

February 15, 2013

**TOPICS COVERED THIS WEEK (CLICK TO VIEW)**[FEDERAL ISSUES](#)[STATE ISSUES](#)[COURTS](#)[FIRM NEWS](#)[FIRM PUBLICATIONS](#)[MORTGAGES](#)[BANKING](#)[CONSUMER FINANCE](#)[PRIVACY/DATA SECURITY](#)**[FEDERAL ISSUES](#)**

**CFPB Plans Heightened Scrutiny of Mortgage Servicing Transfers.** On February 11, the CFPB issued [Bulletin 2013-01](#) to address concerns about "potential risks to consumers" posed by the increased number and size of recent servicing transfers between financial institutions. The guidance states that the CFPB generally will examine such transfers to determine compliance with consumer finance laws, but examiners also will focus on (i) how a transferor has prepared for the transfer of servicing rights, (ii) how a transferee handles the files transferred to it, and (iii) the policies and procedures adopted with regard to transferred loans with loss mitigation in process. The CFPB also plans to require, in appropriate cases, servicers engaged in "significant servicing transfers" to submit written plans detailing how the parties to a transfer will manage consumer risks, and information including: (i) the number of loans involved, (ii) the total servicing volume being transferred, (iii) the name(s) of the servicing platform(s) on which the transferor stored account-level information for transferred loans prior to transfer and information about compatibility with the transferee's systems, (iv) a detailed description of the transaction and system testing to be conducted to ensure accurate transfer of electronic information and a description of the summary report to be generated as a result of this testing, (v) a description of how the transferee will identify and correct errors identified in connection with the transfer, (vi) a description of the training plan and actual training materials for staff involved in reviewing, assessing, utilizing, or communicating information regarding the transferred loans, and (vii) a customer-service plan for responding to loss mitigation inquiries and identifying whether a loan is subject to a pending loss mitigation resolution or application. Servicers will not need CFPB approval of such plans prior to completing a transfer. Finally, the Bulletin offers guidance regarding policies and procedures to comply with the transfer-related aspects of CFPB's recently-issued servicing rules, which become effective on January 14, 2014.

**CFPB Announces Plan for Mortgage Rule Implementation.** On February 13, the CFPB [announced](#) a plan to implement its recently adopted mortgage rules, which go into effect in January 2014. To assist financial institutions with implementing the rules, the CFPB will (i) coordinate with other agencies that conduct examinations of mortgage companies to ensure all regulators have a shared understanding of the CFPB's new rules, (ii) publish plain-language guides in the spring, (iii)

publish updates to the official interpretations, with priority given to issues that are important to a large number of providers or consumers, and that critically affect mortgage companies' implementation decisions, (iv) publish readiness guides, available this summer, and (v) work with the FFIEC to develop more in-depth examination procedures.

**CFPB Releases First MOU with Tribal Government.** On February 12, the CFPB [released](#) a memorandum of understanding (MOU) it entered into last month with the Navajo Nation Department of Justice, pursuant to which the parties will share information. [The MOU](#) provides for confidential treatment and protection from FOIA disclosure of Navajo Nation documents and information provided to the CFPB, and establishes a framework pursuant to which the Navajo Nation can seek information from the CFPB. Notably, nearly a year ago, in [remarks](#) to state attorneys general, CFPB Director Richard Cordray stated the CFPB's intent to focus on payday lenders associated with Native American tribes. The MOU could facilitate the CFPB's efforts to pursue such lenders.

**CFPB Schedules Consumer Advisory Board Meeting.** On February 12, the CFPB [announced](#) that its Consumer Advisory Board will meet on February 20, 2013 in Washington, DC. The portion of the event open to the public will feature remarks from Director Cordray, Associate Director Zixta Martinez, and Consumer Advisory Board Chairman Jose Quinonez. The balance of the event is private, and the [agenda](#) includes (i) a presentation by the CFPB's Supervision Office, (ii) breakout sessions with various CFPB offices, including the Office of Fair Lending, and (iii) a review of recently issued mortgage rules and implementation plans. Members of the public that would like to attend the portion of the event open to the public must RSVP.

**President Obama Issues Executive Order on Cybersecurity.** On February 12, President Obama issued an Executive Order (EO) titled [Improving Critical Infrastructure Cybersecurity](#), and a related [Presidential Policy Directive](#) (PPD). The EO establishes a process to facilitate sharing of cybersecurity information among private firms in critical infrastructure sectors and the federal government, and tasks the National Institute of Standards and Technology (NIST) with developing standards, methodologies, procedures, and processes that will form a voluntary best practices framework to address cyber risks. The EO also includes provisions designed to protect privacy and civil liberties. The financial services sector is one of the many sectors identified as a critical sector, and the EO and PPD name the Treasury Department as the federal entity responsible for providing institutional knowledge and specialized expertise as well as leading, facilitating or supporting the security and resilience programs and associated activities for critical financial services firms. On February 13, NIST initiated the process to develop the best practices framework by [announcing](#) a request for information from critical infrastructure owners and operators, federal agencies, state, local, territorial and tribal governments, standards-setting organizations, other members of industry, consumers, solution providers and other stakeholders. NIST is required by the EO to prepare a preliminary framework by October 10, 2013, and a final framework by February 12, 2014.

