field and that the CFPB needs to keep pace with financial institutions. According to Mr. Cordray (i) the CFPB's data are not connected to individuals (aside from complaint data) and are "anonymized", (ii) much of the data come commercial resources already accessible to firms, (iii) the CFPB obtains certain data from the same sources other regulators have in the past, and (iv) all of the data are essential to the CFPB's ability to carry out its congressionally mandated work, including rulewriting, reporting to Congress, and undertaking other studies. The hearing also covered numerous other topics including (i) the impact of CFPB's mortgage rules on small institutions, (ii) the CFPB's collection and assessment of consumer complaints, (iii) coordination of examinations and information requests among federal and state regulators, and (iv) the status of the CFPB's arbitration study, portions of which the CFPB may release this year.

House Committee Refuses to Allow CFPB Director to Appear. On April 22, House Financial Services Committee Chairman Jeb Hensarling (R-TX) sent letters to CFPB Director Richard Cordray and CFPB General Counsel Meredith Fuchs stating that the House Financial Services Committee cannot allow Director Cordray to testify on the CFPB's semiannual report, as the Committee has in the past, because no nominee for CFPB Director has been confirmed. Citing the D.C. Circuit's January 2013 decision in *Noel Canning v. NLRB*, which invalidated three presidential appointments to the NLRB, Mr. Hensarling asserted that "[a]bsent contrary guidance form the United States Supreme Court, Mr. Cordray does not meet the statutory requirements of a validly-serving Director" and the committee cannot legally accept testimony from him. Mr. Hensarling further indicated that the committee is not relinquishing its oversight role and expects the CFPB to make other employees and information available upon request. Committee Ranking Member Maxine Waters (D-CA) sent a letter one day later to the Chairman, stating that she will use the rules of the committee to allow Director Cordray to testify if the Chairman does not reverse his position.

SEC Fills Enforcement Director, General Counsel Positions. On April 22, the SEC announced that George Canellos and Andrew Ceresney will share responsibilities as co-directors of the SEC's Division of Enforcement. Mr. Canellos has been serving as Acting Enforcement Director since January. He previously had been the division's Deputy Enforcement Director since June 2012, prior to which he served as Director of the SEC's New York Regional Office. Mr. Ceresney previously served as a Deputy Chief Appellate Attorney in the United States Attorney's Office for the Southern District of New York, where he was a member of the Securities and Commodities Fraud Task Force and the Major Crimes Unit. Most recently, he was in private practice with recently-confirmed SEC Chairman Mary Jo White. On April 23, the SEC named Anne Small as General Counsel. Ms. Small is a former Special Assistant to the President and Associate Counsel in the White House Counsel's Office where she advised on legal policy questions with a focus on economic issues. She previously worked at the SEC as Deputy General Counsel for Litigation and Adjudication and now becomes the first woman to be named General Counsel.

Federal Authorities Announce FCPA Action, First SEC Non-Prosecution Agreement. On April 22, the DOJ and the SEC announced parallel actions against a clothing company to resolve allegations that a subsidiary of the company paid bribes to Argentine officials over a several-year period to obtain improper customs clearance of merchandise. The SEC action included the agency's first non-prosecution agreement (NPA) related to FCPA misconduct, which the SEC determined was appropriate given "the company's prompt reporting of the violations on its own initiative, the completeness of the information it provided, and its extensive, thorough, and real-time cooperation with the SEC's investigation." According to the SEC's NPA, the company's cooperation involved (i) reporting preliminary findings of its internal investigation to the staff within two weeks of discovering the illegal payments and gifts, (ii) voluntarily and expeditiously producing documents, (iii) providing English language translations of documents to the staff, (iv) summarizing witness interviews that the company's investigators conducted overseas, and (v) making overseas witnesses available for staff interviews and bringing witnesses to the U.S. The SEC agreement also required the company to pay over $700,000 in disgorgement and prejudgment interest, while the DOJ required the company to pay a nearly $900,000 penalty.

Financial Stability Oversight Council Releases 2013 Annual Report. On April 25, the Financial Stability Oversight Council (FSOC) met in an open session to announce the release of its 2013 Annual Report to the Congress. The Annual Report outlines the FSOC's views with regard to, among other things, (i) the need for housing finance reform to attract private capital to the housing finance system, (ii) increased awareness of operational risks, whether from cyberattack or acts of nature, and (iii) the importance of working with foreign counterparts to reform the governance and integrity of interest reference rates like LIBOR. FSOC Chairman and Treasury Secretary Lew also advised that the FSOC met in executive session to discuss its continuing analysis of non-bank financial companies and that he expects a vote on an initial set of systemically important designations of non-bank financial companies soon.

