Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

July 12, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Finalizes Certain Changes to Qualified Mortgage, Other Rules; Banking, Housing Agencies Propose Changes to HPML Appraisal Rule. On July 10, the CFPB finalized amendments to its ability-to-repay / qualified mortgage rule that are intended to ease certain compliance challenges with making qualified mortgages. In response to industry concerns on the extensive underwriting requirements in Regulation Z's new Appendix Q, the Bureau acknowledged that certain of its provisions were "not well-suited to function as regulatory requirements" and, as a result, finalized major revisions to the methodology for determining a consumer's monthly debt and income for purposes of making a QM under the 43% debt-to-income underwriting alternative. The amendments also finalize clarifications to the CFPB's mortgage servicing and escrows rules. Like the mortgage rules themselves, the amendments will take effect on January 10, 2014. Separately, on the same date, the CFPB, together with the other federal banking and housing regulators, proposed amendments to exempt certain transactions from a January 2013 final rule that requires creditors making higher-priced mortgage loans (HPMLs) to obtain one or more written appraisals and to provide consumers with a notice regarding the use of appraisals and a free copy of each appraisal. For a more detailed review of these final and proposed mortgage rule amendments, see our Special Alert.

CFPB Puts Creditors, Third-Party Debt Collectors on Notice. On July 10, the CFPB issued new debt collection guidance that, among other things, seeks to hold CFPB-supervised creditors accountable for engaging in acts or practices the CFPB considers to be unfair, deceptive, and/or abusive (UDAAP) when collecting their own debts, in much the same way debt collectors are held accountable for violations of the FDCPA. Bulletin 2013-07 reviews the Dodd-Frank Act UDAAP standards, provides a non-exhaustive list of debt collection acts or practices that could constitute UDAAPs, and states that even though creditors generally are not considered debt collectors under the FDCPA, the CFPB intends to supervise their debt collection activities under its UDAAP

authority. Separately, in Bulletin 2013-08, the CFPB provided guidance to creditors, debt buyers, and third-party collectors about compliance with the FDCPA and sections 1031 and 1036 of the Dodd-Frank Act when making representations about the impact that payments on debts in collection may have on credit reports and credit scores. The Bulletin states that potentially deceptive debt collection claims are a matter of "significant concern" to the CFPB and describes actions the CFPB may take to ensure that the debt collection market "functions in a fair, transparent, and competitive manner." In addition, the CFPB announced that it will begin accepting consumer complaints related to debt collection, and published five "action letters" that consumers can use to correspond with debt collectors. The letters address the situations when the consumer (i) needs more information on the debt, (ii) wants to dispute the debt and for the debt collector to prove responsibility or stop communication, (iii) wants to restrict how and when a debt collector can contact them, (iv) has hired a lawyer, or (v) wants the debt collector to stop any and all contact.

CFPB Releases Spring Rulemaking Agenda. On July 3, the CFPB released its spring 2013 regulatory agenda. Among the agenda items are three rulemaking activities listed for the first time: (i) "prerule activities" related to payday loans and deposit advance products anticipated for January 2014, (ii) "further action" on debt collection regulations expected in October 2013, and (iii) "prerule activities" related to Gramm-Leach-Bliley Act privacy notices planned for November 2013. The agenda also indicates that the CFPB expects, among other things, to (i) finalize its integrated mortgage disclosures rule in October 2013, (ii) issue a final student loan servicer "larger participant" rule in September 2013, and (iii) propose a rule regarding general purpose reloadable prepaid cards in December 2013. The agenda does not mention any planned activities related to small business lending data collection or auto finance issues.

CFPB Publishes Mortgage Rules Readiness Guide. On July 8, the CFPB published a guide intended to help financial institutions prepare to comply with the various mortgage-related rules the CFPB promulgated in January 2013, some of which it continues to revise. The guide briefly describes each of the rules and provides (i) a readiness questionnaire, (ii) frequently asked questions, and (iii) a list of other resources available to companies seeking to come into compliance with the new rules. The readiness questionnaire covers (i) implementation plans, (ii) policies and procedures, (iii) training, (iv) audit/quality control, (v) consumer complaints, and (vi) vendor management.

CFPB Publishes 2014 List of Rural Counties. On July 2, the CFPB published a final list of rural and underserved counties for use in 2014. Several of the CFPB's new mortgage rules include provisions and exceptions related to creditors who operate in predominantly rural or underserved counties, including the ability-to-repay/qualified mortgage rule and the TILA escrows rule. The CFPB notes that the list has changed based on 2010 census data such that some small creditors will lose eligibility for certain mortgage rule exemptions. Based on those changes and extensive feedback the CFPB has received about the definition of rural and underserved counties, the CFPB reminded institutions that it (i) recently revised its ability-to-repay rule to extend the ability to originate balloon QMs to certain small creditors that do not operate predominantly in rural or underserved areas during the period from January 10, 2014, to January 10, 2016, (ii) recently proposed to extend the same treatment to these small creditors for purposes of the high-cost mortgage balloon exemption, and (iii) proposed to extend eligibility for the rural or underserved exemption from the escrow requirement to creditors that operated predominantly in rural or underserved counties in any of the previous three years.

House Chairman Outlines Housing Reform Bill. On July 11, House Financial Services Committee Chairman Jeb Hensarling (R-TX) outlined legislation set to be unveiled next week that is designed to reform the housing finance market. The centerpiece of the comprehensive bill is a plan to end the government's conservatorship of Fannie Mae and Freddie Mac over a five year period,

move those entities into receivership, and liquidate them. The bill would aim to replace the government-backed mortgage finance companies with a secondary market funded only by private capital, supported by a non-government, not-for-profit mortgage market utility regulated by the FHFA. The legislation also will include numerous provisions designed to "break down barriers to private investment capital," including by delaying implementation of Basel III capital rules for community financial institutions and incorporating portions of a bipartisan proposal to change the calculation of loan points and fees in determining qualified mortgage eligibility. Finally, the bill would separate the FHA from HUD, limit the FHA's mission to only serving first-time homebuyers and borrowers below 115% of area median income (AMI) nationwide or 150% of AMI in high-cost areas, lower the minimum and maximum FHA loan limits, and increase FHA down payment requirements, among other changes to the FHA program.

