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Financial Services Report

Staying Ahead of the Summons

Editor's Note

Toyota isn't the only one suffering Sudden Acceleration Syndrome. Bank lawyers are also starting to develop a crick in the neck over all the abrupt stops and starts. Just look at what happened.

Bankers across the country reported a sudden lurch in acceleration with the announcement of the Consumer Financial Protection Agency, a showy, turbo-powered, muscle machine. At first, lawmakers got great mileage but others said they had problems getting traction and then, during a test drive, some Senators felt an unexpected slamming on the brakes. Coincidentally, the loud hissing noise disappeared right about that time.

Next, there was the oh-so-snug "sudden seatbelt tightening" problem reported in many of the higher-end "Executive Compensation" sports sedans. The top-of-the-line models even came with driver ejector seats, and those seem to be working fine. Curiously, there were no reports of "sudden seatbelt tightening" at Fannie Mae and Freddie Mac. Speaking of which, there are rumors of a Fannie and Freddie recall due to a "rear view mirror" adjustment problem, with losses likely to exceed $400 billion. (Government officials, looking as if they just eaten bad sushi, are attributing it to faulty floor mats.) It goes to show that in life, as in rear view mirrors, obstacles really are closer than they appear.

If there is a theme to this quarter's stories, it is that the news arrived in 3-D and Dolby surround-sound. The CARD Act went into effect, Congress is still figuring out whether banks should be partners in the economic recovery or be served on pitchfork-kabobs. Big Banks got assessed a whopping Bailout Tax, and the confounding RESPA rules on GFEs and HUD-1's went into effect in January. That is only a small part of what we report. For a quick-link to our Client Alerts and an evergreen report on the financial crisis, turn to http://www.mofo.com/resources/financial-crisis.

Until next time, hug a bank lawyer and don't accept any trouser hand-me-downs from the Norwegian men's Olympic curling team.

William Stern, Editor-in-chief

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Arbitration Report

Ninth Circuit Strikes Again

In a proposed class action alleging that Dell designed, manufactured, and sold defective notebook computers, the Ninth Circuit struck down a class action waiver clause pursuant to which Dell had obtained an order from the district court compelling arbitration. *Omstead v. Dell*, No. 08-16479, 2010 U.S. App. LEXIS 2499 (9th Cir. Feb. 5, 2010). The Ninth Circuit held that the waiver was unconscionable under *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), and refused to apply the Texas choice-of-law provision in the agreement because "California has a materially greater interest than Texas in applying its own law." *Id.* at *12.

For more information, contact Rebekah Kaufman at rkaufman@mofo.com.

Debt Collection Arbitrations Don't Favor Businesses

We previously reported on the settlement of a lawsuit brought by the Minnesota Attorney General against the National Arbitration Forum ("NAF") alleging conflicting ties between the NAF and debt-collection law firms representing major credit card companies. Debt collection arbitration has become a focus of debate. Some critics have claimed that consumer arbitration is biased to favor businesses. An Interim Report issued by a Consumer Arbitration Task Force at Northwestern University School of Law suggests otherwise. The report compared the outcomes of AAA debt collection arbitrations to the outcomes of debt collection cases in court and found that consumers prevail more often in the arbitrations than in court. The study further found that creditor recovery rates in arbitrations were lower than or comparable to creditor recovery rates in court. (For the full study, see http://www.law1.northwestern.edu/searlecenter/issues/index.cfm?ID=81.)

For more information, contact Rebekah Kaufman at rkaufman@mofo.com. ■

Beltway Report

Final Regulatory Rule On FAS 166 and 167

On January 21, the OCC, the FRB, OTS, and FDIC issued the final risk-based capital rule on the Financial Accounting Standards Board's adoption of Statement of Financial Accounting Standard 166, Accounting for Transfers of Financial Assets, Amendment of FASB Statement No. 140 ("FAS 166") and Statement of Financial Accounting Standards No. 167, Amendments to FASB Interpretation No. 46(R) ("FAS 167"). FAS 166 and FAS 167 make changes to how banking organizations account for many items, including securitized assets that had been off the balance sheets. Most banking organizations are required to implement the new standards of FAS 166 and FAS 167 by January 1, 2010. Banking organizations affected by FAS 166 and FAS 167 generally will be subject to higher risk-based regulatory capital requirements intended to better align risk-based capital requirements with the actual risks of certain exposures. Please click here to read our client alert.

