Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

June 8, 2012

Topics In This Issue

Federal Issues

CFPB Finalizes Multiple Rules Governing Enforcement Activities, Issues New Interim Rule. On June 6, the CFPB released final versions of three rules governing aspects of the CFPB's enforcement activities and issued a new interim rule. The three rules set forth, respectively, the CFPB's (i) authority and procedures for conducting investigations, (ii) practices for adjudication proceedings, and (iii) procedures through which state officials update the CFPB on state enforcement activities. While the rules have been in effect since July 2011 (in interim form), the final versions include some changes in response to public comments received. For example, the final investigations rule (i) specifies the CFPB staff members that have authority to initiate or close an investigation, (ii) adds to the CID process a conference between the parties within 10 calendar days of service, (iii) provides CID recipients a number of procedural options when additional time is needed to respond, and (iv) clarifies the rights of witnesses and which objections are appropriate for counsel to make during investigations. Additionally, the CFPB issued a new interim final rule to implement the Equal Access to Justice Act and will accept public comments for 60 days after publication in the *Federal Register*.

CFPB, Prudential Regulators Release Supervisory Coordination Memorandum. On June 4, the CFPB and the federal banking prudential regulators - the Federal Reserve Board, the National Credit Union Administration, the Federal Deposit Insurance Corporation, and the Office of Comptroller of the Currency - jointly released a Memorandum of Understanding (MOU) meant to facilitate coordination of supervisory activities. The Dodd-Frank Act grants the CFPB exclusive authority to examine insured depository institutions and insured credit unions with more than $10 billion of total assets (and their affiliates) for compliance with federal consumer financial laws. The prudential regulators retained supervisory authority for all other applicable laws for such institutions, and all supervisory responsibilities for institutions with $10 billion or less in total assets. The Dodd-Frank Act also requires the CFPB and the prudential regulators to share supervisory information and work to minimize regulatory burden by coordinating examinations. The recent MOU seeks to implement those statutory requirements by establishing guidelines for simultaneous examinations and a framework for sharing certain supervisory information. The MOU also sets forth, among other things, a process by which covered institutions can request separate examinations.

Lawmakers Ask CFPB to Examine Student Debit Cards. On June 7, Senator Richard Durbin (D-IL) and Representative George Miller (D-CA) sent letters to the CFPB and the Department of Education requesting that those agencies examine the practices associated with bank-affiliated student debit cards. The letters cite a recent U.S. PIRG report that identified "troubling practices" with these products, including alleged use of improper fees and misleading marketing. The lawmakers

pose a series of questions to define the scope of the examination, including, for example (i) whether campus-based debit cards provide adequate consumer protections, (ii) whether the fees and penalties associated wit such cards violate federal law, and (iii) whether the contractual agreements between schools and financial institutions violate student privacy rights.

FTC Settles Privacy, Data Security Charges Based On Peer-to-Peer File Sharing Against Two Firms. On June 7, the FTC announced two new cases (and simultaneous settlements), one against a debt collector and the other against an auto dealer, alleging privacy and data violations based on the use of peer-to-peer file sharing software. In both cases, the FTC claims that the firms allowed file-sharing software to be installed on company computers, thereby allowing files containing personal customer information to be accessed by any other person using a networked computer. Both companies, according to the FTC, (i) did not have adequate security plans, (ii) did not use reasonable measures to enforce compliance with existing security policies, (iii) did not adequately train employees, (iv) did not use reasonable methods to prevent, detect and investigate unauthorized access to personal information on its networks, and (v) failed to assess risk to consumers. For the debt collector, the FTC alleges that the failures constituted an unfair act or practice in violation of the FTC Act. The FTC claims that the auto dealer also violated the FTC Act and, for the first time, charges an auto dealer with violations of certain Gramm-Leach-Bliley (GLB) Act rules. The settlement orders with both companies bar misrepresentations regarding the privacy, security, confidentiality, and integrity of any personal information and require that the firms establish comprehensive information security programs that will be audited every other year for 20 years. The auto dealer also is barred from violating the GLB rules at issue.