SEC Charges Bank for Understating Auto Loan Losses. On April 24, the SEC released an order charging a financial institution and two senior executives for allegedly understating millions of dollars in auto loan losses during the period leading up to the financial crisis. The SEC stated that an investigation identified an alleged failure by the institution to incorporate internal loss forecasts into financial reporting, resulting in the institution understating loan loss expense. The institution did not admit the allegations, but agreed to pay $3.5 million to resolve the charges. The SEC also alleged that the two executives caused the understatements by deviating from established policies and procedures and failing to implement proper internal controls for determining its loan loss expense. The two executives did not admit the allegations, but agreed to pay a combined $135,000 to resolve the investigation, and to cease and desist from committing or causing any violations of the relevant federal securities laws.

FTC Updates COPPA FAQs. On April 25, the FTC issued updated FAQs on the recently amended Children's Online Privacy Protection Act Rule. The FAQs provide supplemental guidance designed to help website operators, mobile application developers, plug-ins and advertising networks operating on child-directed websites and online services prepare for the amended regulations, which take effect on July 1, 2013.

FTC Seeks Input on Privacy, Security Implications of Connected Consumer Devices. On April 17, the FTC requested input on the consumer privacy and security issues posed by the connectivity of consumer devices in advance of a public workshop to be held on November 21, 2013. The request notes that connected devices can communicate with consumers, transmit data back to companies, and compile data for third parties. While advances in connected devices provide consumer benefits, greater connectivity also poses privacy and security risks. The FTC seeks comment on (i) the significant developments in services and products that make use of this connectivity, (ii) the technologies that enable this connectivity (e.g., RFID, barcodes, wired and wireless connections), (iii) the current and future uses of smart technology, (iv) consumer benefits, (v) privacy and security concerns, and (vi) how privacy risks should be weighed against potential societal benefits. The FTC is accepting comments through June 1, 2013.

STATE ISSUES

New York Demands Credit Score Changes for Hurricane Sandy-Impacted Consumers. On April 25, New York Governor Andrew Cuomo announced that the New York Department of Financial Services (DFS) sent a letter to several consumer credit bureaus, demanding that the firms (i) ensure that credit scores are not lowered for consumers adversely impacted by Hurricane Sandy, (ii) reset any scores that have been lowered, (iii) work with banks and other lenders to red flag any negative information relating to storm-impacted consumers, and (iv) meet with the DFS to permanently change procedures to prevent credit scores from going down for consumers impacted by a disaster. The letter asserts such actions are required because financial challenges created by the storm could negatively impact individual credit scores for reasons that are unrelated to their creditworthiness. The state's press release provides a phone number for consumers to call if they believe that their credit has been "unfairly impacted" by the storm.

CSBS Seeks Comment on NMLS Licensing Forms, Mortgage Call Report. Earlier this month, the CSBS sought comment on potential revisions to (i) the uniform NMLS company, branch, and individual licensing forms and (ii) the quarterly NMLS Mortgage Call Report. The forms create a national standard of information collection for entities licensed through NMLS, while the quarterly call reports provide comprehensive and uniform information concerning the financial condition of licensed mortgage companies, their mortgage loan activities, and the production information of their mortgage loan originators. The state regulators are seeking comment on, among other things, potential improvements to form changes made in 2012. With respect to the call reports, the state regulators are seeking input on (i) the definition of "application" in the call report, (ii) criteria to be used when determining which companies file the different versions of the report, (iii) whether any policies, requirements, data fields, or definitions should be amended, and (iv) which aggregate call report data should be publicly reported. Comments are due by June 11, 2013.

Connecticut Implements Electronic Mortgage Recording. Recently, Connecticut finalized regulations to implement changes to the state's Uniform Real Property Electronic Recording Act that allows town clerks to accept electronic documents for recording on the land records. Prior to implementation of these changes, town clerks could only accept paper documents for recording. While they may continue to accept paper documents, the regulation permits them to accept delivery of and return electronic documents for the purpose of recording those documents in the land records, consistent with other states. The regulation is also intended to ensure that the records and recordkeeping systems will be maintained properly and securely. The state also has published FAQs for town clerks regarding the new regulation.

COURTS

Federal District Court Holds Financial Institution's Fraud On Itself Triggers Potential FIRREA Liability. On April 24, the U.S. District Court for the Southern District of New York held that a federally insured financial institution may be prosecuted under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) for allegedly engaging in fraud that "affects" the same institution. *U.S. v. Bank of N.Y. Mellon*, No. 11-6969, 2013 WL 1749418 (S.D.N.Y. Apr. 24, 2013). In this case, the government alleges that the bank and one of its employees provided clients with false, incomplete and/or misleading information about the way it determined currency exchange rates for its "standing instruction" foreign exchange transactions, from which the bank profited, and which ultimately exposed it to "billions of dollars in potential liability." Based on a lengthy analysis of textual meaning and congressional intent, the court concluded that the "text and purpose of FIRREA amply encompass the alleged conduct," and that the government's complaint sufficiently alleged that the bank was negatively affected by the fraud. The decision represents the first time a court has interpreted the meaning of the phrase "affecting a federally insured financial institution" under FIRREA to allow the government to prosecute a financial institution for its own alleged misconduct.