For more information, contact Melissa Beck, mbeck@mofo.com, Anna Pinedo, apinedo@mofo.com, or Kenneth Kohler, kkohler@mofo.com.

To the Finish Line: Final CARD Act Rule

On January 12, 2010, leaving issuers with less than two months to implement extensive requirements, the FRB issued a final rule ("Rule") to implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"). The Rule incorporates the substance of the Regulation Z rule issued by the FRB in January 2009. Because many requirements in the January 2009 rule and amendments to Regulation AA ("UDAP Rule") are incorporated into this Rule, the FRB simultaneously issued notices withdrawing the January 2009 rule and the UDAP Rule.

Two remaining provisions of the CARD Act were not included in the Rule. Both are currently scheduled to become effective on August 22, 2010. One provision addresses the reasonableness of penalty fees. The other provision requires issuers to evaluate past interest rate increases and reductions twice a year. We expect the FRB to release a proposed rule implementing these provisions in early March 2010.

For more information, contact Rick Fischer at lfischer@mofo.com, Oliver Ireland at oireland@mofo.com, or Obrea Poindexter at opoindexter@mofo.com.

IF AN INSTITUTION DETERMINES THAT ITS CORE EARNINGS AND CAPITAL ARE INSUFFICIENT TO SUPPORT ITS INTEREST RATE RISK, IT SHOULD TAKE STEPS TO MITIGATE EXPOSURE, INCREASE CAPITAL, OR BOTH.

Fed Clarifies CARD Act Rules For Variable Rates with 'Floors'

Federal Reserve staffers—in two recent ABA-hosted conference calls—have clarified alternatives to dealing with the recent rules related to credit card plans with variable rates. The new rules, mandated

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by the 2009 Credit Card Act, state that for a variable-rate plan to increase to the rate without advance notice and other restrictions, it may not have a "floor" or minimum rate above the index rate plus margin. Issuers had questions about how to make variable-rate changes and the timing of any required notices, especially given the short implementation time frame. Fed staffers explained that there are several alternatives available to card issuers.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

Securitization Reform Bill

On December 11, 2009, the House of Representatives passed the Wall Street Reform and Consumer Protection Act of 2009 ("Bill"). The Bill consolidates and revises numerous financial reform bills that were introduced in the House in the past few months. Title I of the Bill contains a revised version of the Financial Stability and Improvement Act of 2009 that was originally released on October 27, 2009. Subtitle F of Title I (aka the Credit Risk Retention Act of 2009) relates specifically to asset-backed securitization reform ("ABS Bill") and was also revised to address issues raised by the industry after release of the October draft ("ABS Proposal"). The differences between the ABS Bill and the ABS Proposal are outlined in our client alert.

Please click here to read our client alert.

For more information, contact Melissa Beck, mbeck@mofo.com, or Jerry Marlatt, jmarlatt@mofo.com.

House Passes Reforms for Financial Industry

The Wall Street Reform and Consumer Protection Act of 2009 (the "Bill") overhauls regulation of the financial industry with tough controls on large or systemically

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FCRA Preemption Exclusion Confusion

The FCRA expressly exempts from preemption Massachusetts and California statutes on liability for information furnishers. Initially, courts held this exemption did not allow litigants a claim against information furnishers under California or Massachusetts law because the private right of action created by FCRA is not included in the exempted statutory provisions. As we previously reported, the winds shifted in California, where a California appellate court and the Ninth Circuit ruled otherwise. The winds also shifted in Boston, where a federal court recognized other courts had reached a different conclusion, but found a claim brought under the exempted Massachusetts provision was not preempted by FCRA. *Catanzaro v. Experian Information Solutions, Inc.*, 09-105550, 2009 WL 4363207 (D. Mass. Dec. 1, 2009). The court did dismiss as preempted claims brought under other provisions in the same statute and the Massachusetts consumer protection statute.