**Fannie Updates Foreclosure Time Frames for Twelve States.** On February 13, Fannie Mae issued Servicing Guide Announcement [SCV-2013-01](#), which increases the maximum number of allowable days within which routine foreclosure proceedings are to be completed in California, Colorado, Hawaii, Massachusetts, North Carolina, Oregon, Pennsylvania, and Rhode Island, effective for foreclosure sales on or after April 1, 2013. Fannie Mae also decreased the maximum number of allowable days for foreclosure proceedings in Alabama, Iowa, Missouri, and Wisconsin. These time frame reductions will be effective for mortgage loans that become delinquent on or after March 1, 2013. In addition, Fannie Mae (i) announced that on or after April 1, 2013, in New Jersey, allowable delay credit will be given for the actual number of days the mortgage loan is reported in a foreclosure status between December 2010 and April 2012, up to a maximum of 180 days, and (ii) added 90 days to the allowable delay for Military Indulgence, effective for foreclosure sales on or after November 1, 2012. Finally, effective for all foreclosure sales on or after July 1, 2013, those

foreclosure sales that result in a third-party sale will be included in the foreclosure time frame compensatory fee billing process for foreclosure delays.

**FDIC Proposes Amended Definition of Insured Deposits.** On February 12, the FDIC [approved](#) a [proposed rule](#) that would amend its deposit insurance regulations to clarify that deposits in foreign branches of U.S. banks are not FDIC-insured. The U.K. Financial Services Authority (FSA) has proposed a rule to prohibit banks from non-European Economic Area countries from operating deposit-taking branches in the U.K. unless U.K. depositors in such branches would be on an equal footing in the national depositor preference regime with home-country (uninsured) depositors if a bank were to fail and require a resolution. The FDIC believes that U.S. banks seeking to comply with the FSA proposal likely will change their U.K. deposit agreements so that the deposits are payable both in the U.K. and in the U.S. The proposed FDIC rule is intended to protect the Deposit Insurance Fund against the potential resulting liability that the FDIC could face as a deposit insurer for customers of foreign branches of U.S.-based insured depository institutions. While deposits at foreign branches of U.S. banks would not be insured, they could be treated as deposits for purposes of national depositor preference laws. The proposed rule would not affect deposits in overseas military banking facilities governed by regulations of the Department of Defense. The FDIC is seeking comment on all aspects of the proposal within 60 days of its publication in the Federal Register.

**Senate Banking Committee Finalizes Subcommittee Membership.** On February 11, Senate Banking Committee Chairman Tim Johnson (D-SD) and new Ranking Member Mike Crapo (R-ID) [announced](#) the subcommittee assignments for the 113th Congress. The rosters reflect the replacement of majority members Michael Bennet (D-CO), and former Senators Daniel Akaka (D-HI) and Herb Kohl (D-WI) with Elizabeth Warren (D-MA), Joe Manchin (D-WV), and Heidi Heitkamp (D-ND). Minority members Tom Coburn (R-OK) and Dean Heller (R-NV) have replaced Roger Wicker (R-MS) and former Senator Jim DeMint (R-SC). The subcommittee rosters follow recent announcements by the [Chairman Johnson](#) and [Ranking Member Crapo](#) naming subcommittee chairmen and ranking members. The Subcommittee on Housing, Transportation, and Community Development will be led by Chairman Robert Menendez (D-NJ) and Ranking Member Jerry Moran (R-KS), while the Subcommittee on Financial Institutions and Consumer Protection will be led by Chairman Sherrod Brown (D-OH) and Ranking Member Patrick Toomey (R-PA).

**Senate Banking Committee Chairman Outlines Agenda.** On February 12, Chairman Johnson [released](#) the committee's agenda, which includes among its top priorities continuing oversight of implementation of the Dodd-Frank Act, and stabilizing the housing market and building consensus on housing finance reform. With regard to the former, the Chairman's agenda states that the "committee will also explore taking appropriate steps to improve the effectiveness of [the Dodd-Frank Act] should broad bipartisan consensus emerge." With regard to housing, the committee will review the FHA and the health of its insurance fund, the various mortgage rules required by the Dodd-Frank Act, opportunities to expand refinancing, and implementation of the national mortgage servicing settlement. The agenda also includes, among a range of "other priorities," ensuring fairness and transparency in consumer financial services markets, highlighting servicemember protection issues, and monitoring the impact of policies on community banks and credit unions.

**Senate Democrats Complete Battle Lines over CFPB Nomination.** On February 14, 54 of the 55 Senators in the Democratic caucus joined a [letter](#) to President Obama supporting the nomination of Richard Cordray to lead the CFPB and expressing opposition to "efforts to weaken the CFPB through structural changes." The letter responds to a [recent letter](#) to the President from Senate Republicans reiterating their opposition to confirming any nominee as CFPB Director until the structure of the agency is changed. In responding, the Democratic Senators state that never before has a President's nominee to lead an agency been obstructed on such a basis, and point out that a

supermajority of the Senate approved the structure as it exists today.