FTC Announces Largest Civil Penalty Ever Against Third-Party Debt Collector. On July 9, the FTC announced that a third-party debt collector and its subsidiaries agreed to pay a $3.2 million civil penalty to resolve allegations that the companies violated the FDCPA and FTC Act by (i) calling individuals multiple times per day, including early in the morning or late at night, (ii) calling even after being asked to stop, (iii) calling individuals' workplaces despite knowing that the employers prohibited such calls, (iv) leaving phone messages for third parties, which disclosed the debtor's name and the existence of the debt, and (v) continuing collection efforts without verifying a debt, even after individuals said they did not owe the debt. In addition to the monetary penalty, which the FTC described as the largest it has ever obtained against a third-party collector, the stipulated order requires, with regard to consumers who dispute the validity or the amount of a debt, that the companies close the account and end collection efforts, or suspend collection until they have conducted a reasonable investigation and verified that their information about the debt is accurate and complete. The order also restricts situations in which the defendants can leave voicemails that disclose the alleged debtor's name and the fact that he or she may owe a debt, and requires the companies to halt or limit other alleged practices. The companies also must record at least 75% of all their debt collection calls beginning one year after the date of the order, and retain the recordings for 90 days after they are made.

Prudential Regulators Finalize Regulatory Capital Rule, Propose New Leverage Ratio for Large Banks. On July 9, the FDIC and the OCC approved a final rule to implement the risk-based and leverage capital requirements in the Basel III framework and relevant provisions mandated by the Dodd-Frank Act. The same rule was approved on July 2 by the Federal Reserve Board. The final rule (i) increases the minimum common equity tier 1 capital requirement from 2% to 4.5% of risk-weighted assets; (ii) increases the minimum tier 1 capital requirement from 4% to 6% of risk-weighted assets; and (iii) adds a new capital conservation buffer of 2.5% of risk-weighted assets. The rule also establishes a minimum leverage ratio of 4% for all banking organizations. In response to concerns raised by smaller and community banking organizations, the regulators did not finalize more onerous capital requirements that would have substantially increased the risk-weightings for residential mortgages, as explained in more detail in our recent post. The final rule does not change the more stringent limits on the inclusion of mortgage servicing assets and deferred tax assets in regulatory capital calculations, but does extend the phase-in period for community banks. Internationally active banks must begin to implement the new capital rules in January 2014, while all other banking organizations will have until January 2015 to begin to phase in the new capital requirements. Also on July 9, the FDIC and the OCC approved a proposed rule that would require bank holding companies with more than $700 billion in consolidated total assets or $10 trillion in assets under custody to maintain a tier 1 capital leverage buffer of at least 2% above the minimum supplementary leverage ratio requirement of 3%, for a total of 5%. Failure to exceed the 5% ratio would subject covered companies to restrictions on discretionary bonus payments and capital distributions. The proposed rule also would require insured depository institutions of covered holding companies to meet a 6% supplementary leverage ratio to be

considered "well capitalized" for prompt corrective action purposes. The proposal suggests a phase-in period for the rule with an effective date of January 1, 2018. Comments on the proposal are due 60 days after it is published in the Federal Register.

Governor Duke Announces Resignation from Federal Reserve Board. On July 11, the Federal Reserve Board announced that Governor Elizabeth Duke submitted her resignation effective August 31, 2013. She was appointed to the Board in August 2008 to fill a term that expired January 31, 2012. During her time on the Federal Reserve Board, Ms. Duke, a former community banker, focused on housing issues and financial regulation, including with regard to the impact of suc8100.h regulation on community banks. For example, last year she cautioned regulators about the potential impact of the various mortgage and capital rules on small institutions. Ms. Duke, who also previously led the American Bankers Association, did not indicate her future plans.

Fannie Mae, Freddie Mac Provide Additional Information Regarding QM Requirements. On July 2, Fannie Mae and Freddie Mac provided lenders additional information about eligibility criteria for mortgages with application dates on or after January 10, 2014. Recently, the FHFA directed Fannie Mae and Freddie Mac to limit future mortgage acquisitions to loans that meet the requirements for qualified mortgages under the CFPB's ability-to-repay/qualified mortgage rule. The letters state that, effective January 10, 2014, mortgages will be eligible for sale to either entity only if they (i) are fully amortizing, (ii) have terms no longer than 30 years, and (iii) have points and fees of 3% or less of the total loan amount. In addition, both entities will continue to purchase mortgage loans that are exempt from the ability-to-repay rule. Fannie Mae and Freddie Mac anticipate updating policies regarding representations and warranties, as well as certain policies related to loan eligibility in August 2013, and plan to provide information about how they will test for compliance with the new eligibility criteria in September 2013.

Fannie Mae Updates Hardest Hit Fund Requirements. On July 1, Fannie Mae issued Servicing Guide Announcement SVC-2013-14 to notify servicers that they must accept modification assistance received from a state housing finance agency for a mortgage loan in connection with any Fannie Mae modification, without regard to whether principal forbearance is required. In doing so, servicers must also comply with certain delinquency management and default prevention requirements outlined in Announcement SVC-2011-18. Servicers are required to implement the policy changes no later than October 1, 2013, and are encouraged to do so immediately.

HUD Updates Pre-Foreclosure and Deed-in-Lieu of Foreclosure Requirements, Extends Unemployment Forbearance. On July 9, HUD issued Mortgagee Letter 2013-23, which updates pre-foreclosure sale (PFS) and deed-in-lieu (DIL) foreclosure requirements for FHA-approved mortgagees. For a standard PFS, the letter details (i) the deficit income test that mortgagees must use to determine hardship, (ii) the supporting documentation required for such tests, (iii) the method for calculating cash reserve contributions, and (iv) the requirements for approving a PFS based on imminent default. The letter also explains the eligibility requirements for streamlined PFS and DIL, including with regard to military servicemembers. Among numerous other policy changes, HUD also updated the disclosure requirements for all PFS and DIL transactions and outlined certain arms-length requirements for PFS transactions. Mortgagees must implement the new policies by October 1, 2013. Recently, HUD also issued Mortgagee Letter 2013-22 to extend indefinitely its policy to provide special forbearance for unemployed borrowers. That policy, detailed in Mortgagee Letter 2011-23, was set to expire on August 1, 2013.