For more information, contact Nancy Thomas at nthomas@mofo.com.

What a Difference The "S" Makes

A federal district court in Wisconsin has ruled that FCRA preempts state statutory claims against information servicers, but does not preempt common law claims such as libel and negligence. *Ori v. Fifth Third Bank*, __ F. Supp. 2d __, 2009 WL 4895667 (E.D. Wis. Dec. 14, 2009). In reaching this conclusion, the court found that FCRA's preemption of "state law***s***" indicated intent to preempt statutory claims only, whereas statutes or regulations preempting "state law" (without the "s") preempt both statutory and common law claims. The court also relied on the context of the surrounding statutory provisions excluding certain state statutes from FCRA preemption and the structure of the FCRA.

For more information, contact Nancy Thomas at nthomas@mofo.com.

THE COURT FOUND THAT FCRA'S PREEMPTION OF "STATE LAWS" INDICATED INTENT TO PREEMPT STATUTORY CLAIMS ONLY, WHEREAS STATUTES OR REGULATIONS PREEMPTING "STATE LAW" (WITHOUT THE "S") PREEMPT BOTH STATUTORY AND COMMON LAW CLAIMS.

Garnish That!

Are national banks guilty of conversion by assessing servicing fees to debtors whose accounts are subject to a garnishment order and extracting those fees from garnished funds before releasing the remaining funds to garnishors? An Ohio federal court won't reach the question because the Sixth Circuit affirmed its decision finding the claim is expressly preempted by OCC regulations. *Monroe Retail, Inc.*

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THE ADVISORY REITERATES THE IMPORTANCE OF CORPORATE GOVERNANCE, RISK MEASURING AND MONITORING SYSTEMS, STRESS TESTING, AND INTERNAL CONTROLS FOR INTEREST RATE RISK EXPOSURES.

significant institutions and the creation of a new consumer protection agency. The Bill reins in predatory mortgage lending, limits executive pay, enhances the SEC's enforcement powers, and creates federal oversight over the derivatives markets and credit rating agencies. The Bill moved swiftly through the House after lawmakers spent time attempting to reach consensus on a package of 36 amendments. Approved 223-202, Republicans were nearly united in opposition, while Democrats worked to iron out differences among themselves. House Financial Services Committee Chairman Barney Frank (D-Mass.) and other reformers defeated a proposal from fellow Democrats that would have scrapped the proposed Consumer Financial Protection Agency ("CFPA") in favor of a council of regulators. In other CFPA action, lawmakers cleared an amendment from Rep. Jan Schakowsky (D-Ill.) to include reverse mortgages within the CFPA's oversight. Lawmakers also defeated an amendment that would have allowed bankruptcy judges to cram down mortgages during Chapter 13 proceedings. That amendment failed 188-242.

For more information, contact Oliver Ireland at oireland@mofo.com.

Proposed Consumer Financial Protection Agency: Stillborn in the Senate?

Several news outlets, including the *Wall Street Journal* and *Washington Post,* reported that Senate Banking Committee Chairman Chris Dodd (D-Conn.), who is overseeing bipartisan negotiations on his panel's regulatory restructuring bill, may drop plans to create a stand-alone CFPA. According to these reports, the CFPA would be replaced with a strong consumer division in a bank regulatory agency, most likely a newly created federal agency combining the OCC and the OTS.

For more information, contact Oliver Ireland at oireland@mofo.com.

