Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

July 23, 2010

Topics In This Issue

- Federal Issues
- State Issues
- Courts
- Firm News
- Mortgages
- Banking
- Consumer Finance
- Securities
- Litigation

Federal Issues

President Signs Financial Regulatory Reform Into Law. On July 21, President Obama signed into law H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Law). That passage completes the realization of a major overhaul of financial regulation, including a profound change to consumer financial services regulation. The final legislation includes all of the various pieces of the regulatory reform package initially presented to Congress by the Obama Administration over a year ago. Two titles in particular, Title X, which creates the Bureau of Consumer Financial Protection (BCFP), and Title XIV, which implements the Mortgage Reform and Anti-Predatory Lending Act, will have far-reaching effects on institutions engaged in consumer financial services. Aside from these two titles, the Law will enhance and overhaul the regulatory structure applicable to numerous different aspects of the financial system, including thrifts, industrial loan companies, and other non-bank banks, over-the-counter derivatives, securities brokers and dealers and other securities intermediaries, and rating agencies. The Law also creates a new structure to monitor and regulate systemic risk issues, including entities considered "too big to fail." For a summary of the major aspects of each title of the Law, with a primary focus on the titles addressing the BCFP and mortgage reform, and including lists of the various studies required by the Law, please see the Regulatory Restructuring Report, July 21, 2010.

SEC Adopts Changes to Principal Disclosure Document. On July 21, the Securities and Exchange Commission (SEC) unanimously approved amendments to the principal disclosure document that investment advisers registered with the SEC must provide to new and prospective clients. That document, Form ADV, Part 2, which is commonly referred to as the "brochure," explains to investors an investment adviser’s qualifications, investment strategies, and business practices. Under existing, pre-amendment, rules, the brochure requires advisers to respond to a series of multiple-choice and fill-in-the-blank questions organized in a "check-the-box" format that frequently does not accurately describe the adviser’s business or conflicts in a manner that is accessible to the investor. According to the SEC, the adopted amendments are intended to address these shortcomings by transforming the brochure into a plain English narrative that is better suited to inform investors about the advisers who are providing them with investment advice. The amendments adopted by the SEC will require advisers to (i) prepare a narrative, plain English, brochure, presented in a consistent, uniform manner that will make it easier for clients to compare different advisers' disclosures, (ii) expand the brochure's content to better address those topics the SEC believes are most relevant to clients, including an adviser's advisory business, fees and compensation, performance-based fees and side-by-side management, methods of analysis, investment strategies, and risk of loss, disciplinary information, code of ethics, participation or interest in client transactions, and personal trading, and brokerage practices, (iii) supplement the brochure with brief, resume-like disclosures about the specific individuals who will provide services to the clients, and (iv) electronically file brochures, which will be publicly available on the SEC's website, to ensure that investors have easy access. Many state-registered investment advisers also currently file Form ADV with their regulators. Publication of the revised Form ADV, Part 2 has been delayed for five business days in order to accommodate technical, state-specific changes to the items and instructions on the form. The amended rules and forms will become effective 60 days after publication in the *Federal Register*. Most investment advisers will begin distributing and publicly posting new brochures in the first quarter of 2011. For a copy of the press release, please see http://www.sec.gov/news/press/2010/2010-127.htm.

FTC Warns Credit Report Providers About Their Disclosures. On July 22, the Federal Trade Commission (FTC) issued a warning to the operators of eighteen Internet websites offering free credit reports that they must clearly disclose the availability of free, government-sponsored credit reports under federal law, or face prosecution. The warning follows the FTC's recently amended Free Credit Reports Rule, effective as of April 2, 2010, which requires credit report providers to make certain disclosures to help consumers distinguish between ads for free credit reports that allegedly frequently require the purchase of credit monitoring or other services, and the federally mandated credit reports available at annualcreditreport.com or 877-322-8228 that do not require the purchase of additional services. Failure to make the requisite disclosures exposes violators to legal action that can result in penalties of up to $3,500 per violation. For a copy of the FTC press release, please click here. For a copy of the applicable *Federal Register* regulation, please click here.

FDIC Deposit Insurance Permanently Raised to $250,000 Per Depositor. On July 21, the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act permanently raised to $250,000 the standard maximum deposit insurance amount insured by the Federal Deposit Insurance Corporation (FDIC) per depositor, per insured depository institution for each account ownership category. The insurance amount had temporarily been at that level since October 3, 2008, but it was set to revert to its prior level of $100,000 on January 1, 2014. The FDIC encourages insured depository institutions to update their signs, which it provides free of charge at https://vcart.velocitypayment.com/fdic/, in order to reflect the permanent increase. For a copy of the press release, please click here. For a copy of the Financial Institution Letter, please click here.