**FTC Releases Results of Credit Reporting Study.** On February 11, the FTC [released](#) the results of its study of the U.S. credit reporting industry, including its finding that five percent of consumers had errors on one of their three major credit reports that could lead to them paying more for products. The study also found that (i) one in four consumers identified errors on their credit reports that might affect their credit scores; (ii) one in five consumers had an error that was corrected by a credit reporting agency (CRA) after it was disputed; (iii) four out of five consumers who filed disputes experienced some modification to their credit report, with slightly more than one in 10 noticing a change in their credit score after the agencies modified errors on their credit report; (iv) approximately one in 20 consumers had a maximum score change of more than 25 points and only one in 250 consumers had a maximum score change of more than 100 points. The main types of disputed and confirmed material errors identified by the study were errors in the trade line (consumer accounts) or collections information. The [FTC report](#) is the first major study that looks at the full range of participants in the credit reporting and scoring process, including consumers; data furnishers, which include creditors, lenders, debt collection agencies, and the court system; the Fair Isaac Corporation, which develops FICO credit scores; and the national CRAs. The FTC is required to conduct a study of credit report accuracy and provide interim reports every two years, through 2012, with a final report due in 2014. Late last year, the CFPB, which shares jurisdiction over CRAs, published a [white paper](#) on its review of how the three largest CRAs manage consumer data and complaints.

**FTC Recaps Debt Collection Activities for Annual CFPB Report.** On February 1, the FTC sent a [letter](#) to the CFPB describing the FTC's debt collection-related activities over the past year. The responsibility to report to Congress each year on implementation and enforcement of the FDCPA [shifted](#) from the FTC to the CFPB last year, but given their shared authority with regard to the FDCPA, the CFPB relies on the FTC to provide information for inclusion in its annual report. The FTC letter recaps the agency's law enforcement efforts, including the filing or resolution of four actions against collectors alleged to have engaged in deceptive, unfair, or abusive conduct and the filing or resolution of three actions related to phantom debt collection. The letter also highlights outreach and policy activities, including the FTC's [recent debt buyer study](#).

**NCUA Names New Ombudsman, Elevates Position.** On February 11, the NCUA [announced](#) that Joy Lee assumed the duties of Ombudsman, effective immediately. The NCUA also explained that it has elevated the position so the Ombudsman will now be supervised by the Executive Director's office and report directly to the Board. Prior to this position, Ms. Lee served as Senior Federal Financial Institutions Examination Council Advisor to the NCUA Chairman, and before that served in several senior staff positions at NCUA since joining the agency as an examiner in 1987.

**OCC Updates Effective Dates for CMP Inflation Adjustment and New Flood Insurance Penalties.** On February 8, the OCC issued Bulletin [OCC 2013-7](#), which clarifies that the maximum amount of the OCC's civil money penalties (CMP) as [adjusted for inflation last fall](#) apply to violations that occurred on or after December 6, 2012. The Bulletin also states that new flood insurance penalties that also were adopted last fall, apply to violations that occurred on or after July 6, 2012, and not to violations that occurred on or after December 6, 2012, [as originally announced](#).

## STATE ISSUES

**Illinois Enacts Fast-Track Foreclosure Legislation.** On February 8, Illinois Governor Pat Quinn signed [SB 16](#), a bill [introduced in January 2011](#), which creates a fast-track foreclosure process for certain abandoned and vacant properties. Effective June 1, 2013, a lender can petition a court

seeking expedited foreclosure proceedings on properties that hold six or fewer units that are not legally occupied. The bill also shortens the foreclosure timeframe on those properties to between 90 and 180 days. Lenders will be subject to a sliding scale of additional foreclosure filing fees through 2017, ranging from \$50 to \$500. The exact fee amount is dependent on the number of foreclosure actions lenders undertake annually. The state expects the fees to generate \$120 million over the next three years. A portion of that revenue is earmarked to offset local government costs associated with abandoned homes. Funds also will support HUD-approved housing counseling agencies.

**Oregon Finalizes Foreclosure Avoidance Mediation Program Rules.** On February 1, the Oregon Department of Justice [published](#) final rules to implement the foreclosure avoidance mediation program established by [legislation enacted in April 2012](#), which requires beneficiaries to (i) enter into mediation with a grantor for the purpose of negotiating a foreclosure avoidance measure, and (ii) notify a grantor if they are not eligible for any foreclosure avoidance measure or if the grantor has not complied with the terms of a foreclosure avoidance measure. The final rules took effect January 7, 2013, and replaced [temporary rules](#) that had been in place since July 2012. The Oregon Department of Justice also updated its [Frequently Asked Questions](#) for borrowers and lenders/servicers.

**Delaware Amends Abandoned and Unclaimed Property Self-Disclosure Program.** Recently, Delaware enacted [HB 2](#), which amends the state's voluntary self-disclosure program for abandoned and unclaimed property. Among other things, the bill creates additional incentives for holders of such property to report it to the state and resolve claims. Specifically, holders of such property that disclose before June 30, 2013 will have up to one additional year to enter into an agreement and make payment.

## COURTS

**D.C. Federal Court Holds Government False Claims Case Not Precluded by National Servicing Settlement.** On February 12, the U.S. District Court for the District of Columbia [declined to enjoin](#) the government from pursuing alleged False Claims Act violations against a bank that argued such claims were precluded by the terms of the national servicing settlement. *United States v. Bank of Am. Corp.*, No 12-361, 2013 WL 504156 (D.D.C. Feb. 12, 2013). The bank petitioned the court to halt a suit filed by the government in the Southern District of New York, in which the government alleges that the bank's certification of loans under the FHA's Direct Endorsement Lender Program violated the False Claims Act. The bank argued that the national mortgage servicing settlement contains a comprehensive release for certain liability with respect to its alleged FHA mortgage lending conduct. Finding the consent judgment effectuating the settlement to be clear and unambiguous, the court rejected the bank's interpretation of the settlement. The court left it to the Southern District of New York to determine the nature of the claims at issue, but held that the release does not cover the claims as described by the bank. The court therefore denied the bank's motion to enforce the consent judgment and enjoin the New York action.