Guidance on Reverse Mortgages

The Federal Financial Institutions Examination Council ("FFIEC") released proposed guidance designed to help financial institutions ensure that their risk management and consumer protection practices address the compliance and reputation risks raised by reverse mortgage lending. The proposed guidance discusses the general features of reverse mortgage products, relevant legal requirements, and consumer protection concerns. It also focuses on the need for financial institutions to provide clear and balanced information to consumers about the risks and benefits of reverse mortgages when consumers are making product decisions. Financial institutions have to inform consumers of alternatives to reverse mortgages, require consumers receive qualified independent counseling, and take steps to avoid any appearance of conflicts of interests. Comments must be received 60 days from publication in the Federal Register.

For more information, contact Joe Gabai at jgabai@mofo.com.

Annual Notice of Asset-Size Exemption

FRB published its annual notice of the asset-size exemption threshold for depository institutions under Regulation C, which implements the Home Mortgage Disclosure Act ("HMDA"). The asset-size exemption remained $39 million based on the annual percentage change in the CPI for Urban Wage Earners and Clerical Workers for the twelve-month period ending in November 2009. Depository institutions with assets of $39 million or less as of December 31, 2009, are exempt from HMDA collecting data in 2010. An institution's exemption from collecting data in 2010 does not affect its responsibility to report the data it was required to collect in 2009. The 2010 asset-size exemption threshold became effective on January 1, 2010.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

Managing Interest Rate Risk

The federal banking agencies released an advisory reminding depository institutions of supervisory expectations for sound practices to manage interest rate risk. The advisory reiterates the importance of corporate governance, risk measuring and monitoring systems, stress testing, and internal controls for interest rate risk exposures. It clarifies existing guidance and describes effective interest rate risk-management techniques. Regulators expect institutions to have sound risk-management practices to measure, monitor, and control interest rate risks using processes commensurate with their complexity, business model, risk profile, and operational scope. If an institution determines that its core earnings and capital are insufficient to support its interest rate risk, it should take steps to mitigate exposure, increase capital, or both.

In an accompanying Supervision and Regulation letter to the Reserve Bank heads of supervision, the FRB noted

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v. RBS Citizens, N.A., 589 F.3d 274 (6th Cir. 2009). Deferring to an OCC opinion letter, the court found state law claims that would prevent national banks from balancing their accounts and collecting fees prior to remitting funds to garnishors would significantly interfere with the banks' federal authority. A dissenting judge disagreed on grounds that laws of general applicability are not preempted.

For more information, contact Nancy Thomas at nthomas@mofo.com.

Sallie Mae Saved

The Ninth Circuit held the need for uniformity in federal student loan programs trumped state law claims challenging Sallie Mae's interest rate computation method, late fee practices, and setting of the first repayment date. *Chae v. SLM Corp.*, No. 08-56154, 2010 WL 253215 (9th Cir. Jan. 25, 2010). The court held plaintiffs' misrepresentation claims were expressly preempted by the Higher Education Act provision excluding loans made under the Act from state law disclosure requirements. The court held conflict preemption defeated plaintiffs' state-law challenges to the practices themselves, deferring to the Department of Education's view, expressed in a brief submitted in the action, that Congress intended to create a uniform regulatory framework.

For more information, contact Nancy Thomas at nthomas@mofo.com.

HOLA Is Good, But Not That Good

HOLA and OTS regulations preempt state law claims based on California's predatory lending statute and state lending laws or TILA, but do not preempt claims based on a thrift's alleged misrepresentation on the interest rate applicable to plaintiff's mortgage. *Ibarra v. Loan City*, 09 CV 02228, 2010 U.S. Dist. LEXIS 6583 (S.D. Cal. Jan. 27, 2010). Claims based on the

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OD'd on OD's

You'd think they'd eaten bad sushi. On February 19, the Fed proposed last-minute changes to rules that limit overdraft charges on transactions at ATMs and one-time debit card transactions. It threatened to ban all overdraft fees by July 1 unless financial institutions have the changes in place by that time. The changes involve rules under Regulation E and Regulation DD that limit overdraft charges unless customers opt in to fee arrangements. The Fed said financial institutions will have to implement the proposed revisions to Regulation E by the existing July 1 compliance deadline, or face a prohibition on all overdraft fees. The prohibition would apply not only to ATM and one-time debit transactions covered by the proposed Reg E/DD changes, but also to other instruments such as bounced checks that are not covered by those regs.