FCC Seeks Comments on Mobile Device Privacy, Data Security. Recently, the FCC released a request for public comment on the privacy and data security of personal information on mobile devices. The request focuses on the amount and types of consumer information that may be collected by carriers. For example, the FCC lists a series of factors, including (i) the degree of control that the service provider exercises over the design, integration, installation, or use of the software that collects and stores information, (ii) the manner in which the collected information is used, and (iii) the role of third parties in collecting and storing data, and asks which, if any, are relevant to assessing a wireless provider's obligations under the Communications Act and the Commission's implementing rules. The FCC will accept public comments for 30 days from publication of the request in the Federal Register. In 2007, the FCC similarly solicited comments and revised its rules under the Communications Act to tighten data security requirements and address pretexting.

Fannie Mae Appoints New CEO. On June 5, Fannie Mae announced that Timothy J. Mayopoulos will be its next president and CEO, effective June 18, 2012. Mr. Mayopoulos is currently executive vice president, chief administrative officer, and general counsel at Fannie Mae. Prior to joining Fannie Mae, he was executive vice president and general counsel at Bank of America Corporation and a senior manager at Deutsche Bank AG, Credit Suisse First Boston, and Donaldson, Lufkin & Jenrette, Inc. Mr. Mayopoulos will succeed Michael J. Williams, who in January announced his decision to step down.

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State Issues

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Nationwide View of State-Licensed Mortgage Entities, compiles data concerning companies, branches, and mortgage loan originators who are state-licensed or state-registered through NMLS. The report provides information about new applications activity, the legal status of licensed or registered companies, and state-by-state licensing data. The second report, the NMLS Federal Registry Quarterly Report, provides summary information about the charter type of federally registered entities and state-by-state summary data.

Michigan Court Rule Change Allows Electronic Signatures. Recently, the Michigan Supreme Court approved a rule change that allows the use of electronic signatures for any document filed in the state court system, including any signature required by a law or court rule to be notarized or made under oath.

Several States Adjust Mortgage Registration, Licensing Regulations. Recently, five states amended their laws to clarify the scope of their mortgage-related registration and licensing requirements. First, New Hampshire passed House Bill 247, which exempts from licensing requirements mortgage bankers and brokers who negotiate three or fewer residential mortgage loans in a calendar year. The bill will take effect July 13, 2012. New Hampshire also enacted House Bill 408 to provide an exemption for attorneys, which took effect on May 29, 2012. Second, Louisiana enacted, effective immediately, House Bill 508, which defines "regularly engaged" to clarify thresholds for activity requiring licensure as a mortgage loan originator or mortgage broker or lender. Third, Mississippi enacted Senate Bill 2897, which makes several changes to the state's S.A.F.E. Mortgage Act including a change to the definition of mortgage loan originator to exclude certain activities. The changes go into effect July 1, 2012. Fourth, in Michigan, the Governor recently signed Senate Bill 908, which immediately amends the Mortgage Loan Originators Licensing Act to require, among other things, that a person have an approved sponsor in the NMLS in order to be licensed as a mortgage loan originator. Finally, New York enacted Senate Bill 3779, which as of January 1, 2013 will exempt from licensing any individual, person, partnership, association, corporation or other entity which makes three or fewer loans in a calendar year and no more than five in a two year period, provided that no such mortgage loans were solicited, processed, placed or negotiated by a mortgage broker, mortgage banker or exempt organization. New York also extended again its emergency rules regarding mortgage loan originator licensing, this time through August 12, 2012.