**Additional State AGs Join Challenge to Dodd-Frank Act Provisions.** On February 13, the plaintiffs in a case challenging portions of the Dodd-Frank Act [sought leave](#) to file a [second amended complaint](#) to add as plaintiffs the state attorneys general (AGs) of Alabama, Georgia, Kansas, Montana, Nebraska, Ohio, Texas, and West Virginia. Motion for Leave to File Second Amended Complaint, *State Nat'l Bank of Big Spring v. Wolin*, No 12-1032 (D.D.C., filed Feb. 13, 2013). The new state AGs join the AGs of Michigan, Oklahoma, and South Carolina, who [previously joined the suit](#) and claim that the "orderly liquidation authority" (OLA) for financial institutions provided to the Treasury Secretary by the Dodd-Frank Act violates the separation of powers doctrine, as well as the Fifth Amendment's bar against the taking of property without due process.

The case also involves private party plaintiffs who, in addition to challenging the OLA, challenge as unconstitutional (i) the formation and operation of the CFPB, (ii) the appointment of CFPB Director Richard Cordray, and (iii) the operation of the Financial Stability Oversight Council. The plaintiffs were due to respond to a pending government motion to dismiss, but asked the court to stay briefing on that motion pending resolution of the motion to file a second amended complaint.

**Defendants in CFPB Enforcement Action Renew Challenge to Validity of Director's Appointment.** On February 11, a law firm and related parties [sued](#) by the CFPB for allegedly deceiving consumers through a network of mortgage loan modification businesses filed a [brief](#) in which they renewed a challenge to the CFPB Director's appointment. Opp. to Receiver's Request for Payment, *CFPB v. Chance Edward Gordon*, No. 12-6147 (C.D. Cal., filed Feb. 11, 2013). The defendants cite a [recent opinion](#) from the U.S. Court of Appeals for the D.C. Circuit that held appointments to the National Labor Relations Board made by President Obama in January 2012 during a purported Senate recess were unconstitutional, and argue that CFPB Director Cordray was appointed on the same day, and in the same manner found to be constitutionally invalid by the D.C. Circuit Court. The defendants stated in their motion that they have propounded Requests for Admissions regarding the date and nature of Mr. Cordray's appointment, and likely will follow with a motion for summary judgment.

**California Appeals Court Permits Borrowers' Claims against Lender Based on Auto Dealer's Alleged Breach of Installment Contract.** On February 4, the California Court of Appeal, Third District, [held](#) the FTC's Holder Rule allows borrowers to assert claims against a lender assignee that they might otherwise have against the auto dealer with whom the borrowers entered the installment contract. *Lafferty v. Wells Fargo Bank*, No. C0678812, 2013 WL 412900 (Cal. App. Ct. Feb. 4, 2013). The borrowers stopped making payments on their motor home, disclaimed their ownership interest, and filed suit against the dealer with whom they financed the purchase of the vehicle after the dealer refused to make repairs to the vehicle. Relying upon the FTC's Holder Rule, which requires language in every consumer installment contract to state that any holder of the consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of the goods, the borrowers sued the bank to whom their loan had been assigned. After a trial court dismissed the case, the borrowers appealed. The appeals court reversed the judgment, holding that the "plain meaning of the Holder Rule allows the [borrowers] to assert claims against [the bank] they might otherwise have against [the dealer]," but limited the borrowers' recovery to the actual amounts paid under the installment contract. The appeals court declined to follow courts in other jurisdictions that looked beyond the plain meaning of the rule to assess the FTC's original intent in adopting the rule, and rejected the bank's argument that the Reese-Levering Act limits the borrowers' right to rescission of the contract. The appeals court also held that the borrowers stated causes of action against the bank under the CLRA and for negligence, but that their claim for negligent defamation of credit was preempted by the Fair Credit Reporting Act. The appeals court reversed the trial court order.

## FIRM NEWS

### **Complimentary Webinar - *United States v. S&P*: DOJ's Latest Fraud Suit Underscores the Importance of Understanding FIRREA, Its Reach, and Its Limitations**

BuckleySandler LLP will host a webinar on Thursday, February 21, 2013, from 2:00-3:00 PM ET, to review the latest and largest of a series of fraud lawsuits brought by the government under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), a financial fraud statute that has been on the books for decades but only recently has been aggressively enforced. [Andrew Schilling](#), [Ross Morrison](#), and [Michelle L. Rogers](#) will discuss the reach and limitations of

FIRREA, its recent rediscovery by the DOJ, and where the DOJ may go from here. **Click [here](#) to register.**

[David Baris](#) will speak at the [2013 American Bankers Association National Conference for Community Bankers](#) at the JW Marriott Orlando, Grande Lakes, Orlando, FL on February 18, 2013. His topic is entitled "Challenges and Opportunities for Bank Boards in 2013".

[Margo Tank](#) will speak about ESIGN and eRecording at the [Property Records Industry Association Winter Symposium](#), being held in Washington, DC, on February 27, 2013.

[Katy Ryan](#) will speak at the [2013 NMLS Annual Conference & Training](#) in San Antonio, TX on February 27-28, 2013. The session, "Advance Change Notifications", will examine NMLS updates in the second quarter of 2013 meant to accommodate changes to a licensee's record resulting from change of control or other branch or company amendments.