Bailout Taxing on Big Banks

President Obama's proposed Financial Crisis Responsibility Fee would be levied against the debts of financial firms with over $50 billion in consolidated assets. It seeks to recoup over the next 12 years TARP's projected cost of $117 billion. The fee, aimed at institutions whose risk-taking precipitated the financial crisis, also seeks to discourage excessive leverage.

The proposed tax is 15 basis points of covered liabilities per year, with liabilities defined as: Covered Liabilities = Assets – Tier 1 Capital – FDIC-assessed deposits (and/or insurance policy reserves, as appropriate). This would equal a $1.5 million tax for every $1 billion in covered liabilities.

The proposed tax may yield unintended consequences. While small banks and community banks are exempt, it could drive up funding costs for banks that rely more heavily on deposits for liquidity. Large banks could blunt the tax by increasing deposits through paying more interest. Smaller banks would have to match. Large banks could also cut back on advances from the Federal Home Loan banks. Building equity is another way to reduce the impact.

For more information, contact Henry Fields at hfields@mofo.com, Mark Gillett at mgillett@mofo.com, or Barbara Mendelson at bmendelson@mofo.com.

A Wash in the Ninth Circuit?

In *Donohue v. Quick Collect*, No. 09-35183, 2010 U.S. App. LEXIS 772, at *10, *17-19 (9th Cir. Jan. 13, 2010), the Ninth Circuit concluded that: (1) a debt-collection complaint served directly upon a consumer is a communication subject to the Fair Debt Collection Practices Act ("FDCPA"); and (2) technical, non-material inaccuracies within covered communications are not actionable under the FDCPA. Donohue filed a putative class action against Quick Collect, alleging FDCPA violations when its debt-collection complaint and demand letter charged a usurious annual rate above 12%, the maximum under Washington law. Donohue also claimed that Quick Collect violated the prohibition against the use of false or misleading statements via "misrepresenting the amount of interest"—that is, the debt-collection complaint incorrectly stated that $32.89 was interest of 12% per annum on the $270.99 principal. *Id.* at *2-3. The Ninth Circuit affirmed the grant of summary judgment for defendant, finding that it did not charge a usurious rate, and that the complaint's technical failure to breakdown both interest and pre-assignment finance charges was not materially false. *Id.* at *9, *18.

For more information, contact Joe Gabai at jgabai@mofo.com.

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that, although the advisory is targeted at depository institutions, the advice is also directly related to bank holding companies who should manage and control aggregate risk exposures, including interest rate risk, on a consolidated basis, while recognizing legal distinctions and possible obstacles to cash movements among subsidiaries.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

Basel Proposals Abound

December 2009, the Basel Committee on Banking Supervision ("BCBS") published its documents on "Strengthening the resilience of the banking sector" and the "International framework for liquidity risk measurement, standards and monitoring" (collectively "Basel Proposals"). The Basel Proposals addresses shortcomings in the Basel II capital framework, such as flaws in the definition of capital that compromise market discipline and pro-cyclicality, which helped amplify financial shocks. The Basel Proposals are intended to "promote a better balance between financial innovation, economic efficiency, and sustainable growth over the long run." They have drawn criticism from bankers and national regulators who have expressed concerns that BCBS is pushing ahead too quickly under political pressure from G20 leaders, and that the new rules may unduly curtail banks' lending capacity. Interested parties should provide comments by April 16, 2010. BCBS has stated that it plans to issue, by the end of 2010, a fully calibrated, comprehensive set of proposals, which banks will then be given time to implement in "phases" by December 31, 2012. Please click here to read our client alert.