SEC Establishes New Offices to Streamline Staff Expertise. On July 16, the Securities and Exchange Commission (SEC) announced the establishment of three new offices within the Division of Corporation Finance for the purpose of enhancing its disclosure review and policy operations. According to the SEC, the creation of these offices is meant to streamline and concentrate staff expertise and resources with a focus on critically important institutions and financial products. The new offices will (i) perform enhanced reviews of large and financially significant financial services institutions, (ii) focus on disclosure reviews and policy-making associated with asset-backed securities and other structured finance products, including monitoring their impact on the markets, and (iii) review and evaluate trends in securities offerings and capital markets to determine whether rules and regulations are working effectively, including conducting market research. For a copy of the press release, please click here.

Federal Reserve Board Agrees to Reduce TARP Funds Available to the TALF Program. On July 20, the Board of Governors of the Federal Reserve System (the Board) announced its agreement with the Treasury Department to reduce the availability of Troubled Asset Relief Program (TARP) funds to cover losses by the Term Asset-Backed Securities Loan Facility (TALF) program from $20 billion to $4.3 billion. Since the inception of the TALF program in March 2009, the program has extended $70 billion in loans to investors in highly rated asset-backed securities and commercial mortgage-backed securities. Any losses under the TALF program are to be absorbed, in the first instance, by excess interest accrued on the TALF loans. Any remaining losses would then be covered by the TARP funds. According to the Board, as of July 20 the TALF program has experienced no losses and all outstanding TALF loans are well collateralized. For a copy of the press release, please click here.

Fidelity National Financial Settles FTC Anticompetitive Claims. On July 16, the Federal Trade Commission (FTC) announced that Fidelity National Financial, Inc. (Fidelity) has agreed to sell several title plants and related assets in Oregon and greater Detroit, Michigan as part of a deal to settle a complaint that Fidelity's 2008 acquisition of three LandAmerica Financial, Inc. (LandAmerica) subsidiaries reduced competition in several local markets pertaining to the provision of title insurance information services by title plants. The FTC's proposed settlement order seeks to restore competition in those markets by requiring Fidelity to (i) sell part of its ownership of the sole title plant serving Portland, Oregon to Northwest Title, (ii) sell a copy of the data from each of the title plants serving Oregon's Benton, Jackson, Linn, and Marion counties to Northwest Title, (iii) sell a copy of the title data in the three Detroit-area counties that LandAmerica provided to Data Trace before the acquisition to an FTC-approved buyer, and (iv) notify the FTC before acquiring 50 percent or more of any joint title plant in California, Colorado, Nevada, New Mexico, Oregon, and Texas, which are all states in which Fidelity's acquisition of LandAmerica's subsidiaries increased Fidelity's ownership interest in title plants. The proposed order will be subject to public comment for 30 days, until August 16, 2010, after which the FTC will decide whether to make it final. For a copy of the press release, please see http://www.ftc.gov/opa/2010/07/fidelity.shtm.

FTC Settles Action Against Allegedly Fraudulent "Rapid Debt Reduction" Group. On July 19, the U.S. District Court for the Western District of Washington approved a settlement between the Federal Trade Commission (FTC) and Mutual Consolidated Savings and its affiliates and principals (the MCS defendants) after allegations that the MCS defendants had defrauded consumers with a promise to reduce their credit card interest rates for a fee of several hundred dollars. The MCS defendants allegedly marketed a phony "Rapid Debt Reduction" program to consumers through direct calls and the Internet and made false representations that the program could provide customers with a reduced credit card interest rate and an alternative payment plan, which together would reduce consumers' debt burden. The settlement bans the MCS defendants from working in the debt relief industry and requires them to pay approximately $1.5 million, which is all of their available assets, to be used to refund defrauded consumers. If the MCS defendants misrepresented their financial condition, they must pay $22.5 million, which is the full amount of the alleged consumer injury. For a copy of the press release, please see http://www.ftc.gov/opa/2010/07/mutualconsol.shtm.