Courts

State AGs Granted Right to Intervene in Private MBS Action. On June 6,

a New York state court ordered that the attorneys general for the states of Delaware and New York (state AGs) could intervene in a case challenging an $8.5 billion settlement related to allegations that the originator and servicer of certain mortgage backed securities breached obligations owed to the trusts. In re Application of The Bank of New York Mellon, No. 651786/11, slip op. (NY Sup. Ct. Jun 6, 2012). The trustee is seeking state confirmation that it had authority to enter into the settlement agreement and in so doing did not violate its duties under the trust agreements and state law. A group of institutional investors moved to challenge the settlement, and in a decision earlier this year the Second Circuit reversed a federal district court and held that the case fell within the securities exception to both original and appellate jurisdiction under the Class Action Fairness Act of 2005 and should proceed in state court. The federal district court also had granted a motion to intervene filed by the state AGs, holding that they could appropriately intervene to represent the interests of absent investors. The court reasoned that the state AGs had "parens patriae standing" to preserve an "honest marketplace." On remand in state court, the state AGs renewed their motions to intervene. In granting intervention, the state court rejected arguments made by the trustee and the institutional investors that the state AGs lack parens patriae standing, and that the state AGs are not seeking any injunctive relief to protect any quasi-sovereign interests. Instead, the court followed the prior federal court decision and held that the state AGs identified legitimate quasi-sovereign interests sufficient to provide standing to intervene.

Federal Appeals Court Holds Good Faith Estimate Not a Contract. On May 31, the U.S. Court of Appeals for the Eleventh Circuit held that a Good Faith Estimate is not a contract but rather an estimate, and thus cannot support an action for breach of contract. *Hackett v. Columbia Equities, Ltd.*, No. 1:10-cv-03530-AT, 2012 U.S.App. LEXIS 10949 (11th Cir. May 31, 2012). The court of appeals also dismissed a claim for "material alteration of a note" because the plaintiff failed to provide any statutory or common law rule that imposes civil liability on a party that materially alters a note. The pro se plaintiff asserted a variety of state and federal claims against three financial institutions related to a mortgage contract, all of which were dismissed by the district court for improper service, being time barred, or failing to state a claim upon which relief could be granted. The court of appeals affirmed the dismissal of all counts.

Fourth Circuit Holds West Virginia Consumer Credit and Protection Act Statute of Limitations Begins to Run on Acceleration Date. On May 31, the U.S. Court of Appeals for the Fourth Circuit held that the one-year statute of limitations under the West Virginia Consumer Credit and Protection Act (WVCCPA) begins to run on the date the loan is accelerated, and not the date the loan is scheduled to mature. *Delebreau v. Bayview Loan Servicing, LLC*, No. 11-1139, 2012 WL 1949371 (4th Cir. May 31, 2012). At issue was whether the borrowers' claim under the WVCCPA, alleging the servicer improperly added fees to their account, was time barred by the WVCCPA's one-year statute of limitations, which runs from the "due date of the last scheduled payment of the agreement" of the

parties. The servicer argued that "the due date of the last scheduled payment of the agreement" was the loan acceleration date declaring the entire loan amount due. The borrowers contended that it was the loan maturity date designated in the loan documents, which in this case was twenty-three years after the acceleration date. Affirming the district court's judgment, the court held that the acceleration date was the operative date, reasoning that no further payments were scheduled after that date. Therefore, the borrowers' claims were dismissed as time barred.

California Federal District Court Dismisses Four Mortgage Insurers from Captive Reinsurance Kickback Suit. On May 25, the U.S. District Court for the Eastern District of California dismissed a group of mortgage insurers from a proposed class action over allegations that their reinsurance arrangement with a lender's affiliate violated RESPA's anti-kickback prohibitions. *McCarn v. HSBC USA, Inc*, No. 12-00375, 2012 U.S. Dist. LEXIS 74085 (E.D. Ca. May 29, 2012). In this case, the borrower was required to procure private mortgage insurance (PMI) in order to obtain a mortgage loan. The mortgage insurance he purchased was arranged by his lender. Unbeknownst to the borrower, the PMI provider he engaged had a reinsurance arrangement with the lender whereby the lender required the PMI provider, as a condition of doing business with the lender, to reinsure the PMI provider's insurance risk with the lender's subsidiary. The borrower alleged that this arrangement violated RESPA's anti-kickback provision, which specifies that captive reinsurance arrangements are permissible only if the payments to the affiliated reinsurer (i) are for reinsurance services actually furnished or for servicers performed and (ii) are bona fide compensation that does not exceed the value of such services. Certain of the PMI providers-not the borrower's actual PMI provider-moved to dismiss the action on standing grounds. They claimed that they did not provide PMI for the borrower's loan and therefore the borrower's injuries were not fairly traceable to their alleged actions. The court agreed, and held that the borrower failed to adequately plead a conspiracy and thus did not establish that the injuries were causally connected to these PMI providers' actions. The court noted that from the PMI providers' standpoint, the fewer participants in the alleged "scheme" the better because the remaining providers would each get more of the lender's business. The court found that the borrower had not pled facts supporting a conspiracy, aside from "conclusory allegations of 'collective action' to suggest that the various PMI providers would have any financial motivation to act in concert" and dismissed the action without prejudice.