OCC Seeks Reconsideration of Order Requiring Disclosure of Non-Public Documents related to Bank's AML/CTF Compliance. On April 24, the U.S. District Court for the Southern District of New York stayed an order that would have required a bank to disclose non-public supervisory information subject to the bank examination privilege. *Wultz v. Bank of* China, No. 11-1266 (S.D.N.Y. Apr. 24, 2013). The case was brought by the family of victims of a suicide bombing attack who claim that failures in the bank's anti-money laundering and counter-terrorism financing compliance program aided and abetted international terrorism. On April 9, 2013, the court compelled the bank and the OCC to produce various investigative files and regulatory communications over their objection that the bank examination privilege protected such production. The court relied in part on a recent and unrelated Senate investigative report's description of the OCC oversight process. The court reasoned that the OCC's ideal supervision process, on which it based its claim of privilege, diverges from the actual process described in the Senate report, and that the actual process undermines assumptions on which other courts have relied about the likely effects of overriding the bank examination privilege. The court added that "the OCC's supervisory mission might in some cases be helped as much as hindered by the intervention of private litigants." In support of its motion to reconsider, the OCC argued that the court failed to properly weigh long-standing principles and that its decision "will be construed as an erosion of the bank examination privilege that ultimately will undermine the bank supervisory process." The OCC also asserted that it never waived the privilege and appropriately and in good faith relied upon the procedures set forth under its *Touhy* regulation, which is designed to provide the OCC with the opportunity to review non-public OCC information in the possession of regulated entities prior to production. The OCC asked the court to vacate its prior order and order the plaintiffs to submit a *Touhy* request for all materials withheld on the groups of bank examination privilege. The court agreed to stay its prior order and established a briefing schedule on the motion for reconsideration, which will be completed by May 10, 2013.

Obama Administration Seeks Supreme Court Review of Recess Appointment Decision. On April 25, the DOJ and the National Labor Relations Board (NLRB) filed a petition seeking U.S. Supreme Court review of the D.C. Circuit Court's January 25, 2013 decision invalidating the appointment of three NLRB members. *Nat'l Labor Rel. Bd. v. Noel Canning*, No. 12-1281 (cert. pet. filed, Apr. 25, 2013). The D.C. Circuit held that appointments to the NLRB made by President Obama in January 2012 during a purported Senate recess were unconstitutional. CFPB Director Richard Cordray was appointed in the same manner and on the same day as the NLRB members, and his appointment is the subject of a lawsuit currently pending in the U.S. District Court for the District of Columbia. The petition asks the Court to resolve two questions: (i) whether the President's recess appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions, and (ii) whether the President's recess appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess. If the Court accepts review of the case, it likely would be heard during the Court's next session, which begins in October 2013.

Ninth Circuit Disapproves $45 Million FCRA Class Settlement Based on Conditional Incentive Award. On April 22, the U.S. Court of Appeals for the Ninth Circuit reversed a district court's order approving a $45M class action settlement under FCRA on the grounds that the conditional nature of the incentive award rendered the class representatives and class counsel inadequate representatives of the absent class members. *Radcliffe v. Experian Info. Solutions Inc.*, 11-56376, 2013 WL 1715422 (9th Cir. Apr. 22, 2013). The plaintiffs alleged that the three major credit reporting agencies issued consumer credit reports containing negative entries for debts that were already discharged through bankruptcy. The parties reached a settlement in February 2009, whereby a $45M common fund would provide an award not to exceed $5,000 to each named plaintiff, while plaintiffs suffering actual damages would receive awards ranging from $150.00 to $750.00 and the remaining class members would each recover roughly $26.00. The Ninth Circuit held that the "incentive awards" provided to the named plaintiffs "corrupt the settlement by undermining the adequacy of the class representatives and class counsel," while the conditional nature of the awards "removed a critical check on the fairness of the class-action settlement, which rests on the unbiased judgment of class representatives similarly situated to absent class members." The court further held that class counsel would have been disqualified under this agreement because they have a fiduciary responsibility to represent the interests of the class as a whole, and conditional incentive rewards would require class counsel to represent class members with conflicting interests. The court explained that the disparity between the awards given to the named plaintiffs and the rest of the class "further exacerbated the conflict of interest caused by the conditional incentive awards." The court concluded that the representative plaintiffs ultimately were unable to fairly and adequately protect the interests of the class, reversed the district court's approval of the settlement, and remanded the case for further proceedings.