[James Shreve](#) will speak at the [RSA Conference](#) in San Francisco, California on February 28, 2013. The session, "Who Owns the Data in Mobile Payments and Why that Matters," will examine regulatory and contractual issues that may arise from data ownership in mobile payments systems.

[James Parkinson](#) will speak on corruption risks associated with doing business in India at a panel produced by the Association of the Bar of the City of New York City on March 1, 2013.

[Jonathan Cannon](#) will speak at the [Lenders One Winter Conference](#) in Kissimmee, Florida, on March 4, 2013. His topics are the new qualified mortgage/ability to repay rules, and the new loan originator compensation rules.

[Thomas Sporkin](#) and [James Shreve](#) will speak at the International Association of Privacy Professionals [Global Privacy Summit](#) in Washington, DC on March 7, 2013. The session, "Demystifying SEC Guidance on Cybersecurity Risk," will discuss guidance from the SEC's Division of Corporate Finance on how and when actual or possible cybersecurity incidents and their costs should be included in public filings.

[Donna Wilson](#) will be a panelist at the Second Annual Round Table on Current "Hot Topics" and Legal Developments Facing the Retail and Fashion Industries on March 7, 2013 in New York, NY.

[Andrew Sandler](#) will participate in the "Fair Lending Forum" at [CBA Live 2013](#), the Consumer Bankers Association's annual conference for retail banking leaders, to be held March 11-13, 2013 in Phoenix, AZ.

[John Redding](#) will speak on March 12, 2013 at the [Independent Community Bankers of America National Convention](#) in Las Vegas, NV about the impact of the CFPB's new mortgage origination and servicing rules on community banks.

[Andrew Schilling](#) will be a panelist for "[False Claims Act: Enforcement and Compliance Issues Explored](#)," a Knowledge Congress CLE webcast, on March 13, 2013. This event will present an overview of the False Claims Act and address regulatory updates and enforcement developments, key takeaways from related cases, identifying risks for potential FCA violations, and developing a robust compliance program.

[Andrew Sandler](#) will speak at the [National Community Reinvestment Coalition Annual Conference](#), March 20-23, 2013 in Washington, D.C. Mr. Sandler's workshop is entitled "The Future of Fair Lending: Key Lessons from 2012".

[Jonice Gray Tucker](#) will speak at the [American Bar Association's Business Law Section Spring Meeting](#) on April 4, 2013 in Washington, D.C. The panel on which she is participating will focus on CFPB enforcement actions.

[Jonice Gray Tucker](#) and [Valerie Hletko](#) will moderate a panel entitled "Extreme Makeover: Consumer Protection Edition" at the [American Bar Association's Business Law Section Spring Meeting](#) on April 4, 2013 in Washington, D.C. The panel will focus on the CFPB's new regulations and related compliance expectations.

[Andrew Sandler](#) will speak at the 39th Annual Bankers Legal Conference which will be held April 4-5, 2013 at The Westin Austin at the Domain.

[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.

## **FIRM PUBLICATIONS**

[Donna Wilson](#) and [Brandon Reilly](#) published "[California's Homeowner Bill of Rights](#)" in the January 2013 edition of Mortgage Banking.

[Andrew Schilling](#) published "[U.S. Using Subpoenas Under 1989 Act as New Tool to Probe Financial Firms](#)," on January 3, 2013 on [Reuters' Financial Regulatory Forum](#).

[Margo Tank](#) and [David Whitaker](#) authored "[Is Regulatory Uncertainty an Impediment to Mobile Payments](#)," which was published on PaymentsJournal.com on January 23, 2013.

[Amanda Raines](#) and [A.J. Dhaliwal](#) published "[Petitions to Modify or Set Aside CFPB Civil Investigative Demands \(CIDs\): Analysis of Recent Decisions](#)" on January 29, 2013, as part of the LexisNexis 2013 Emerging Issues commentary series.

[Ben Saul](#), [Aaron Mahler](#), and Jared Kelly published "[Know the Standard of FDIC Liability for Community Banks](#)" in Law360 on February 5, 2013.

[David Baris](#) and Jared Kelly recently published a book entitled "FDIC Director Suits - Lessons Learned." The authors reviewed all of the FDIC's current civil suits against directors of failed banks and savings institutions -34 cases as of the book's printing, involving over 250 directors-and extracted key points for consideration. The book is available for purchase [here](#).

## **About BuckleySandler LLP ([www.bucklesandler.com](http://www.bucklesandler.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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*We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes. Email [infobytes@bucklesandler.com](mailto:infobytes@bucklesandler.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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**D.C. Federal Court Holds Government False Claims Case Not Precluded by National Servicing Settlement.** On February 12, the U.S. District Court for the District of Columbia [declined to enjoin](#) the government from pursuing alleged False Claims Act violations against a bank that argued such claims were precluded by the terms of the national servicing settlement. *United States v. Bank of Am. Corp.*, No 12-361, 2013 WL 504156 (D.D.C. Feb. 12, 2013). The bank petitioned the court to halt a suit filed by the government in the Southern District of New York, in which the government alleges that the bank's certification of loans under the FHA's Direct Endorsement Lender Program violated the False Claims Act. The bank argued that the national mortgage servicing settlement contains a comprehensive release for certain liability with respect to its alleged FHA mortgage lending conduct. Finding the consent judgment effectuating the settlement to be clear and unambiguous, the court rejected the bank's interpretation of the settlement. The court left it to the Southern District of New York to determine the nature of the claims at issue, but held that the release does not cover the claims as described by the bank. The court therefore denied the bank's motion to enforce the consent judgment and enjoin the New York action.