For more information, contact Peter Green at pgreen@mofo.com, Helen Kim at hkim@mofo.com, or Anna Pinedo at apinedo@mofo.com. ■

"Operations"

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New Asset-Size Thresholds for Small Banks and Thrifts

The FRB, FDIC, OCC, and OTS have announced annual adjustments to asset-size thresholds for defining "small bank," "small savings association," "intermediate small bank," and "intermediate small savings association" under the Community Reinvestment Act (CRA).

The annual adjustments are based on the year-to-year change in the average of the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers, for each 12-month period ending in November. Due to the 0.98 percent decrease in the most recent CPI index, the definitions of small and intermediate small institutions for CRA examinations changed, effective January 1, 2010:

- "Small bank" or "small savings association" means an institution that, as of December 31 for either of the prior two years, had assets of less than $1.098 billion.
- "Intermediate small bank" or "intermediate small savings association" means a small institution with assets of at least $274 million as of December 31 for both of the prior two years, and less than $1.098 billion as of December 31 for either of the prior two years.

For more information, contact Henry Fields at hfields@mofo.com, Joe Gabai at jgabai@mofo.com, Mark Gillett at mgillett@mofo.com, or Barbara Mendelson at bmendelson@mofo.com.

Third Circuit Wants Reliance for TILA Actual Damages

In *Vallies v. Sky Bank*, 591 F.3d 152 (3d Cir. 2009), the sole issue was whether a plaintiff alleging disclosure violations must prove detrimental reliance to recover actual damages under § 1640(a)1 of the Truth in Lending Act ("TILA"). Vallies brought a putative class action after the note to finance his auto purchase failed to itemize his payment for debt cancellation insurance and failed to calculate the same into the finance charge. *Id*. at 154, 163. The Third Circuit looked to the statutory language and followed persuasive authority from the Sixth, Ninth, Eleventh, Fifth, Eighth, and First Circuits to conclude that detrimental reliance was required. *Id.* at 155-56. It affirmed the summary judgment for defendant because plaintiff failed to plead and could not prove detrimental reliance. *Id.* at 164.

For more information, contact Michael Agoglia at magoglia@mofo.com.

New Interest-Rate Restrictions on Deposits

Previously, less than well-capitalized FDIC-insured institutions cannot pay more than 75 basis points above the prevailing rates for deposits in the applicable market area. Effective January 1, 2010, the rules for determining compliance with the 75 basis point ceiling changed. Institutions subject to interest rate restrictions will be required to use the "national rate" to determine conformance with the restrictions, unless they qualify to use local market area rates. Before, these interest rate restrictions were measured against local market area rates. In many areas, the national rate may be lower than local market area rates that banks have been using as a benchmark. As a result, many banks may have to lower applicable deposit rates to comply with the new rules.

For more information, please see our client alert or contact Henry Fields at hfields@mofo.com, Joe Gabai at jgabai@mofo.com, Mark Gillett at mgillett@mofo.com, or Barbara Mendelson at bmendelson@mofo.com. ■

"Preemption" Mortgage Report

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duty not to misrepresent material facts, the court explained, are not preempted because such duty generally applies to all business and do not regulate lending.

Separately, a Los Angeles federal court held HOLA and OTS regulations do not completely preempt state law claims to create subject matter jurisdiction, finding HOLA did not provide the exclusive cause of action for the claims asserted. *Bartolome v. Homefield Financial Inc.*, CV 09-7258, 2009 WL 4907050 (C.D. Cal. Dec. 11, 2009).

For more information, contact Nancy Thomas at nthomas@mofo.com.

It Could Have Been Worse

In December, the House of Representatives passed the Wall Street Reform and Consumer Protection Act of 2009. This reform measure could change the landscape of federal preemption for national banks and federal thrifts. Although it purports to codify *Barnett Bank*, it may severely limit the ability of regulators to preempt state laws by broad rules, as the OCC and OTS have previously done. Additionally, the bill would repeal *Watters*, eliminating preemption of state laws applicable to operating subsidiaries of national banks and federal thrifts, and it would give state AGs visitorial powers over these institutions.