Miscellany

Security at Financial Institution Service Provider Scrutinized by Regulators. Recently, Fidelity National Information Services, Inc. (FIS), a company providing payment processing and other services to banks and other financial institutions,

reportedly was the subject of a critical assessment by the FDIC. The FDIC report comes in the aftermath of a 2011 security breach at the company and a subsequent examination by the FDIC, OCC, and the Federal Reserve Bank of Atlanta. According to the report, the FDIC demanded that FIS immediately address eight issues, including risk management and information security issues. The FDIC allegedly also stated that actions taken by the company to date were insufficient given the regulatory concerns and weaknesses identified by the FDIC. The NCUA received the FDIC report and forwarded to credit unions with an advisory note to use the report in managing vendor relations with

FIS. The report on FIS comes as regulators are placing enhanced scrutiny on financial institutions' relationships with third party service providers. In April, the CFPB issued Bulletin 2012-03, providing guidance to regulated entities on the oversight of business relationships with service providers. The CFPB bulletin states that "[t]he CFPB expects supervised banks and nonbanks to have an effective process for managing the risks of service provider relationships" and lists specific minimum steps that should be a part of service provider oversight.

European Bank Resolution Proposal Released. On June 6, the European Commission released a proposal to establish common rules for EU member country banking regulators to follow when faced with failing banks. The rules are meant to provide a more standard regulatory structure and approach to help reduce the impact of bank failures, improve market stability, and limit taxpayer risk. To achieve these goals, the Commission's proposal would allow banks that do not pose a systemic risk to fail. Further, the proposal would shift the burden of restructuring costs for a systemically important troubled bank to its shareholders, creditors, and any employees responsible for mismanagement. Public authorities would be given new powers to (i) intervene earlier, (ii) establish in advance bank resolution plans, (iii) assume control of a failing bank if early intervention fails, and (iv) better coordinate cross-border issues raised by a failing bank. Banks, for their part, would be required to put in to place recovery plans and take certain actions if capital reserves fall below a set level, among other things. The proposals must first be considered and approved by the European Parliament and Council, and would take effect in 2018.

European Commission Proposes Electronic Identification Regulation. On June 4, the European Commission adopted a proposed regulation that would create a framework for secure cross-border electronic transactions in Europe. The regulation seeks to facilitate European electronic commerce by requiring mutual recognition of national electronic identification systems, which would allow individuals and businesses to use their national electronic identification schemes to access public services in other EU countries. For example, the regulation would remove technical and legal barriers in order to make it easier for a company in one country to bid on public sector contracts elsewhere within the EU. The regulation does not require action by member states to develop electronic identity cards and will not require an EU-wide electronic identification or database. Under the European Union's ordinary legislative procedure, the regulation now must be adopted by the European Parliament and Council.

Firm News

BuckleySandler Noted for Its Impressive Enforcement & Litigation Talent by Chambers USA. BuckleySandler LLP is pleased to announce that the firm and eight of its partners have received top rankings in Chambers USA, which ranks leading firms and lawyers in a range of practice areas throughout the U.S. based on in-depth client and peer research. This year, Chambers USA recognized BuckleySandler as "one of the preeminent legal brands in the consumer finance market," and ranked it highly in both Financial Services Regulation: Banking (Enforcement & Investigations) and Financial Services Regulation: Consumer Finance (Compliance). Chambers USA provided individual attorney recognition to seven partners in one or more of these Financial Services categories, recognized Andrew L. Sandler as a "Star Individual" in Financial Services Regulation:

Consumer Finance (Litigation), and recognized David S. Krakoff in District of Columbia Litigation: White-Collar Crime & Government Investigations.