**Fannie Updates Foreclosure Time Frames for Twelve States.** On February 13, Fannie Mae issued Servicing Guide Announcement [SCV-2013-01](#), which increases the maximum number of allowable days within which routine foreclosure proceedings are to be completed in California, Colorado, Hawaii, Massachusetts, North Carolina, Oregon, Pennsylvania, and Rhode Island, effective for foreclosure sales on or after April 1, 2013. Fannie Mae also decreased the maximum number of allowable days for foreclosure proceedings in Alabama, Iowa, Missouri, and Wisconsin. These time frame reductions will be effective for mortgage loans that become delinquent on or after March 1, 2013. In addition, Fannie Mae (i) announced that on or after April 1, 2013, in New Jersey, allowable delay credit will be given for the actual number of days the mortgage loan is reported in a foreclosure status between December 2010 and April 2012, up to a maximum of 180 days, and (ii) added 90 days to the allowable delay for Military Indulgence, effective for foreclosure sales on or after November 1, 2012. Finally, effective for all foreclosure sales on or after July 1, 2013, those foreclosure sales that result in a third-party sale will be included in the foreclosure time frame compensatory fee billing process for foreclosure delays.

**Illinois Enacts Fast-Track Foreclosure Legislation.** On February 8, Illinois Governor Pat Quinn signed [SB 16](#), a bill [introduced in January 2011](#), which creates a fast-track foreclosure process for certain abandoned and vacant properties. Effective June 1, 2013, a lender can petition a court seeking expedited foreclosure proceedings on properties that hold six or fewer units that are not legally occupied. The bill also shortens the foreclosure timeframe on those properties to between 90 and 180 days. Lenders will be subject to a sliding scale of additional foreclosure filing fees through 2017, ranging from \$50 to \$500. The exact fee amount is dependent on the number of foreclosure actions lenders undertake annually. The state expects the fees to generate \$120 million over the next three years. A portion of that revenue is earmarked to offset local government costs associated with abandoned homes. Funds also will support HUD-approved housing counseling agencies.

**Oregon Finalizes Foreclosure Avoidance Mediation Program Rules.** On February 1, the Oregon Department of Justice [published](#) final rules to implement the foreclosure avoidance mediation program established by [legislation enacted in April 2012](#), which requires beneficiaries to (i) enter into mediation with a grantor for the purpose of negotiating a foreclosure avoidance measure, and (ii) notify a grantor if they are not eligible for any foreclosure avoidance measure or if the grantor has not complied with the terms of a foreclosure avoidance measure. The final rules took effect January 7, 2013, and replaced [temporary rules](#) that had been in place since July 2012.

The Oregon Department of Justice also updated its [Frequently Asked Questions](#) for borrowers and lenders/servicers.

## **BANKING**

**FDIC Proposes Amended Definition of Insured Deposits.** On February 12, the FDIC Board [approved](#) a [proposed rule](#) that would amend its deposit insurance regulations to clarify that deposits in foreign branches of U.S. banks are not FDIC-insured. The U.K. Financial Services Authority (FSA) has proposed a rule to prohibit banks from non-European Economic Area countries from operating deposit-taking branches in the U.K. unless U.K. depositors in such branches would be on an equal footing in the national depositor preference regime with home-country (uninsured) depositors if a bank were to fail and require a resolution. The FDIC believes that U.S. banks seeking to comply with the FSA proposal likely will change their U.K. deposit agreements so that the deposits are payable both in the U.K. and in the U.S. The proposed FDIC rule is intended to protect the Deposit Insurance Fund against the potential resulting liability that the FDIC could face as a deposit insurer for customers of foreign branches of U.S.-based insured depository institutions. While deposits at foreign branches of U.S. banks would not be insured, they could be treated as deposits for purposes of national depositor preference laws. The proposed rule would not affect deposits in overseas military banking facilities governed by regulations of the Department of Defense. The FDIC is seeking comment on all aspects of the proposal within 60 days of its publication in the Federal Register.

**Senate Banking Committee Finalizes Subcommittee Membership.** On February 11, Senate Banking Committee Chairman Tim Johnson (D-SD) and new Ranking Member Mike Crapo (R-ID) [announced](#) the subcommittee assignments for the 113th Congress. The rosters reflect the replacement of majority members Michael Bennet (D-CO), and former Senators Daniel Akaka (D-HI) and Herb Kohl (D-WI) with Elizabeth Warren (D-MA), Joe Manchin (D-WV), and Heidi Heitkamp (D-ND). Minority members Tom Coburn (R-OK) and Dean Heller (R-NV) have replaced Roger Wicker (R-MS) and former Senator Jim DeMint (R-SC). The subcommittee rosters follow recent announcements by the [Chairman Johnson](#) and [Ranking Member Crapo](#) naming subcommittee chairmen and ranking members. The Subcommittee on Housing, Transportation, and Community Development will be led by Chairman Robert Menendez (D-NJ) and Ranking Member Jerry Moran (R-KS), while the Subcommittee on Financial Institutions and Consumer Protection will be led by Chairman Sherrod Brown (D-OH) and Ranking Member Patrick Toomey (R-PA).