Nevertheless, the bill represents a significant improvement over the original version due to a deal between House Financial Services Committee Chairman Barney Frank and moderate Democrats. Senator Christopher Dodd, Congressman Frank's counterpart, is rumored to be close to releasing his own draft bill.

For more information, contact Oliver Ireland at oireland@mofo.com. ■

Consummation TILA-Style

In *Weintraub v. Quicken Loans, Inc.*, No. 08-2373, 2010 U.S. App. LEXIS 2502 (4th Cir. Feb. 5, 2010), the Fourth Circuit determined what constitutes a consummated credit transaction giving rise to the right to rescind under the federal Truth in Lending Act. Before closing a refi loan on their home, the Weintraubs attempted to exercise their TILA right to rescind, and demanded a full refund of their $500 deposit. Quicken refunded $129 after deducting for the credit report and appraisal.

The district court granted summary judgment to Quicken, holding that the statutory right to rescind is available only to rescind a consummated credit transaction. *Id.* at *8-9. The Fourth Circuit affirmed, concluding that a consummated credit transaction in this context results in binding loan obligations and the creation of a security interest in the consumer's property. *Id.* at *14, 16-17. The Fourth Circuit concluded that because the Weintraubs chose not to take the loan before closing, they were not entitled to rescission under TILA. *Id.* at *18.

For more information, contact Joe Gabai at jgabai@mofo.com.

The Hit List: Fannie Mae and Freddie Mac

On January 22, Chairman Barney Frank (D-Mass.) of the House Financial Services Committee called for abolishing Fannie Mae and Freddie Mac.

Representative Frank added that his committee would examine the future of both companies within the broader context of coming up with a whole new system for the nation's housing finance. For months, the Obama administration said it expected to announce in early February a new course for the twin behemoths, which were effectively nationalized in 2008. As this went to press, neither a broad outline nor detailed reforms were released.

Meanwhile, House Financial Services Committee member Spencer Bachus (R-Ala.) introduced a bill to reduce annual compensation for the two companies' senior management to the level of federal employees with similar duties. The bill counters the Federal Housing Finance Agency's recent approval of compensation that would allow Fannie and Freddie's CEOs to be paid up to $6 million.

For more information, contact Joe Gabai at jgabai@mofo.com.

On the RESPA Grapevine

New RESPA rules on the Good Faith Estimate (GFE) and Settlement Statement (HUD-1) took effect on January 1, 2010. To promote lower borrowing costs and the ability to shop around for settlement services, HUD's new disclosure rules require certain fees to be no more than 10% higher in the HUD-1 presented at loan closing than those fees were in the GFE. Otherwise, the lender absorbs the difference.

Lenders seem to be all over the board with the new GFE requirements. Some lenders and settlement providers may be listing the most conservative estimates to avoid being penalized. Others believe that HUD granted a 4-month delay before the new rules set in.

Certain GFE items such as title insurance premiums and state transfer taxes are posing problems. Lenders seem to want more simplified "all inclusive" title insurance and escrow rates. But, title insurance is regulated by RESPA and various states. It is not priced the same in every state. Some states allow "all inclusive" rates, while other

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states want title insurance rates to be more detailed and transparent.

For more information, contact Michael Agoglia at magoglia@mofo.com or Will Stern at wstern@mofo.com.

Municipalities ISO Revenue, the Sequel

Previously, we reported on lawsuits by cities to hold banks liable for rising foreclosures.

On January 16, Baltimore's suit against Wells Fargo under the Fair Housing Act was booted. *Baltimore v. Wells Fargo Bank*, No. 08-CV-00062, 2010 U.S. Dist. LEXIS 834, at *1-2 (D. Md. Jan. 16, 2010). Judge Motz dismissed the complaint with leave to amend; concluding that Baltimore's standing to sue for inner city blight was "not plausible." Judge Motz credited Baltimore's admission that of the 16,000 to 30,000 vacant homes only 80 had Wells loans. *Id.* at *8. Judge Motz underscored the implausible causality, noting other factors leading to urban decay, such as "extensive unemployment, lack of educational opportunity and choice irresponsible parenting, disrespect for the law, widespread drug use, and violence." *Id.* at *9.