Supreme Court Narrows Application of Alien Tort Statute. The Supreme Court recently sharply narrowed the potential application of the Alien Tort Statute (ATS), which allows foreign plaintiffs to bring civil actions in U.S. district courts for torts committed in violation of the law of nations or a treaty of the United States. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2013 WL 1628935 (Apr. 17, 2013). Foreign plaintiffs traditionally have sought to use the ATS to hold firms liable for alleged human rights abuse committed by foreign governments. Here, a district court dismissed several claims brought by Nigerian nationals who alleged that several non-U.S. oil companies had aided and abetted the Nigerian government in committing human rights violations. On interlocutory appeal, the Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability. The Supreme Court unanimously affirmed on different grounds, focusing on when courts can recognize a cause of action under the ATS for violation of the law of nations occurring in a non-U.S. sovereign territory. The Court held that the presumption against extraterritorial jurisdiction applied to claims under the ATS, and nothing in the statute rebutted that presumption; even where claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application, which requires more than mere corporate presence. The Court's ruling further limits the risk that foreign plaintiffs might expand ATS claims into new industries, including by bringing claims against financial institutions for global financial crime such as fraud and money laundering, or for financing projects during which alleged human rights abuses are committed.

FIRM NEWS

Complimentary Webinar - Defending SCRA Actions
Please join BuckleySandler LLP attorneys Kirk Jensen and Jeffrey Naimon on May 1, 2013 from 2:00-3:15 PM ET, to review enforcement actions by federal and state authorities based on alleged violations of the Servicemembers Civil Relief Act. The panelists will discuss how requirements in the various consent orders in many cases exceed the requirements in the statute itself and how careful factual and legal scrutiny can successfully identify meritless claims. The webinar will review what regulators expect from a compliance standpoint, while helping you prepare to defend your institution against claims that do not involve conduct prohibited by the SCRA. For registration and other information, please click here.

Complimentary Webinar - SEC Whistleblower 101: How to Prevent or Mitigate Whistleblower Claims
Thomas Sporkin will participate in an American Association of Bank Directors webinar that will cover several aspects of the current whistleblower claims environment including guidance on minimizing potential whistleblower risk and strategies for ensuring that your bank's board and officers comply with their duties under the law. The webinar, which will be moderated by David Baris, will take place on May 6, 2013, 2:00 - 3:00 PM ET. For registration and other information, please click here.

Benjamin Klubes and Jonice Gray Tucker will speak to the Financial Services Roundtable on May 1, 2013 on the topic of Managing Fair Lending and Jonice Gray Tucker also will speak on May 2, 2013 on the topic of Litigation Trends.

Jeffrey Naimon will participate on an Inside Mortgage Finance audio conference entitled "QM Checklist: Prepare for Ability-to-Repay/Qualified Mortgage Implementation," on May 9, 2013, 2:30 PM ET.

James Parkinson will speak at ACI's Conference for FCPA and Anti-Corruption in the Life Sciences Industry on May 15, 2013, on a panel titled, "Managing Corruption Risks in a Transactional Setting: How to Prevent FCPA Pitfalls in Life Science Joint Ventures, Mergers & Acquisitions and Collaborations."

James Parkinson will participate in a Strafford CLE webinar, "FCPA Risks for U.S. and Non-U.S. Execs," on June 4, 2013, 1:00 - 2:30 PM.

Andrea Mitchell will speak at an American Bankers Association Fair Lending Workshop on June 8, 2013 in Chicago, IL, offered in connection with the ABA Regulatory Compliance Conference. The Fair Lending Workshop will review current fair lending hot topics and how institutions can manage or mitigate fair lending obstacles and demonstrate compliance with fair lending laws and regulations.

Jonathan Cannon will speak at the National Settlement Services Summit in Cleveland, Ohio on June 12, 2013. Mr. Cannon's session is entitled "RESPA defined in 2013: What's new, what's the same and where do compliance issues lurk?"

FIRM PUBLICATIONS

Jonice Gray Tucker and Kendra Kinnaird wrote "Mortgage Crisis Triggers Stronger Focus on Vendors," published by the National Notary Association on March 8, 2013.

Andrew Schilling, Ross Morrison, and Michelle Rogers published in Law360, "Finally, 8 Factors Governing FIRREA Civil Penalty Awards," on March 12, 2013, and "FCA Allows Treble Damages - 'But Treble What?'", on March 26, 2013.

Margo Tank, David Whitaker, and Ian Spear published, "Federal Regulators Issue Guidance on Social Media and Mobile Privacy," in Internet Law & Strategy on April 4, 2013.

Andrew Schilling, Ross Morrison, and Michelle Rogers published, "Little-known Statute May Breathe New Life into False Claims Act Cases Against Financial Institutions," in Thomson Reuters Accelus on April 18, 2013.

About BuckleySandler LLP (www.buckleysandler.com)

With more than 150 lawyers in Washington, New York, Los Angeles, and Orange County, BuckleySandler provides best-in-class legal counsel to meet the challenges of its financial services industry and other corporate and individual clients across the full range of government enforcement actions, complex and class action litigation, and transactional, regulatory, and public policy issues. The Firm represents many of the nation's leading financial services institutions. "The best at what they do in the country." (Chambers USA).