OCC Names Head of Large Bank Supervision. On July 10, the OCC named Martin Pfinsgraff as Senior Deputy Comptroller for Large Bank Supervision. Mr. Pfinsgraff has been filling that role on an acting basis since Michael Brosnan left the position to become Examiner-in-Charge of an OCC-supervised institution. Mr. Pfinsgraff previously served as Deputy Comptroller for Credit and Market

Risk and prior to joining the OCC held senior positions with iJet International, Prudential Insurance Company, and Prudential Investment Corporation.

NIST Releases Draft Outline of Cybersecurity Framework. On July 2, the National Institute of Standards and Technology (NIST) released a draft outline of a framework to improve the cybersecurity of certain critical infrastructure. It proposes a core structure for the framework and includes a user's guide and an executive overview that describes the purpose, need, and application of the framework in business. Under an Executive Order issued earlier this year, NIST is tasked with developing standards, methodologies, procedures, and processes that will form a voluntary best practices framework to address cyber risks. It solicited and recently analyzed public comments about the voluntary framework. Based on certain comments that emphasized the importance of executive involvement in managing cyber risks, the framework is designed to help business leaders evaluate how prepared their organizations are to deal with cyber threats and their impacts. NIST also released a draft compendium of existing standards, practices, and guidelines to reduce cyber risks to critical infrastructure industries. It plans to publish the official draft Cybersecurity Framework for public comment in October 2013.

STATE ISSUES

Colorado AG Investigating Foreclosure Law Firm Fees. On July 11, the Denver Post reported that Colorado Attorney General (AG) John Suthers is investigating whether foreclosure law firms are inflating fees that are added to the cost of the foreclosure and mortgage balance, and subsequently are passed on to borrowers, lenders, and investors. The AG has not filed charges against any firms, but has moved to enforce subpoenas his office issued seeking information from numerous law firms about the foreclosure fees they charged. The investigation covers all costs claimed by the firms, including costs related to posting foreclosure notices on homeowners' doors, which the AG claims substantially exceed the market rate.

Ten More States Adopt Uniform MLO Test. On July 1, the CSBS announced that ten additional state agencies will use the new National SAFE MLO test. Twenty state agencies adopted the test when it initially was introduced in April 2013. The uniform test combines both the national and state testing requirements of the SAFE Act, replaces the separate, state-specific tests for the states that adopt it, and streamlines the license application process for mortgage loan originators (MLOs) seeking licenses in multiple states. The CSBS reports that an additional five state agencies are scheduled to adopt the test by the start of 2014.

California AG Releases Data Breach Report, Proposes Data Security Policy Changes. On July 1, California Attorney General Kamala Harris (AG) released a report analyzing data breaches reported to her office in 2012, the first year companies were required to report to the AG any breach involving more than 500 state residents. The report identifies 131 data breach incidents that put the personal information of 2.5 million individuals at risk. The report includes policy recommendations focused on (i) data encryption, (ii) information security, (iii) notice letters, and (iv) the definition of personal information. Specifically, the AG urged companies to encrypt digital personal information when moving or sending it out of their secure network, and pledged to prioritize enforcement investigations of breaches involving unencrypted personal information. The report notes that a large percentage of breaches surveyed resulted from the failure of information security controls and references requirements under state law to protect the personal information of California residents. The AG also stated that companies should make their data breach notices to consumers easier to read, and that the state legislature should consider expanding breach notice requirements to cover breaches involving passwords. The AG highlighted a pending bill, SB 46, which would revise the existing notice requirement to also require reporting of breaches involving information that would

permit access to an online account, i.e. user name or email address, in combination with a password or security question and answer. That bill has already passed the state Senate and been approved by two Assembly committees; it is awaiting action by the full Assembly.

COURTS

Eighth Circuit Holds Borrowers Must File Suit Within TILA Three-Year Rescission Period. On July 12, the U.S. Court of Appeals for the Eighth Circuit held that a borrower seeking rescission under TILA must file suit within three years, and that merely providing the lender notice is insufficient to preserve the borrower's right of rescission. *Keiran v. Home Capital, Inc.*, No. 11-3878 (8th Cir. Jul. 12, 2013). As the Tenth Circuit did last year, the Eighth Circuit reasoned that the text of the statute, as explicated by the Supreme Court in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), establishes that filing suit is required. Also like the Tenth Circuit, the court expressly rejected the CFPB's argument that the lender, rather than the obligor, should be required to file suit to prevent rescission. To adopt the CFPB's position, the court explained, "would create a situation wherein rescission is complete, in effect, simply upon notice from the borrower, whether or not the borrower had a valid basis for such a remedy. Under this scenario, the bank's security interest would be unilaterally impaired, casting a cloud on the property's title, and approach envisioned and rejected by *Beach*." The holding is the latest in a series of circuit court decisions on this issue, with the majority of circuits now holding in favor of the lender and rejecting the position that notice extends the three-year TILA rescission right. BuckleySandler LLP filed an amicus brief in *Keiran* on behalf of the American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition.

Ninth Circuit Holds Repeated Erroneous Default Notices Can Be ECOA "Adverse Action." On July 3, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit held that a mortgage servicer's alleged repeated delivery of notices of default and acceleration to borrowers who were current on their obligation could be "adverse action," triggering the ECOA notification requirements. *Schlegel v. Wells Fargo Bank,* No. 11-6816, 2013 WL 3336727 (9th Cir. July 3, 2013). According to the borrowers, although they received a discharge in bankruptcy, they reaffirmed their mortgage loan, subject to a modification that apparently reduced their monthly payment obligation. The borrowers claimed that the servicer did not correct its records to reflect the loan modification and sent several notices of default and acceleration. The Ninth Circuit held that, while sending a mistaken default notice would not necessarily constitute an adverse action, the conduct alleged in the complaint, in which the creditor repeatedly stated that the obligation was immediately due and payable, fell within the definition of an "adverse action" as, among other things, a "revocation of credit." Therefore, the court reversed the district court's dismissal of the borrowers' claim that the mortgage servicer had failed to provide a notification within 30 days after taking adverse action, as required under ECOA. The appellate court, however, upheld the district court's dismissal of the borrowers' claim under the FDCPA, holding that the complaint failed to adequately allege that the servicer was a "debt collector" under the FDCPA - i.e.,either that its principal business was the collection of debts or that it was collecting the subject debt "for another."