Baltimore's City Solicitor is planning an amended complaint with specific claims tied to the Wells vacancies. The amended complaint may resemble Buffalo's. Buffalo wants $16,000 for demolishing each of 57 blighted homes where banks allegedly walked away. Meanwhile, Cleveland intends to appeal the dismissal of its public nuisance suit. Memphis filed its public nuisance suit against Wells on December 30.

For more information, contact Wendy Garbers at wgarbers@mofo.com. ■

Privacy Report

New Model GLBA Privacy Form

On December 1, 2009, the federal banking agencies and the CFTC, FTC, NCUA and SEC issued a final rule amending their privacy rules under Title V of the Gramm-Leach-Bliley Act ("GLBA"). It provides a model privacy form that financial institutions may use to describe their privacy policies, and to give consumers the opportunity to opt out of information sharing with non-affiliated third parties. The model form also addresses relevant opt outs under the Fair Credit Reporting Act ("FCRA") relating to the information sharing with affiliates. The model form, which was under development for several years, is similar to the form proposed in 2007 by these agencies. The final rule provides numerous detailed requirements for how the model form must be presented and what information must be included. While use of the model form is not required, a financial institution that uses the form (as instructed in the final rule) will be deemed compliant with the GLBA notice content requirements for privacy policies and opt-out notices.

For more information, please see our client alert, or contact Obrea Poindexter at opoindexter@mofo.com or Nathan Taylor at ndtaylor@mofo.com.

Federal Agencies Issue FCRA Risk-Based Pricing Rule

On December 22, 2009, the FRB and the FTC announced a final rule to implement the risk-based pricing requirements of section 615(h) of the FCRA. The risk-based pricing rule will require a creditor to provide a consumer with a "risk-based pricing" notice when the creditor, based on the consumer's credit report, charges the consumer a higher interest rate than the creditor charges a substantial proportion of its other customers.

THE COMPLIANCE DATE FOR THE DATA SECURITY REGULATIONS ISSUED BY THE MASSACHUSETTS OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION HAS FINALLY ARRIVED— MARCH 1, 2010.

Lenders are required to comply with the new rule beginning January 1, 2011.

For more information, contact Andrew Smith at asmith@mofo.com.

Ready or Not, Massachusetts Here We Come

The compliance date for the data security regulations issued by the Massachusetts Office of Consumer Affairs and Business Regulation has finally arrived—March 1, 2010. The Massachusetts regulations impose far more detailed and comprehensive data security requirements than most, if not all, other states. For example, the regulations require that a business develop, implement, maintain, and monitor a comprehensive, written information security program that contains administrative, technical, and physical safeguards to ensure the security and confidentiality of records containing personal information relating

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"Privacy"

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to Massachusetts residents. Beyond its general, risk-based information security program requirement and related administrative requirements, the Massachusetts regulations also require that a business implement a number of detailed and specific measures, including implementing secure user authentication protocols and access control measures for computer systems.

For more information, contact Miriam Wugmeister at mwugmeister@mofo.com or Nathan Taylor at ndtaylor@mofo.com.

Beware of Furnishing FCRA Info

The federal banking agencies, NCUA, and FTC have issued two new rules to implement FACT Act requirements for "furnishers" – i.e., companies, such as lenders and insurers, that furnish information to consumer reporting agencies. Under the first of the rules, a furnisher will be required to implement written policies and procedures regarding the accuracy and integrity of information it furnishes to consumer reporting agencies, including an assessment of the risks to the accuracy and integrity of furnished information. Under the second rule, a furnisher will be required to investigate disputes submitted directly to the furnisher by consumers regarding the accuracy of information in consumer reports. Compliance with both rules is required by July 1, 2010.

For more information, contact Andrew Smith at asmith@mofo.com. ■

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