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Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (310) 424-3900
Orange County: 3121 Michelson Drive, Suite 210, Irvine, CA 92612, (949)398-1360

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

In addition, please feel free to email our attorneys. A list of attorneys can be found here.

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MORTGAGES

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BANKING

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Federal District Court Holds Financial Institution's Fraud On Itself Triggers Potential FIRREA Liability. On April 24, the U.S. District Court for the Southern District of New York held that a federally insured financial institution may be prosecuted under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) for allegedly engaging in fraud that "affects" the same institution. *U.S. v. Bank of N.Y. Mellon*, No. 11-6969, 2013 WL 1749418 (S.D.N.Y. Apr. 24, 2013). In this case, the government alleges that the bank and one of its employees provided clients with false, incomplete and/or misleading information about the way it determined currency exchange rates for its "standing instruction" foreign exchange transactions, from which the bank profited, and which ultimately exposed it to "billions of dollars in potential liability." Based on a lengthy analysis of textual meaning and congressional intent, the court concluded that the "text and purpose of FIRREA amply encompass the alleged conduct," and that the government's complaint sufficiently alleged that the bank was negatively affected by the fraud. The decision represents the first time a court has interpreted the meaning of the phrase "affecting a federally insured financial institution" under FIRREA to allow the government to prosecute a financial institution for its own alleged misconduct.

OCC Seeks Reconsideration of Order Requiring Disclosure of Non-Public Documents related

to Bank's AML/CTF Compliance. On April 24, the U.S. District Court for the Southern District of New York stayed an order that would have required a bank to disclose non-public supervisory information subject to the bank examination privilege. *Wultz v. Bank of* China, No. 11-1266 (S.D.N.Y. Apr. 24, 2013). The case was brought by the family of victims of a suicide bombing attack who claim that failures in the bank's anti-money laundering and counter-terrorism financing compliance program aided and abetted international terrorism. On April 9, 2013, the court compelled the bank and the OCC to produce various investigative files and regulatory communications over their objection that the bank examination privilege protected such production. The court relied in part on a recent and unrelated Senate investigative report's description of the OCC oversight process. The court reasoned that the OCC's ideal supervision process, on which it based its claim of privilege, diverges from the actual process described in the Senate report, and that the actual process undermines assumptions on which other courts have relied about the likely effects of overriding the bank examination privilege. The court added that "the OCC's supervisory mission might in some cases be helped as much as hindered by the intervention of private litigants." In support of its motion to reconsider, the OCC argued that the court failed to properly weigh long-standing principles and that its decision "will be construed as an erosion of the bank examination privilege that ultimately will undermine the bank supervisory process." The OCC also asserted that it never waived the privilege and appropriately and in good faith relied upon the procedures set forth under its *Touhy* regulation, which is designed to provide the OCC with the opportunity to review non-public OCC information in the possession of regulated entities prior to production. The OCC asked the court to vacate its prior order and order the plaintiffs to submit a *Touhy* request for all materials withheld on the groups of bank examination privilege. The court agreed to stay its prior order and established a briefing schedule on the motion for reconsideration, which will be completed by May 10, 2013.

Supreme Court Narrows Application of Alien Tort Statute. The Supreme Court recently sharply narrowed the potential application of the Alien Tort Statute (ATS), which allows foreign plaintiffs to bring civil actions in U.S. district courts for torts committed in violation of the law of nations or a treaty of the United States. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2013 WL 1628935 (Apr. 17, 2013). Foreign plaintiffs traditionally have sought to use the ATS to hold firms liable for alleged human rights abuse committed by foreign governments. Here, a district court dismissed several claims brought by Nigerian nationals who alleged that several non-U.S. oil companies had aided and abetted the Nigerian government in committing human rights violations. On interlocutory appeal, the Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability. The Supreme Court unanimously affirmed on different grounds, focusing on when courts can recognize a cause of action under the ATS for violation of the law of nations occurring in a non-U.S. sovereign territory. The Court held that the presumption against extraterritorial jurisdiction applied to claims under the ATS, and nothing in the statute rebutted that presumption; even where claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application, which requires more than mere corporate presence. The Court's ruling further limits the risk that foreign plaintiffs might expand ATS claims into new industries, including by bringing claims against financial institutions for global financial crime such as fraud and money laundering, or for financing projects during which alleged human rights abuses are committed.

CONSUMER FINANCE

CFPB Announces Organization, Senior Personnel Changes. On April 22, the CFPB announced the creation of the Office of Financial Institutions and Business Liaison, which will interface with bank and nonbank trade associations, financial institutions, and other businesses. The new office will be led by Dan Smith, who previously served as the Director for Industry and State Relations at

Freddie Mac. The CFPB also announced that Catherine Galicia will serve as Assistant Director for Legislative Affairs. Ms. Galicia most recently served as Senior Counsel for the Senate Committee on Banking, Housing and Urban Affairs, where she helped draft the consumer protection provisions of the Dodd-Frank Act. She replaces Lisa Konwinski, who will become Deputy Associate Director for External Affairs. In addition, Hubert "Skip" Humphrey will transition from his role as Assistant Director in the Office of Older Americans to Senior Liaison Officer, focusing on expanding the Office's efforts to build strong working relationships with state, local, public and private organizations.