New York Federal Court Holds Courts Possess Power to Accept or Reject DPA. On July 1, in the U.S. District Court for the Eastern District of New York held that it has the power to accept or reject a deferred prosecution agreement (DPA), and to retain supervisory power over the implementation of a DPA. *U.S. v. HSBC Bank USA, N.A.,* No. 12-00763, 2013 WL 3306161 (E.D.N.Y. Jul, 1, 2013). In 2012, a major international bank holding company announced agreements with U.S. law enforcement authorities and federal bank regulators to end investigations into alleged inadequate compliance with anti-money laundering and sanctions laws by the holding company and its U.S. subsidiaries. As part of the resolution, the companies entered into a DPA,

which the parties filed with the court and asked the court hold the case in abeyance to exclude part of the DPA from the federal Speedy Trial Act. In reviewing the request for abeyance, the court held that it has broader supervisory power to approve or reject the agreement in its entirety and that such power extends to implementation of the agreement. The court approved the DPA, but retained authority to monitor its execution and implementation. The court explained that "by placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority." Under its supervisory powers holding, which the court characterized as "novel," the court could later move to modify the agreement. More broadly, the court's assessment of its supervisory power potentially calls into question the certainty and finality of DPAs, which could impact the use of that prosecutorial tool.

Dealer Pleads Guilty to Criminal Violations of the SCRA. On June 27, the U.S. Attorney for the Northern District of Alabama announced that a used car dealer pleaded guilty to charges that he violated the Servicemembers Civil Relief Act (SCRA). *United States v. Nuss*, No. 13-102 (N.D. Ala. Plea entered Jun. 27, 2013). In March, a federal grand jury returned a two-count indictment charging the car dealer with failing to follow the SCRA when asked to do so by an Alabama National Guard member who had been called to active duty in Afghanistan. The guardsman allegedly had sent a letter from his deployed location, in which he asked that his interest rate be reduced to 6% as required by the SCRA. According to the indictment, the dealer refused to reduce the interest rate, and hired two individuals to repossess the guardsman's vehicle without first obtaining a SCRA-required court order. Notably, the dealer entered his plea without a plea agreement with the government. He is scheduled for sentencing on September 12, 2013. The maximum penalty for each SCRA violation is one year in prison, and a $100,000 fine.

Tenth Circuit Affirms Dismissal of Securities Act Claims Against Banks That Underwrote Stock of Failed Mortgage Lender. On July 9, the U.S. Court of Appeals for the Tenth Circuit affirmed a district court's order dismissing claims brought by investors against banks that had underwritten a mortgage lender's stock offerings. *Slater v. A.G. Edwards & Sons, Inc.*, No. 11-2170, 2013 WL 3390038 (10th Cir. Jul. 9, 2013). The lender, which focused on the adjustable-rate mortgage market, attempted to raise new capital through a series of stock offerings in 2007 and 2008 before filing for bankruptcy in 2009. Investors in those offerings filed suit after the stock price dropped following the lender's disclosure that it had been subject to margin calls triggered by a decline in the value of certain Alt-A mortgages that backed securities the lender had purchased. The investors alleged that documents related to the offerings violated Section 11 of the Securities Act because they did not disclose, among other things, the existence of the Alt-A MBS. In affirming dismissal of the claims against the underwriters, the Tenth Circuit concluded that plaintiffs had not alleged "an actionable misrepresentation or omission at the time of [the] stock offerings." The court explained that the lender was not under any obligation to disclose the MBS to make its statements true and accurate, and that the picture it provided was materially accurate, in part because the prospectus warned that the lender's liquidity conditions could worsen.

FIRM NEWS

Margo Tank will present an eOriginal and DocuSign webinar about the legal and compliance challenges of electronic signatures and electronic records management. The webinar, titled "Top 5 Things You Need to Know to Keep Your Electronic Documents Secure and Legal" will be held on July 16, 2013.

Margo Tank will participate on a panel on "E-Delivery" at The American Council for Life Insurers' Compliance and Legal Sections Annual Meeting being held in Orlando, Florida from July 17-19, 2013. The panel will discuss the legal and regulatory issues insurance carriers face as they move

to implement insurance policy related customer communication via e-delivery.

Andrew Sandler will participate in the Stafford webinar, Bank Enforcement Actions: New Issues, Higher Penalties, Joint Enforcement Actionsbeing held on Thursday, July 18, 2013, from 1:00 pm to 2:30 PM EDT.

Jonice Gray Tucker will speak at the Thomson Reuters workshop, Preparing for a CFPB Examination in Washington, DC on August 1, 2013. To receive 15% off registration fees, please enter the promotion code: 15CFPB at checkout. This offer is available until July 15th.

Jonice Gray Tucker will moderate a Regulatory "Super Session" at the California Mortgage Bankers Association's Western States Loan Servicing Conference on August 4, 2013, in Las Vegas, Nevada. The panel will focus the changing regulatory landscape for mortgage servicers and practical tips for compliance.

Jonice Gray Tucker will moderate a panel at the American Bar Association Annual Meeting entitled: "Knowing is Half the Battle: The CFPB's Mortgage Rules, HUD's Disparate Impact Rule, and More." Speakers will include BuckleySandler partner Joseph Reilly, David Berenbaum (NCRC), Ken Markison (MBA), and David Stein (Promontory). The panel will be held on August 10, 2013, in San Francisco, CA.