According to Chambers USA, BuckleySandler is noted for "its impressive enforcement and litigation talent, and represents some of the world's most high-profile financial institutions in a host of enforcement actions." Chambers further highlights BuckleySandler's regulatory work by saying "[the firm] was recently commissioned by a number of national banks to produce an exhaustive 50-state survey of all state and federal laws affecting lending businesses."

"We are pleased that Chambers USA has once again ranked our firm and so many of our partners. This recognition is all the more meaningful because Chambers' research methodology focuses on peer and client review and thereby validates our commitment to outstanding legal work and client service," said BuckleySandler Chairman and Executive Partner, Andrew L. Sandler.

Nationwide

Financial Services Regulation: Banking (Enforcement & Investigations) (Firm Ranked Band 2)
Andrew L. Sandler (Band 1)
Benjamin B. Klubes (Band 3)

Financial Services Regulation: Consumer Finance (Compliance) (Firm Ranked Band 1)
Jeremiah S. Buckley (Band 1)
Joseph M. Kolar (Band 1)
Andrew L. Sandler (Band 1)
John P. Kromer (Band 3)
Jeffrey P. Naimon (Band 3)
Clinton Rockwell (Band U - Up and Coming)

District of Columbia

Litigation: White-Collar Crime & Government Investigations
David S. Krakoff (Band 2)

Andrew Sandler will speak at the American Bankers Association's Regulatory Compliance Conference in Orlando, FL on June 11, 2012. Mr. Sandler's session is entitled: "Hot Topics in Fair Lending."

Jeffrey Naimon will speak at the American Financial Services Association's 14th State Government Affairs & Legal Issues Forum in Fort Lauderdale, FL on June 12, 2012. Mr. Naimon's panel will discuss the CFPB's bulletins regarding fair lending and vendor management.

Jeffrey Naimon and **Howard Eisenhardt** will participate in the Mortgage Bankers Association's Anti-Money Laundering and Suspicious Activity Report Programs for Nonbank Mortgage Lenders and Originators Webinar on June 19, 2012. Mr. Naimon and Mr. Eisenhardt will discuss the role of AML

programs and SARs in fighting mortgage fraud and preventing losses; the background of the Bank Secrecy Act; the AML program structure; the roles and responsibilities of various staff at the lender and of the lender compliance officer; what triggers a SAR filing; filing and submitting SAR forms; the importance of filing SARs in a timely manner; and the risks of violating BSA/AML requirements.

Jeffrey Naimon will speak at National Mortgage News' 4th Annual Best Practices in Loss Mitigation Conference in Dallas, TX on July 19, 2012. Mr. Naimon's panel is entitled, "Current Regulatory Issues and Political Outlook" and will provide an overview of the regulatory and legislative developments affecting the mortgage servicing market, review current regulatory issues, and discuss how the issues and election year political moving parts might affect the current regulatory landscape.

Mortgages

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Securities

State AGs Granted Right to Intervene in Private MBS Action. On June 6,

a New York state court ordered that the attorneys general for the states of Delaware and New York (state AGs) could intervene in a case challenging an $8.5 billion settlement related to allegations that the originator and servicer of certain mortgage backed securities breached obligations owed to the trusts. In re Application of The Bank of New York Mellon, No. 651786/11, slip op. (NY Sup. Ct. Jun 6, 2012). The trustee is seeking state confirmation that it had authority to enter into the settlement agreement and in so doing did not violate its duties under the trust agreements and state law. A group of institutional investors moved to challenge the settlement, and in a decision earlier this year the Second Circuit reversed a federal district court and held that the case fell within the securities exception to both original and appellate jurisdiction under the Class Action Fairness Act of 2005 and should proceed in state court. The federal district court also had granted a motion to intervene filed by the state AGs, holding that they could appropriately intervene to represent the interests of absent investors. The court reasoned that the state AGs had "parens patriae standing" to preserve an "honest marketplace." On remand in state court, the state AGs renewed their motions to intervene. In granting intervention, the state court rejected arguments made by the trustee and the institutional investors that the state AGs lack parens patriae standing, and that the state AGs are not seeking any injunctive relief to protect any quasi-sovereign interests. Instead, the court followed the prior federal court decision and held that the state AGs identified legitimate quasi-sovereign interests sufficient to provide standing to intervene.