HUD Announces Intent to Investigate Mortgage Lenders For Discrimination. On July 21, the U.S. Department of Housing and Urban Development (HUD) announced that it will begin several investigations to determine whether certain mortgage lenders illegally denied families mortgages because the mother is pregnant or a family member is experiencing a short-term disability. The announcement was triggered by a New York Times report suggesting that some lenders may be denying credit to borrowers because of a pregnancy or maternity leave, in violation of the Fair Housing Act. HUD's Federal Housing Administration requires its approved lenders to review a borrower's income to determine whether the borrower can reasonably be expected to continue paying their mortgage for the first three years of the loan, but lenders cannot inquire into a borrower's future maternity leave or discriminate against borrowers on the basis of a pregnancy or short-term disability if the borrower demonstrates that he or she intends to return to work and can otherwise continue to meet the income requirements to qualify for the loan. The investigations will be directed by HUD's Office of Fair Housing and Equal Opportunity. For a copy of the press release, please see http://1.usa.gov/akNUmv.

State Issues

Pennsylvania Department of Banking Issues Reverse Mortgage Policy. The Pennsylvania Department of Banking (the Department) recently issued a policy statement to provide guidance to licensees regarding the proper conduct of making, originating or servicing reverse mortgage loans and to inform licensees of the proper use of, and risks associated with, reverse mortgage loans. Because most reverse mortgages are marketed to elderly consumers, the Department's policy addresses concerns that these consumers may be victimized by poor advice or outright fraud. The Department is also concerned that licensees may not be fully cognizant of the propriety of, and the necessary practices required to protect consumers who use, reverse mortgage loans. And the Department is particularly concerned about the special financial risks associated with proprietary reverse mortgage loans because they are not insured by the Federal government and are not required to follow the standards and requirements mandated by the Federal Housing Administration to obtain Federal insurance. The areas addressed by the policy statement are (i) the financial strength of the licensee lender, (ii) the content of reverse mortgage loan agreements, (iii) the procedures regarding reverse mortgage loan origination, (iv) the consequences of a reverse mortgage loan for a non-borrower spouse, (v) conflicts of interest, (vi) a prohibition on offering unsuitable reverse mortgage loans, (vii) servicing obligations, (viii) an applicant's mental capacity, and (ix) power of attorney. There are no new regulatory requirements as a result of the policy statement. For a copy of the policy statement, please see http://www.pabulletin.com/secure/data/vol40/40-28/1253.html.

Illinois Law Enacted to Further Protect Seniors from Financial Exploitation. On July 17, Illinois passed a law enhancing the obligations of financial institutions to identify and report the financial exploitation of seniors. Under the new law, the state must develop training standards to be used by employees of financial institutions who have direct contact with customers. The employees will be trained how to identify and report financial exploitation. Compliance with the training standards will be part of the Illinois Department of Financial and Professional Regulation's bank examination checklist, which will then submit a compliance report to the Illinois Department on Aging twice a year. The law becomes effective immediately. For a copy of the press release, please click here.

Courts

Virginia Federal Court Upholds Lender's Use of Incorrect Model Form in Refinancing Transaction. On July 15, the U.S. District Court for the Eastern District of Virginia rejected a borrower's argument that the lender's use of a model form intended for a new credit transaction, and not for a refinancing, was insufficient to give a borrower in a refinancing notice of the effects on his prior mortgage of exercising the right to rescission. *Watkins v. Suntrust Mortgage, Inc.*, 2010 U.S. Dist. LEXIS 71390, No. 3:10-CV-98 (E.D. Va. July 15, 2010). The borrower alleged that the lender failed to meet its disclosure obligations under the Truth-in-Lending Act (TILA) when, in connection with the refinancing of a home mortgage, the lender provided the borrower with Model Form H-8 (new credit transaction disclosure notice) and not with Model Form H-9 (refinancing transaction disclosure notice), as set forth in Appendix H to Federal Reserve Board Regulation Z. Relying on recent precedent from the Eastern District of Virginia (as reported in *InfoBytes*, June 11, 2010) established in *Larabee* that a notice satisfies the statutory requirements of TILA as long as it "recited the essential elements of a TILA disclosure set forth in Regulation Z," and rejecting precedent from the Seventh Circuit holding that the provision of two rescission notices, one of which contained language describing a refinancing transaction and the other describing a new line of credit, did not meet the TILA disclosure obligations, the court held that the borrower received "clear and conspicuous notice of his TILA rights" despite the lender's use of a new credit transaction disclosure notice in a refinancing transaction. The court therefore granted the lender's motion to dismiss the borrower's claim. For a copy of the opinion, please click here.