Kirk Jensen will speak at the American Bar Association Annual Meeting on August 10, 2013 in San Francisco, CA. Mr. Jensen's panel is titled, "The CFPB's Amicus Program and Trends in Consumer Litigation."

BuckleySandler is a proud sponsor of The Five Star Institute's Compliance Caucus taking place September 9-10, 2013 in Dallas, TX. The firm will have two speakers at this year's event: On Tuesday, September 10, Andrea Mitchell will speak on the panel, "Understanding UDAAP and Emerging Regulations in Compliance," and Ben Olson will speak on the panel, "Get to Know CFPB and What's on the Agenda."

Jeff Naimon will speak at the Mortgage Bankers Association's Risk Management and Quality Assurance Forum in Phoenix, AZ, on September 11, 2013. His session entitled, "Regulatory Compliance Update", will analyze the Dodd-Frank Ability to Repay/QM rule requirements.

Donna Wilson will speak at ACI's 12th National Forum on Residential Mortgage Litigation and Regulatory Enforcement, on September 26, 2013 in Dallas, TX. Ms. Wilson's panel is titled, "Responding to Stepped Up Litigation and Enforcement Being Brought at the State Level, With an Emphasis on California, Florida, New York, Illinois, Texas, and Nevada."

James Shreve will speak at the International Association of Privacy Professionals Privacy Academy in Seattle, Washington on October 1, 2013. The session, "Is the Best Defense a Good Offense?," will discuss legal issues involved in employing active defense techniques in responding to cybersecurity incidents and risks.

James Shreve will be speaking at the Information Systems Security Association's International Conference in Nashville, Tennessee on October 10, 2013. The session, "Get Up to Date: 20 Security & Privacy Laws in 50 Minutes" will examine the primary privacy and data security laws impacting information security professionals.

Thomas Sporkin will participate on a panel on whistleblowers at the American Bar Association's Securities Fraud 2013 Conference in New Orleans, LA, October 24-25, 2013.

Margo Tank and David Whitaker will speak at The Electronic Signature and Record Association's E-Signatures 2013 Annual Conference, on November 14, 2013 in New York. Their panel is titled, "E-Sign 101 - Questions, Answers, and Best Practices."

FIRM PUBLICATIONS

Benjamin Klubes, Michelle Rogers, and Katherine Halliday published "HAMP Risk on the Rise: A Complicated Regulatory Scheme Under the Spotlight," on June 5, 2013 in Bloomberg Law.

Margo Tank and David Whitaker authored "Planning for Accessibility When Developing Financial Services Websites and Mobile Apps," which appeared in ABA's Consumer Financial Services Newsletter on June 20, 2013.

Jonice Gray Tucker and Valerie Hletko authored "CFPB's Vague New 'Responsible Conduct' Guidelines," which appeared on Law360 on June 28, 2013.

Kirk Jensen and Valerie Hletko authored "More Scrutiny for Short-Term, Small-Dollar Lenders," which appeared on Law360 on July 8, 2013.

Jonice Gray Tucker and Amanda Raines authored "CFPB Investigations in Focus: Navigating CIDs," which appeared on Law360 on July 11, 2013.

Valerie Hletko authored "A Broader Application of Fair Debt Collection Principles," which was published on Law360 on July 12, 2013.

Margo Tank and Ian Spear authored "What Emerging Payment Providers Can Learn From Liberty Reserve and Mt. Gox." The article will appear in the August 1, 2013 issue of Payments Journal.

About BuckleySandler LLP (www.buckleysandler.com)

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

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

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

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

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MORTGAGES

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CFPB Publishes 2014 List of Rural Counties. On July 2, the CFPB published a final list of rural and underserved counties for use in 2014. Several of the CFPB's new mortgage rules include provisions and exceptions related to creditors who operate in predominantly rural or underserved counties, including the ability-to-repay/qualified mortgage rule and the TILA escrows rule. The CFPB notes that the list has changed based on 2010 census data such that some small creditors will lose eligibility for certain mortgage rule exemptions. Based on those changes and extensive feedback the CFPB has received about the definition of rural and underserved counties, the CFPB reminded institutions that it (i) recently revised its ability-to-repay rule to extend the ability to originate balloon QMs to certain small creditors that do not operate predominantly in rural or underserved areas during the period from January 10, 2014, to January 10, 2016, (ii) recently proposed to extend the same treatment to these small creditors for purposes of the high-cost mortgage balloon exemption, and (iii) proposed to extend eligibility for the rural or underserved exemption from the escrow requirement to creditors that operated predominantly in rural or underserved counties in any of the previous three years.

House Chairman Outlines Housing Reform Bill. On July 11, House Financial Services Committee Chairman Jeb Hensarling (R-TX) outlined legislation set to be unveiled next week that is

designed to reform the housing finance market. The centerpiece of the comprehensive bill is a plan to end the government's conservatorship of Fannie Mae and Freddie Mac over a five year period, move those entities into receivership, and liquidate them. The bill would aim to replace the government-backed mortgage finance companies with a secondary market funded only by private capital, supported by a non-government, not-for-profit mortgage market utility regulated by the FHFA. The legislation also will include numerous provisions designed to "break down barriers to private investment capital," including by delaying implementation of Basel III capital rules for community financial institutions and incorporating portions of a bipartisan proposal to change the calculation of loan points and fees in determining qualified mortgage eligibility. Finally, the bill would separate the FHA from HUD, limit the FHA's mission to only serving first-time homebuyers and borrowers below 115% of area median income (AMI) nationwide or 150% of AMI in high-cost areas, lower the minimum and maximum FHA loan limits, and increase FHA down payment requirements, among other changes to the FHA program.