E-Commerce

Michigan Court Rule Change Allows Electronic Signatures. Recently, the Michigan Supreme Court

approved a rule change that allows the use of electronic signatures for any document filed in the state court system, including any signature required by a law or court rule to be notarized or made under oath.

Security at Financial Institution Service Provider Scrutinized by Regulators. Recently, Fidelity National Information Services, Inc. (FIS), a company providing payment processing and other services to banks and other financial institutions, reportedly was the subject of a critical assessment by the FDIC. The FDIC report comes in the aftermath of a 2011 security breach at the company and a subsequent examination by the FDIC, OCC, and the Federal Reserve Bank of Atlanta. According to the report, the FDIC demanded that FIS immediately address eight issues, including risk management and information security issues. The FDIC allegedly also stated that actions taken by the company to date were insufficient given the regulatory concerns and weaknesses identified by the FDIC. The NCUA received the FDIC report and forwarded to credit unions with an advisory note to use the report in managing vendor relations with FIS. The report on FIS comes as regulators are placing enhanced scrutiny on financial institutions' relationships with third party service providers. In April, the CFPB issued Bulletin 2012-03, providing guidance to regulated entities on the oversight of business relationships with service providers. The CFPB bulletin states that "[t]he CFPB expects supervised banks and nonbanks to have an effective process for managing the risks of service provider relationships" and lists specific minimum steps that should be a part of service provider oversight.

European Commission Proposes Electronic Identification Regulation. On June 4, the European Commission adopted a proposed regulation that would create a framework for secure cross-border electronic transactions in Europe. The regulation seeks to facilitate European electronic commerce by requiring mutual recognition of national electronic identification systems, which would allow individuals and businesses to use their national electronic identification schemes to access public services in other EU countries. For example, the regulation would remove technical and legal barriers in order to make it easier for a company in one country to bid on public sector contracts elsewhere within the EU. The regulation does not require action by member states to develop electronic identity cards and will not require an EU-wide electronic identification or database. Under the European Union's ordinary legislative procedure, the regulation now must be adopted by the European Parliament and Council.

Privacy/Data Security

FTC Settles Privacy, Data Security Charges Based On Peer-to-Peer File Sharing Against Two Firms. On June 7,

the FTC announced two new cases (and simultaneous settlements), one against a debt collector and the other against an auto dealer, alleging privacy and data violations based on the use of peer-to-peer file sharing software. In both cases, the FTC claims that the firms allowed file-sharing software to be installed on company computers, thereby allowing files containing personal customer information to be accessed by any other person using a networked computer. Both companies, according to the FTC, (i) did not have adequate security plans, (ii) did not use reasonable measures to enforce compliance with existing security policies, (iii) did not adequately train employees, (iv) did not use reasonable methods to prevent, detect and investigate unauthorized access to personal information on its networks, and (v) failed to assess risk to consumers. For the debt collector, the FTC alleges that the failures constituted an unfair act or practice in violation of the FTC Act. The FTC claims that the auto dealer also violated the FTC Act and, for the first time, charges an auto dealer with violations of certain Gramm-Leach-Bliley (GLB) Act rules. The settlement orders with both companies bar misrepresentations regarding the privacy, security, confidentiality, and integrity of any personal information and require that the firms establish comprehensive information security programs that will be audited every other year for 20 years. The auto dealer also is barred from violating the GLB rules at issue.

FCC Seeks Comments on Mobile Device Privacy, Data Security. Recently, the FCC released a request for public comment on the privacy and data security of personal information on mobile devices. The request focuses on the amount and types of consumer information that may be collected by carriers. For example, the FCC lists a series of factors, including (i) the degree of control that the service provider exercises over the design, integration, installation, or use of the software that collects and stores information, (ii) the manner in which the collected information is used, and (iii) the role of third parties in collecting and storing data, and asks which, if any, are relevant to assessing a wireless provider's obligations under the Communications Act and the Commission's implementing rules. The FCC will accept public comments for 30 days from publication of the request in the Federal Register. In 2007, the FCC similarly solicited comments and revised its rules under the Communications Act to tighten data security requirements and address pretexting.