**Senate Banking Committee Chairman Outlines Agenda.** On February 12, Chairman Johnson [released](#) the committee's agenda, which includes among its top priorities continuing oversight of implementation of the Dodd-Frank Act, and stabilizing the housing market and building consensus on housing finance reform. With regard to the former, the Chairman's agenda states that the "committee will also explore taking appropriate steps to improve the effectiveness of [the Dodd-Frank Act] should broad bipartisan consensus emerge." With regard to housing, the committee will review the FHA and the health of its insurance fund, the various mortgage rules required by the Dodd-Frank Act, opportunities to expand refinancing, and implementation of the national mortgage servicing settlement. The agenda also includes, among a range of "other priorities," ensuring fairness and transparency in consumer financial services markets, highlighting servicemember protection issues, and monitoring the impact of policies on community banks and credit unions.

**Additional State AGs Join Challenge to Dodd-Frank Act Provisions.** On February 13, the plaintiffs in a case challenging portions of the Dodd-Frank Act [sought leave](#) to file a [second amended complaint](#) to add as plaintiffs the state attorneys general (AGs) of Alabama, Georgia, Kansas, Montana, Nebraska, Ohio, Texas, and West Virginia. Motion for Leave to File Second

Amended Complaint, *State Nat'l Bank of Big Spring v. Wolin*, No 12-1032 (D.D.C., filed Feb. 13, 2013). The new state AGs join the AGs of Michigan, Oklahoma, and South Carolina, who [previously joined the suit](#) and claim that the "orderly liquidation authority" (OLA) for financial institutions provided to the Treasury Secretary by the Dodd-Frank Act violates the separation of powers doctrine, as well as the Fifth Amendment's bar against the taking of property without due process. The case also involves private party plaintiffs who, in addition to challenging the OLA, challenge as unconstitutional (i) the formation and operation of the CFPB, (ii) the appointment of CFPB Director Richard Cordray, and (iii) the operation of the Financial Stability Oversight Council. The plaintiffs were due to respond to a pending government motion to dismiss, but asked the court to stay briefing on that motion pending resolution of the motion to file a second amended complaint.

**NCUA Names New Ombudsman, Elevates Position.** On February 11, the NCUA [announced](#) that Joy Lee assumed the duties of Ombudsman, effective immediately. The NCUA also explained that it has elevated the position so the Ombudsman will now be supervised by the Executive Director's office and report directly to the Board. Prior to this position, Ms. Lee served as Senior Federal Financial Institutions Examination Council Advisor to the NCUA Chairman, and before that served in several senior staff positions at NCUA since joining the agency as an examiner in 1987.

**OCC Updates Effective Dates for CMP Inflation Adjustment and New Flood Insurance Penalties.** On February 8, the OCC issued Bulletin [OCC 2013-7](#), which clarifies that the maximum amount of the OCC's civil money penalties (CMP) as [adjusted for inflation last fall](#) apply to violations that occurred on or after December 6, 2012. The Bulletin also states that new flood insurance penalties that also were adopted last fall, apply to violations that occurred on or after July 6, 2012, and not to violations that occurred on or after December 6, 2012, [as originally announced](#).

## CONSUMER FINANCE

**CFPB Releases First MOU with Tribal Government.** On February 12, the CFPB [released](#) a memorandum of understanding (MOU) it entered into last month with the Navajo Nation Department of Justice, pursuant to which the parties will share information. [The MOU](#) provides for confidential treatment and protection from FOIA disclosure of Navajo Nation documents and information provided to the CFPB, and establishes a framework pursuant to which the Navajo Nation can seek information from the CFPB. Notably, nearly a year ago, in [remarks](#) to state attorneys general, CFPB Director Richard Cordray stated the CFPB's intent to focus on payday lenders associated with Native American tribes. The MOU could facilitate the CFPB's efforts to pursue such lenders.

**CFPB Schedules Consumer Advisory Board Meeting.** On February 12, the CFPB [announced](#) that its Consumer Advisory Board will meet on February 20, 2013 in Washington, DC. The portion of the event open to the public will feature remarks from Director Cordray, Associate Director Zixta Martinez, and Consumer Advisory Board Chairman Jose Quinonez. The balance of the event is private, and the [agenda](#) includes (i) a presentation by the CFPB's Supervision Office, (ii) breakout sessions with various CFPB offices, including the Office of Fair Lending, and (iii) a review of recently issued mortgage rules and implementation plans. Members of the public that would like to attend the portion of the event open to the public must RSVP.

**Senate Democrats Complete Battle Lines over CFPB Nomination.** On February 14, 54 of the 55 Senators in the Democratic caucus joined a [letter](#) to President Obama supporting the nomination of Richard Cordray to lead the CFPB and expressing opposition to "efforts to weaken the CFPB through structural changes." The letter responds to a [recent letter](#) to the President from Senate Republicans reiterating their opposition to confirming any nominee as CFPB Director until the structure of the agency is changed. In responding, the Democratic Senators state that never before has a President's nominee to lead an agency been obstructed on such a basis, and point out that a

supermajority of the Senate approved the structure as it exists today.