Fannie Mae, Freddie Mac Provide Additional Information Regarding QM Requirements. On July 2, Fannie Mae and Freddie Mac provided lenders additional information about eligibility criteria for mortgages with application dates on or after January 10, 2014. Recently, the FHFA directed Fannie Mae and Freddie Mac to limit future mortgage acquisitions to loans that meet the requirements for qualified mortgages under the CFPB's ability-to-repay/qualified mortgage rule. The letters state that, effective January 10, 2014, mortgages will be eligible for sale to either entity only if they (i) are fully amortizing, (ii) have terms no longer than 30 years, and (iii) have points and fees of 3% or less of the total loan amount. In addition, both entities will continue to purchase mortgage loans that are exempt from the ability-to-repay rule. Fannie Mae and Freddie Mac anticipate updating policies regarding representations and warranties, as well as certain policies related to loan eligibility in August 2013, and plan to provide information about how they will test for compliance with the new eligibility criteria in September 2013.

Fannie Mae Updates Hardest Hit Fund Requirements. On July 1, Fannie Mae issued Servicing Guide Announcement SVC-2013-14 to notify servicers that they must accept modification assistance received from a state housing finance agency for a mortgage loan in connection with any Fannie Mae modification, without regard to whether principal forbearance is required. In doing so, servicers must also comply with certain delinquency management and default prevention requirements outlined in Announcement SVC-2011-18. Servicers are required to implement the policy changes no later than October 1, 2013, and are encouraged to do so immediately.

HUD Updates Pre-Foreclosure and Deed-in-Lieu of Foreclosure Requirements, Extends Unemployment Forbearance. On July 9, HUD issued Mortgagee Letter 2013-23, which updates pre-foreclosure sale (PFS) and deed-in-lieu (DIL) foreclosure requirements for FHA-approved mortgagees. For a standard PFS, the letter details (i) the deficit income test that mortgagees must use to determine hardship, (ii) the supporting documentation required for such tests, (iii) the method for calculating cash reserve contributions, and (iv) the requirements for approving a PFS based on imminent default. The letter also explains the eligibility requirements for streamlined PFS and DIL, including with regard to military servicemembers. Among numerous other policy changes, HUD also updated the disclosure requirements for all PFS and DIL transactions and outlined certain arms-length requirements for PFS transactions. Mortgagees must implement the new policies by October 1, 2013. Recently, HUD also issued Mortgagee Letter 2013-22 to extend indefinitely its policy to provide special forbearance for unemployed borrowers. That policy, detailed in Mortgagee Letter 2011-23, was set to expire on August 1, 2013.

Eighth Circuit Holds Borrowers Must File Suit Within TILA Three-Year Rescission Period. On July 12, the U.S. Court of Appeals for the Eighth Circuit held that a borrower seeking rescission under TILA must file suit within three years, and that merely providing the lender notice is

insufficient to preserve the borrower's right of rescission. *Keiran v. Home Capital, Inc.*, No. 11-3878 (8th Cir. Jul. 12, 2013). As the Tenth Circuit did last year, the Eighth Circuit reasoned that the text of the statute, as explicated by the Supreme Court in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), establishes that filing suit is required. Also like the Tenth Circuit, the court expressly rejected the CFPB's argument that the lender, rather than the obligor, should be required to file suit to prevent rescission. To adopt the CFPB's position, the court explained, "would create a situation wherein rescission is complete, in effect, simply upon notice from the borrower, whether or not the borrower had a valid basis for such a remedy. Under this scenario, the bank's security interest would be unilaterally impaired, casting a cloud on the property's title, and approach envisioned and rejected by *Beach*." The holding is the latest in a series of circuit court decisions on this issue, with the majority of circuits now holding in favor of the lender and rejecting the position that notice extends the three-year TILA rescission right. BuckleySandler LLP filed an amicus brief in *Keiran* on behalf of the American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition.

Ninth Circuit Holds Repeated Erroneous Default Notices Can Be ECOA "Adverse Action." On July 3, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit held that a mortgage servicer's alleged repeated delivery of notices of default and acceleration to borrowers who were current on their obligation could be "adverse action," triggering the ECOA notification requirements. *Schlegel v. Wells Fargo Bank,* No. 11-6816, 2013 WL 3336727 (9th Cir. July 3, 2013). According to the borrowers, although they received a discharge in bankruptcy, they reaffirmed their mortgage loan, subject to a modification that apparently reduced their monthly payment obligation. The borrowers claimed that the servicer did not correct its records to reflect the loan modification and sent several notices of default and acceleration. The Ninth Circuit held that, while sending a mistaken default notice would not necessarily constitute an adverse action, the conduct alleged in the complaint, in which the creditor repeatedly stated that the obligation was immediately due and payable, fell within the definition of an "adverse action" as, among other things, a "revocation of credit." Therefore, the court reversed the district court's dismissal of the borrowers' claim that the mortgage servicer had failed to provide a notification within 30 days after taking adverse action, as required under ECOA. The appellate court, however, upheld the district court's dismissal of the borrowers' claim under the FDCPA, holding that the complaint failed to adequately allege that the servicer was a "debt collector" under the FDCPA - i.e.,either that its principal business was the collection of debts or that it was collecting the subject debt "for another."

Colorado AG Investigating Foreclosure Law Firm Fees. On July 11, the Denver Post reported that Colorado Attorney General (AG) John Suthers is investigating whether foreclosure law firms are inflating fees that are added to the cost of the foreclosure and mortgage balance, and subsequently are passed on to borrowers, lenders, and investors. The AG has not filed charges against any firms, but has moved to enforce subpoenas his office issued seeking information from numerous law firms about the foreclosure fees they charged. The investigation covers all costs claimed by the firms, including costs related to posting foreclosure notices on homeowners' doors, which the AG claims substantially exceed the market rate.

Ten More States Adopt Uniform MLO Test. On July 1, the CSBS announced that ten additional state agencies will use the new National SAFE MLO test. Twenty state agencies adopted the test when it initially was introduced in April 2013. The uniform test combines both the national and state testing requirements of the SAFE Act, replaces the separate, state-specific tests for the states that adopt it, and streamlines the license application process for mortgage loan originators (MLOs) seeking licenses in multiple states. The CSBS reports that an additional five state agencies are scheduled to adopt the test by the start of 2014.