Federal Regulators Target Payday Loans, Deposit Advance Products. On April 24, the CFPB published a white paper on payday loan and deposit advance products that claims to show those products lead to a "cycle of high-cost borrowing." On April 25, the FDIC and the OCC proposed guidance relating to deposit advance products based on similar concerns. The CFPB paper reflects the results of what the CFPB characterizes as a year-long, in-depth review of short-term, small-dollar loans, which began with a January 2012 field hearing. Although it acknowledges that demand exists for small dollar credit products, that such products can be helpful for consumers, and that alternatives may not be available, the CFPB concludes that such products are only appropriate in limited circumstances and faults lenders for not determining whether the products are suitable for each customer. The CFPB paper does not propose any rule or guidance, but is instead intended to present a clear statement of CFPB concerns. The paper notes that a related CFPB study of online payday loans is ongoing. The FDIC and OCC proposed guidance outlines the agencies' safety and soundness, compliance, and consumer protection concerns about deposit advance products, and sets forth numerous expectations, including with regard to consumer eligibility, capital adequacy, fees, compliance, management oversight, and third-party relationships. For example, under the guidance the agencies would expect banks to offer a deposit advance product only to customers who (i) have at least a six month relationship with the bank, (ii) do not have any delinquent or adversely classified credits, and (iii) meet specific financial capacity standards. The guidance also would require, among other things, that (i) each deposit advance loan be repaid in full before the extension of a subsequent loan, (ii) banks refrain from offering more than one loan per monthly statement cycle and provide a cooling-off period of at least one monthly statement cycle after the repayment of a loan before another advance is extended, and (iii) banks reevaluate customer eligibility every six months.

New York Demands Credit Score Changes for Hurricane Sandy-Impacted Consumers. On April 25, New York Governor Andrew Cuomo announced that the New York Department of Financial Services (DFS) sent a letter to several consumer credit bureaus, demanding that the firms (i) ensure that credit scores are not lowered for consumers adversely impacted by Hurricane Sandy, (ii) reset any scores that have been lowered, (iii) work with banks and other lenders to red flag any negative information relating to storm-impacted consumers, and (iv) meet with the DFS to permanently change procedures to prevent credit scores from going down for consumers impacted by a disaster. The letter asserts such actions are required because financial challenges created by the storm could negatively impact individual credit scores for reasons that are unrelated to their creditworthiness. The state's press release provides a phone number for consumers to call if they believe that their credit has been "unfairly impacted" by the storm.

Senators Raise Concerns about CFPB's Data Collection. On April 23, the Senate Banking Committee held a hearing during which CFPB Director Richard Cordray testified on the CFPB's semiannual report to Congress. A substantial portion of the hearing focused on the CFPB's collection and use of data. Republican committee members led by Ranking Member Mike Crapo (R-ID) criticized the CFPB's data collection efforts and its developing ability to "watch" consumers, and questioned the CFPB's legal authority to collect data that could be reverse engineered to connect with specific consumers. Mr. Cordray explained that "big data" is the cutting edge of research in every field and that the CFPB needs to keep pace with financial institutions. According to Mr. Cordray (i) the CFPB's data are not connected to individuals (aside from complaint data) and are "anonymized", (ii) much of the data come commercial resources already accessible to firms, (iii) the CFPB obtains certain data from the same sources other regulators have in the past, and (iv) all of the data are essential to the CFPB's ability to carry out its congressionally mandated work, including rulewriting, reporting to Congress, and undertaking other studies. The hearing also covered numerous other topics including (i) the impact of CFPB's mortgage rules on small institutions, (ii) the CFPB's collection and assessment of consumer complaints, (iii) coordination of examinations and information requests among federal and state regulators, and (iv) the status of the CFPB's arbitration study, portions of which the CFPB may release this year.

House Committee Refuses to Allow CFPB Director to Appear. On April 22, House Financial Services Committee Chairman Jeb Hensarling (R-TX) sent letters to CFPB Director Richard Cordray and CFPB General Counsel Meredith Fuchs stating that the House Financial Services Committee cannot allow Director Cordray to testify on the CFPB's semiannual report, as the Committee has in the past, because no nominee for CFPB Director has been confirmed. Citing the D.C. Circuit's January 2013 decision in *Noel Canning v. NLRB*, which invalidated three presidential appointments to the NLRB, Mr. Hensarling asserted that "[a]bsent contrary guidance form the United States Supreme Court, Mr. Cordray does not meet the statutory requirements of a validly-serving Director" and the committee cannot legally accept testimony from him. Mr. Hensarling further indicated that the committee is not relinquishing its oversight role and expects the CFPB to make other employees and information available upon request. Committee Ranking Member Maxine Waters (D-CA) sent a letter one day later to the Chairman, stating that she will use the rules of the committee to allow Director Cordray to testify if the Chairman does not reverse his position.