**Defendants in CFPB Enforcement Action Renew Challenge to Validity of Director's Appointment.** On February 11, a law firm and related parties [sued](#) by the CFPB for allegedly deceiving consumers through a network of mortgage loan modification businesses filed a [brief](#) in which they renewed a challenge to the CFPB Director's appointment. Opp. to Receiver's Request for Payment, *CFPB v. Chance Edward Gordon*, No. 12-6147 (C.D. Cal., filed Feb. 11, 2013). The defendants cite a [recent opinion](#) from the U.S. Court of Appeals for the D.C. Circuit that held appointments to the National Labor Relations Board made by President Obama in January 2012 during a purported Senate recess were unconstitutional, and argue that CFPB Director Cordray was appointed on the same day, and in the same manner found to be constitutionally invalid by the D.C. Circuit Court. The defendants stated in their motion that they have propounded Requests for Admissions regarding the date and nature of Mr. Cordray's appointment, and likely will follow with a motion for summary judgment.

**FTC Releases Results of Credit Reporting Study.** On February 11, the FTC [released](#) the results of its study of the U.S. credit reporting industry, including its finding that five percent of consumers had errors on one of their three major credit reports that could lead to them paying more for products. The study also found that (i) one in four consumers identified errors on their credit reports that might affect their credit scores; (ii) one in five consumers had an error that was corrected by a credit reporting agency (CRA) after it was disputed; (iii) four out of five consumers who filed disputes experienced some modification to their credit report, with slightly more than one in 10 noticing a change in their credit score after the agencies modified errors on their credit report; (iv) approximately one in 20 consumers had a maximum score change of more than 25 points and only one in 250 consumers had a maximum score change of more than 100 points. The main types of disputed and confirmed material errors identified by the study were errors in the trade line (consumer accounts) or collections information. The [FTC report](#) is the first major study that looks at the full range of participants in the credit reporting and scoring process, including consumers; data furnishers, which include creditors, lenders, debt collection agencies, and the court system; the Fair Isaac Corporation, which develops FICO credit scores; and the national CRAs. The FTC is required to conduct a study of credit report accuracy and provide interim reports every two years, through 2012, with a final report due in 2014. Late last year, the CFPB, which shares jurisdiction over CRAs, published a [white paper](#) on its review of how the three largest CRAs manage consumer data and complaints.

**California Appeals Court Permits Borrowers' Claims against Lender Based on Auto Dealer's Alleged Breach of Installment Contract.** On February 4, the California Court of Appeal, Third District, [held](#) the FTC's Holder Rule allows borrowers to assert claims against a lender assignee that they might otherwise have against the auto dealer with whom the borrowers entered the installment contract. *Lafferty v. Wells Fargo Bank*, No. C0678812, 2013 WL 412900 (Cal. App. Ct. Feb. 4, 2013). The borrowers stopped making payments on their motor home, disclaimed their ownership interest, and filed suit against the dealer with whom they financed the purchase of the vehicle after the dealer refused to make repairs to the vehicle. Relying upon the FTC's Holder Rule, which requires language in every consumer installment contract to state that any holder of the consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of the goods, the borrowers sued the bank to whom their loan had been assigned. After a trial court dismissed the case, the borrowers appealed. The appeals court reversed the judgment, holding that the "plain meaning of the Holder Rule allows the [borrowers] to assert claims against [the bank] they might otherwise have against [the dealer]," but limited the borrowers' recovery to the actual amounts paid under the installment contract. The appeals court declined to follow courts in other jurisdictions that looked beyond the plain meaning of the rule to assess the FTC's original intent in adopting the rule, and rejected the bank's argument that the Reese-Levering Act limits the

borrowers' right to rescission of the contract. The appeals court also held that the borrowers stated causes of action against the bank under the CLRA and for negligence, but that their claim for negligent defamation of credit was preempted by the Fair Credit Reporting Act. The appeals court reversed the trial court order.

**FTC Recaps Debt Collection Activities for Annual CFPB Report.** On February 1, the FTC sent a [letter](#) to the CFPB describing the FTC's debt collection-related activities over the past year. The responsibility to report to Congress each year on implementation and enforcement of the FDCPA [shifted](#) from the FTC to the CFPB last year, but given their shared authority with regard to the FDCPA, the CFPB relies on the FTC to provide information for inclusion in its annual report. The FTC letter recaps the agency's law enforcement efforts, including the filing or resolution of four actions against collectors alleged to have engaged in deceptive, unfair, or abusive conduct and the filing or resolution of three actions related to phantom debt collection. The letter also highlights outreach and policy activities, including the FTC's [recent debt buyer study](#).

## PRIVACY/DATA SECURITY

**President Obama Issues Executive Order on Cybersecurity.** On February 12, President Obama issued an Executive Order (EO) titled [Improving Critical Infrastructure Cybersecurity](#), and a related [Presidential Policy Directive](#) (PPD). The EO establishes a process to facilitate sharing of cybersecurity information among private firms in critical infrastructure sectors and the federal government, and tasks the National Institute of Standards and Technology (NIST) with developing standards, methodologies, procedures, and processes that will form a voluntary best practices framework to address cyber risks. The EO also includes provisions designed to protect privacy and civil liberties. The financial services sector is one of the many sectors identified as a critical sector, and the EO and PPD name the Treasury Department as the federal entity responsible for providing institutional knowledge and specialized expertise as well as leading, facilitating or supporting the security and resilience programs and associated activities for critical financial services firms. On February 13, NIST initiated the process to develop the best practices framework by [announcing](#) a request for information from critical infrastructure owners and operators, federal agencies, state, local, territorial and tribal governments, standards-setting organizations, other members of industry, consumers, solution providers and other stakeholders. NIST is required by the EO to prepare a preliminary framework by October 10, 2013, and a final framework by February 12, 2014.

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