BANKING

Prudential Regulators Finalize Regulatory Capital Rule, Propose New Leverage Ratio for Large Banks. On July 9, the FDIC and the OCC approved a final rule to implement the risk-based and leverage capital requirements in the Basel III framework and relevant provisions mandated by the Dodd-Frank Act. The same rule was approved on July 2 by the Federal Reserve Board. The final rule (i) increases the minimum common equity tier 1 capital requirement from 2% to 4.5% of risk-weighted assets; (ii) increases the minimum tier 1 capital requirement from 4% to 6% of risk-weighted assets; and (iii) adds a new capital conservation buffer of 2.5% of risk-weighted assets. The rule also establishes a minimum leverage ratio of 4% for all banking organizations. In response to concerns raised by smaller and community banking organizations, the regulators did not finalize more onerous capital requirements that would have substantially increased the risk-weightings for residential mortgages, as explained in more detail in our recent post. The final rule does not change the more stringent limits on the inclusion of mortgage servicing assets and deferred tax assets in regulatory capital calculations, but does extend the phase-in period for community banks. Internationally active banks must begin to implement the new capital rules in January 2014, while all other banking organizations will have until January 2015 to begin to phase in the new capital requirements. Also on July 9, the FDIC and the OCC approved a proposed rule that would require bank holding companies with more than $700 billion in consolidated total assets or $10 trillion in assets under custody to maintain a tier 1 capital leverage buffer of at least 2% above the minimum supplementary leverage ratio requirement of 3%, for a total of 5%. Failure to exceed the 5% ratio would subject covered companies to restrictions on discretionary bonus payments and capital distributions. The proposed rule also would require insured depository institutions of covered holding companies to meet a 6% supplementary leverage ratio to be considered "well capitalized" for prompt corrective action purposes. The proposal suggests a phase-in period for the rule with an effective date of January 1, 2018. Comments on the proposal are due 60 days after it is published in the Federal Register.

Governor Duke Announces Resignation from Federal Reserve Board. On July 11, the Federal Reserve Board announced that Governor Elizabeth Duke submitted her resignation effective August 31, 2013. She was appointed to the Board in August 2008 to fill a term that expired January 31, 2012. During her time on the Federal Reserve Board, Ms. Duke, a former community banker, focused on housing issues and financial regulation, including with regard to the impact of suc8100.h regulation on community banks. For example, last year she cautioned regulators about the potential impact of the various mortgage and capital rules on small institutions. Ms. Duke, who also previously led the American Bankers Association, did not indicate her future plans.

OCC Names Head of Large Bank Supervision. On July 10, the OCC named Martin Pfinsgraff as Senior Deputy Comptroller for Large Bank Supervision. Mr. Pfinsgraff has been filling that role on an acting basis since Michael Brosnan left the position to become Examiner-in-Charge of an OCC-supervised institution. Mr. Pfinsgraff previously served as Deputy Comptroller for Credit and Market Risk and prior to joining the OCC held senior positions with iJet International, Prudential Insurance Company, and Prudential Investment Corporation.

CONSUMER FINANCE

CFPB Puts Creditors, Third-Party Debt Collectors on Notice. On July 10, the CFPB issued new debt collection guidance that, among other things, seeks to hold CFPB-supervised creditors accountable for engaging in acts or practices the CFPB considers to be unfair, deceptive, and/or abusive (UDAAP) when collecting their own debts, in much the same way debt collectors are held accountable for violations of the FDCPA. Bulletin 2013-07 reviews the Dodd-Frank Act UDAAP

standards, provides a non-exhaustive list of debt collection acts or practices that could constitute UDAAPs, and states that even though creditors generally are not considered debt collectors under the FDCPA, the CFPB intends to supervise their debt collection activities under its UDAAP authority. Separately, in Bulletin 2013-08, the CFPB provided guidance to creditors, debt buyers, and third-party collectors about compliance with the FDCPA and sections 1031 and 1036 of the Dodd-Frank Act when making representations about the impact that payments on debts in collection may have on credit reports and credit scores. The Bulletin states that potentially deceptive debt collection claims are a matter of "significant concern" to the CFPB and describes actions the CFPB may take to ensure that the debt collection market "functions in a fair, transparent, and competitive manner." In addition, the CFPB announced that it will begin accepting consumer complaints related to debt collection, and published five "action letters" that consumers can use to correspond with debt collectors. The letters address the situations when the consumer (i) needs more information on the debt, (ii) wants to dispute the debt and for the debt collector to prove responsibility or stop communication, (iii) wants to restrict how and when a debt collector can contact them, (iv) has hired a lawyer, or (v) wants the debt collector to stop any and all contact.

CFPB Releases Spring Rulemaking Agenda. On July 3, the CFPB released its spring 2013 regulatory agenda. Among the agenda items are three rulemaking activities listed for the first time: (i) "prerule activities" related to payday loans and deposit advance products anticipated for January 2014, (ii) "further action" on debt collection regulations expected in October 2013, and (iii) "prerule activities" related to Gramm-Leach-Bliley Act privacy notices planned for November 2013. The agenda also indicates that the CFPB expects, among other things, to (i) finalize its integrated mortgage disclosures rule in October 2013, (ii) issue a final student loan servicer "larger participant" rule in September 2013, and (iii) propose a rule regarding general purpose reloadable prepaid cards in December 2013. The agenda does not mention any planned activities related to small business lending data collection or auto finance issues.

FTC Announces Largest Civil Penalty Ever Against Third-Party Debt Collector. On July 9, the FTC announced that a third-party debt collector and its subsidiaries agreed to pay a $3.2 million civil penalty to resolve allegations that the companies violated the FDCPA and FTC Act by (i) calling individuals multiple times per day, including early in the morning or late at night, (ii) calling even after being asked to stop, (iii) calling individuals' workplaces despite knowing that the employers prohibited such calls, (iv) leaving phone messages for third parties, which disclosed the debtor's name and the existence of the debt, and (v) continuing collection efforts without verifying a debt, even after individuals said they did not owe the debt. In addition to the monetary penalty, which the FTC described as the largest it has ever obtained against a third-party collector, the stipulated order requires, with regard to consumers who dispute the validity or the amount of a debt, that the companies close the account and end collection efforts, or suspend collection until they have conducted a reasonable investigation and verified that their information about the debt is accurate and complete. The order also restricts situations in which the defendants can leave voicemails that disclose the alleged debtor's name and the fact that he or she may owe a debt, and requires the companies to halt or limit other alleged practices. The companies also must record at least 75% of all their debt collection calls beginning one year after the date of the order, and retain the recordings for 90 days after they are made.