Obama Administration Seeks Supreme Court Review of Recess Appointment Decision. On April 25, the DOJ and the National Labor Relations Board (NLRB) filed a petition seeking U.S. Supreme Court review of the D.C. Circuit Court's January 25, 2013 decision invalidating the appointment of three NLRB members. *Nat'l Labor Rel. Bd. v. Noel Canning*, No. 12-1281 (cert. pet. filed, Apr. 25, 2013). The D.C. Circuit held that appointments to the NLRB made by President Obama in January 2012 during a purported Senate recess were unconstitutional. CFPB Director Richard Cordray was appointed in the same manner and on the same day as the NLRB members, and his appointment is the subject of a lawsuit currently pending in the U.S. District Court for the District of Columbia. The petition asks the Court to resolve two questions: (i) whether the President's recess appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions, and (ii) whether the President's recess appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess. If the Court accepts review of the case, it likely would be heard during the Court's next session, which begins in October 2013.

Ninth Circuit Disapproves $45 Million FCRA Class Settlement Based on Conditional Incentive Award. On April 22, the U.S. Court of Appeals for the Ninth Circuit reversed a district court's order approving a $45M class action settlement under FCRA on the grounds that the conditional nature of the incentive award rendered the class representatives and class counsel inadequate representatives of the absent class members. *Radcliffe v. Experian Info. Solutions Inc.*, 11-56376, 2013 WL 1715422 (9th Cir. Apr. 22, 2013). The plaintiffs alleged that the three major credit reporting agencies issued consumer credit reports containing negative entries for debts that were already discharged through bankruptcy. The parties reached a settlement in February 2009, whereby a $45M common fund would provide an award not to exceed $5,000 to each named plaintiff, while plaintiffs suffering actual damages would receive awards ranging from $150.00 to $750.00 and the remaining class members would each recover roughly $26.00. The Ninth Circuit held that the "incentive awards" provided to the named plaintiffs "corrupt the settlement by undermining the adequacy of the class representatives and class counsel," while the conditional nature of the awards "removed a critical check on the fairness of the class-action settlement, which rests on the unbiased judgment of class representatives similarly situated to absent class members." The court further held that class counsel would have been disqualified under this agreement because they have a fiduciary responsibility to represent the interests of the class as a whole, and conditional incentive rewards would require class counsel to represent class members with conflicting interests. The court explained that the disparity between the awards given to the named plaintiffs and the rest of the class "further exacerbated the conflict of interest caused by the conditional incentive awards." The court concluded that the representative plaintiffs ultimately were unable to fairly and adequately protect the interests of the class, reversed the district court's approval of the settlement, and remanded the case for further proceedings.

SECURITIES

SEC Fills Enforcement Director, General Counsel Positions. On April 22, the SEC announced that George Canellos and Andrew Ceresney will share responsibilities as co-directors of the SEC's Division of Enforcement. Mr. Canellos has been serving as Acting Enforcement Director since January. He previously had been the division's Deputy Enforcement Director since June 2012, prior to which he served as Director of the SEC's New York Regional Office. Mr. Ceresney previously served as a Deputy Chief Appellate Attorney in the United States Attorney's Office for the Southern District of New York, where he was a member of the Securities and Commodities Fraud Task Force and the Major Crimes Unit. Most recently, he was in private practice with recently-confirmed SEC Chairman Mary Jo White. On April 23, the SEC named Anne Small as General Counsel. Ms. Small is a former Special Assistant to the President and Associate Counsel in the White House Counsel's Office where she advised on legal policy questions with a focus on economic issues. She previously worked at the SEC as Deputy General Counsel for Litigation and Adjudication and now becomes the first woman to be named General Counsel.

SEC Charges Bank for Understating Auto Loan Losses. On April 24, the SEC released an order charging a financial institution and two senior executives for allegedly understating millions of dollars in auto loan losses during the period leading up to the financial crisis. The SEC stated that an investigation identified an alleged failure by the institution to incorporate internal loss forecasts into financial reporting, resulting in the institution understating loan loss expense. The institution did not admit the allegations, but agreed to pay $3.5 million to resolve the charges. The SEC also alleged that the two executives caused the understatements by deviating from established policies and procedures and failing to implement proper internal controls for determining its loan loss expense. The two executives did not admit the allegations, but agreed to pay a combined $135,000 to resolve the investigation, and to cease and desist from committing or causing any violations of the relevant federal securities laws.