SECURITIES

Tenth Circuit Affirms Dismissal of Securities Act Claims Against Banks That Underwrote Stock of Failed Mortgage Lender. On July 9, the U.S. Court of Appeals for the Tenth Circuit affirmed a district court's order dismissing claims brought by investors against banks that had underwritten a mortgage lender's stock offerings. *Slater v. A.G. Edwards & Sons, Inc.*, No. 11-2170,

2013 WL 3390038 (10th Cir. Jul. 9, 2013). The lender, which focused on the adjustable-rate mortgage market, attempted to raise new capital through a series of stock offerings in 2007 and 2008 before filing for bankruptcy in 2009. Investors in those offerings filed suit after the stock price dropped following the lender's disclosure that it had been subject to margin calls triggered by a decline in the value of certain Alt-A mortgages that backed securities the lender had purchased. The investors alleged that documents related to the offerings violated Section 11 of the Securities Act because they did not disclose, among other things, the existence of the Alt-A MBS. In affirming dismissal of the claims against the underwriters, the Tenth Circuit concluded that plaintiffs had not alleged "an actionable misrepresentation or omission at the time of [the] stock offerings." The court explained that the lender was not under any obligation to disclose the MBS to make its statements true and accurate, and that the picture it provided was materially accurate, in part because the prospectus warned that the lender's liquidity conditions could worsen.

PRIVACY/DATA SECURITY

NIST Releases Draft Outline of Cybersecurity Framework. On July 2, the National Institute of Standards and Technology (NIST) released a draft outline of a framework to improve the cybersecurity of certain critical infrastructure. It proposes a core structure for the framework and includes a user's guide and an executive overview that describes the purpose, need, and application of the framework in business. Under an Executive Order issued earlier this year, NIST is tasked with developing standards, methodologies, procedures, and processes that will form a voluntary best practices framework to address cyber risks. It solicited and recently analyzed public comments about the voluntary framework. Based on certain comments that emphasized the importance of executive involvement in managing cyber risks, the framework is designed to help business leaders evaluate how prepared their organizations are to deal with cyber threats and their impacts. NIST also released a draft compendium of existing standards, practices, and guidelines to reduce cyber risks to critical infrastructure industries. It plans to publish the official draft Cybersecurity Framework for public comment in October 2013.

California AG Releases Data Breach Report, Proposes Data Security Policy Changes. On July 1, California Attorney General Kamala Harris (AG) released a report analyzing data breaches reported to her office in 2012, the first year companies were required to report to the AG any breach involving more than 500 state residents. The report identifies 131 data breach incidents that put the personal information of 2.5 million individuals at risk. The report includes policy recommendations focused on (i) data encryption, (ii) information security, (iii) notice letters, and (iv) the definition of personal information. Specifically, the AG urged companies to encrypt digital personal information when moving or sending it out of their secure network, and pledged to prioritize enforcement investigations of breaches involving unencrypted personal information. The report notes that a large percentage of breaches surveyed resulted from the failure of information security controls and references requirements under state law to protect the personal information of California residents. The AG also stated that companies should make their data breach notices to consumers easier to read, and that the state legislature should consider expanding breach notice requirements to cover breaches involving passwords. The AG highlighted a pending bill, SB 46, which would revise the existing notice requirement to also require reporting of breaches involving information that would permit access to an online account, i.e. user name or email address, in combination with a password or security question and answer. That bill has already passed the state Senate and been approved by two Assembly committees; it is awaiting action by the full Assembly.

CRIMINAL ENFORCEMENT

New York Federal Court Holds Courts Possess Power to Accept or Reject DPA. On July 1, in the U.S. District Court for the Eastern District of New York held that it has the power to accept or reject a deferred prosecution agreement (DPA), and to retain supervisory power over the implementation of a DPA. *U.S. v. HSBC Bank USA, N.A.,* No. 12-00763, 2013 WL 3306161 (E.D.N.Y. Jul, 1, 2013). In 2012, a major international bank holding company announced agreements with U.S. law enforcement authorities and federal bank regulators to end investigations into alleged inadequate compliance with anti-money laundering and sanctions laws by the holding company and its U.S. subsidiaries. As part of the resolution, the companies entered into a DPA, which the parties filed with the court and asked the court hold the case in abeyance to exclude part of the DPA from the federal Speedy Trial Act. In reviewing the request for abeyance, the court held that it has broader supervisory power to approve or reject the agreement in its entirety and that such power extends to implementation of the agreement. The court approved the DPA, but retained authority to monitor its execution and implementation. The court explained that "by placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority." Under its supervisory powers holding, which the court characterized as "novel," the court could later move to modify the agreement. More broadly, the court's assessment of its supervisory power potentially calls into question the certainty and finality of DPAs, which could impact the use of that prosecutorial tool.

Dealer Pleads Guilty to Criminal Violations of the SCRA. On June 27, the U.S. Attorney for the Northern District of Alabama announced that a used car dealer pleaded guilty to charges that he violated the Servicemembers Civil Relief Act (SCRA). *United States v. Nuss*, No. 13-102 (N.D. Ala. Plea entered Jun. 27, 2013). In March, a federal grand jury returned a two-count indictment charging the car dealer with failing to follow the SCRA when asked to do so by an Alabama National Guard member who had been called to active duty in Afghanistan. The guardsman allegedly had sent a letter from his deployed location, in which he asked that his interest rate be reduced to 6% as required by the SCRA. According to the indictment, the dealer refused to reduce the interest rate, and hired two individuals to repossess the guardsman's vehicle without first obtaining a SCRA-required court order. Notably, the dealer entered his plea without a plea agreement with the government. He is scheduled for sentencing on September 12, 2013. The maximum penalty for each SCRA violation is one year in prison, and a $100,000 fine.