Federal Authorities Announce FCPA Action, First SEC Non-Prosecution Agreement. On April 22, the DOJ and the SEC announced parallel actions against a clothing company to resolve allegations that a subsidiary of the company paid bribes to Argentine officials over a several-year period to obtain improper customs clearance of merchandise. The SEC action included the agency's first non-prosecution agreement (NPA) related to FCPA misconduct, which the SEC determined was appropriate given "the company's prompt reporting of the violations on its own initiative, the completeness of the information it provided, and its extensive, thorough, and real-time cooperation with the SEC's investigation." According to the SEC's NPA, the company's cooperation involved (i) reporting preliminary findings of its internal investigation to the staff within two weeks of discovering the illegal payments and gifts, (ii) voluntarily and expeditiously producing documents,

(iii) providing English language translations of documents to the staff, (iv) summarizing witness interviews that the company's investigators conducted overseas, and (v) making overseas witnesses available for staff interviews and bringing witnesses to the U.S. The SEC agreement also required the company to pay over $700,000 in disgorgement and prejudgment interest, while the DOJ required the company to pay a nearly $900,000 penalty.

E-COMMERCE

Connecticut Implements Electronic Mortgage Recording. Recently, Connecticut finalized regulations to implement changes to the state's Uniform Real Property Electronic Recording Act that allows town clerks to accept electronic documents for recording on the land records. Prior to implementation of these changes, town clerks could only accept paper documents for recording. While they may continue to accept paper documents, the regulation permits them to accept delivery of and return electronic documents for the purpose of recording those documents in the land records, consistent with other states. The regulation is also intended to ensure that the records and recordkeeping systems will be maintained properly and securely. The state also has published FAQs for town clerks regarding the new regulation.

PRIVACY/DATA SECURITY

FTC Updates COPPA FAQs. On April 25, the FTC issued updated FAQs on the recently amended Children's Online Privacy Protection Act Rule. The FAQs provide supplemental guidance designed to help website operators, mobile application developers, plug-ins and advertising networks operating on child-directed websites and online services prepare for the amended regulations, which take effect on July 1, 2013.

FTC Seeks Input on Privacy, Security Implications of Connected Consumer Devices. On April 17, the FTC requested input on the consumer privacy and security issues posed by the connectivity of consumer devices in advance of a public workshop to be held on November 21, 2013. The request notes that connected devices can communicate with consumers, transmit data back to companies, and compile data for third parties. While advances in connected devices provide consumer benefits, greater connectivity also poses privacy and security risks. The FTC seeks comment on (i) the significant developments in services and products that make use of this connectivity, (ii) the technologies that enable this connectivity (e.g., RFID, barcodes, wired and wireless connections), (iii) the current and future uses of smart technology, (iv) consumer benefits, (v) privacy and security concerns, and (vi) how privacy risks should be weighed against potential societal benefits. The FTC is accepting comments through June 1, 2013.

PAYMENTS

CFPB Issues Final Preemption Determination for Maine, Tennessee Unclaimed Gift Card Laws. On April 19, the CFPB issued a final preemption determination regarding whether the Electronic Fund Transfer Act (EFTA) and Regulation E preempt certain unclaimed gift card laws in Maine and Tennessee. The EFTA, as implemented by Regulation E, generally prohibits any person from issuing a gift certificate, store gift card, or general-use prepaid card with an expiration date, though under certain conditions, the card may have an expiration date so long as it is at least five years after the date of issuance (or five years after the date that funds were last loaded). The CFPB determined that the Maine law does not interfere with a consumer's ability to use a gift cards at point-of-sale for at least as long as guaranteed by the EFTA and Regulation E because it requires the issuer to honor the gift card on presentation indefinitely even if the unused value has been transferred to the state. For Tennessee, the CFPB reached the opposite conclusion because the Tennessee provision permits issuers to decline to honor gift cards as soon as two years after issuance. According to the CFPB, the Tennessee law is inconsistent with federal law because, in effect, the provision allows funds to expire sooner than is permitted under EFTA and Regulation E.

CRIMINAL ENFORCEMENT

Federal Authorities Announce FCPA Action, First SEC Non-Prosecution Agreement. On April 22, the DOJ and the SEC announced parallel actions against a clothing company to resolve allegations that a subsidiary of the company paid bribes to Argentine officials over a several-year period to obtain improper customs clearance of merchandise. The SEC action included the agency's first non-prosecution agreement (NPA) related to FCPA misconduct, which the SEC determined was appropriate given "the company's prompt reporting of the violations on its own initiative, the completeness of the information it provided, and its extensive, thorough, and real-time cooperation with the SEC's investigation." According to the SEC's NPA, the company's cooperation involved (i) reporting preliminary findings of its internal investigation to the staff within two weeks of discovering the illegal payments and gifts, (ii) voluntarily and expeditiously producing documents, (iii) providing English language translations of documents to the staff, (iv) summarizing witness interviews that the company's investigators conducted overseas, and (v) making overseas witnesses available for staff interviews and bringing witnesses to the U.S. The SEC agreement also required the company to pay over $700,000 in disgorgement and prejudgment interest, while the DOJ required the company to pay a nearly $900,000 penalty.