Ninth Circuit Finds that Creditors Do Not Have a Purchase Money Security Interest in Negative Equity. On July 16, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the Bankruptcy Appellate Panel (BAP) and held that a creditor does not have a purchase money security interest in the negative equity of a vehicle traded in at the time the debtor purchased a new vehicle. *In re Penrod*, 2010 WL 2794409, No. 08-60037 (9th Cir. July 16, 2010). The creditor that financed the debtor's automobile purchase objected to the debtor's Chapter 13 plan to bifurcate its claim into unsecured and secured portions, claiming that it had a purchase money security interest in the entire amount of the claim, including the $7,000 of negative equity from the debtor's trade-in. The bankruptcy court held that the creditor did not have a purchase money security interest in the portion of the loan related to the negative equity, but found the creditor did have a purchase money security interest in the remainder, and the BAP affirmed. The Ninth Circuit also affirmed, creating a circuit split with eight other circuits. To reach its holding, the Ninth Circuit first examined the so-called "hanging paragraph" provision of the Bankruptcy Code, which prevents the bifurcation of a secured claim into secured and unsecured portions when the creditor has a "purchase money security interest" in a motor vehicle acquired for the debtor's personal use within 910 days preceding the debtor's bankruptcy filing. After examining the relevant portion of the Uniform Commercial Code and its Official Comment, the court rejected the creditor's argument that negative equity should be considered a purchase money security interest because "negative equity is antecedent debt [and a] seller or lender can obtain a purchase money security interest only for new value, and closely related costs." The court also found that the creditor's position was inconsistent with the Bankruptcy Code, because, under the Code, "security interests are given preferential treatment to the extent that the obligation relates to the receipt of truly new value, not just old obligations that have been repackaged." Finally, the Ninth Circuit found that the creditor erroneously relied on the California Automobile Sales Finance Act, which includes negative equity charges in the "cash price" of the vehicle, because the Act's definition is silent regarding whether those charges result in a purchase money security interest. For a copy of the opinion, please see http://bit.ly/p2P5Qc.

Virginia Federal Court Rules FCRA Preempts Tennessee Statutory & Common Law Claims. On July 16, the U.S. District Court for the Eastern District of Tennessee held that the Fair Credit Reporting Act (FCRA) preempts both common law and statutory state law claims. *Lufkin v. Capital One Bank*, 2010 WL 2813437, No. 3:10-CV-18 (E.D. Tenn. July 16, 2010). The plaintiff in *Lufkin*claimed that he was prevented from refinancing on certain real estate loans because the defendants caused his credit score to decline by incorrectly reporting that his credit card accounts were delinquent. The plaintiff brought both federal claims, under the FCRA and the Fair Debt Collection Practices Act (FDCPA), and state law claims, under the Tennessee Consumer Protection Act, the Tennessee Credit Services Business Act, and common law fraud, defamation and breach of contract claims. Noting a split in authority, the court sided with the majority of courts which have found that § 1681t(b)(1)(F) of the FCRA "applies to preempt both statutory and common law claims under state law that are based on allegations involving a subject matter regulated under the FCRA." The court went on to grant the defendants' motion to dismiss because the plaintiff failed to state a claim under either the FCRA or the FDCPA. For a copy of the opinion, please click here.

Georgia Supreme Court Holds Corporations May Not Be Directly or Vicariously Liable Under Law Limiting Notary Fees. The Supreme Court of Georgia recently held that a statute limiting fees for providing notarial services applies to notaries public, but does not apply directly or vicariously to corporations employing notaries public. *Anthony v. American General Financial Services, Inc.*, 2010 WL 2553586, No. S10Q0203 (Ga. June 28, 2010). The plaintiffs sought to recover a $350.00 notary fee charged by the defendant lender to refinance a mortgage loan that allegedly exceeded the statutory maximum permitted by OCGA § 45-17-11(b). The court first found that corporations employing notaries public are not directly liable under the statute because the relevant statutory text makes it "clear that consumers were directly protected against 'notary publics,' not anyone else[,]" and also because "a corporation cannot serve as a notary public." The court next found that a corporation may not be held vicariously liable for the acts of a notary public employed by the corporation because a notary acting in his or her official capacity is a public officer, and the private employer has no control over the performance of his or her notarial duties. The court did find, however, that a corporation may be held liable where it "procures or otherwise qualifies as a party to or participant in such a violation by a[] notary." Other holdings by the court were that (i) a private civil cause of action does not arise under OCGA § 45-17-11 against a corporation employing notaries public to recover notarial fees paid in excess of, and without notice of, the statutorily-prescribed maximum notary fee, (ii) recovery under a breach of contract claim for notarial fees paid in excess of, and without notice of, the statutorily-prescribed maximum notary fee when the actual fee charged was clearly specified in the contract as being "reasonable and necessary" is not barred by the voluntary payment doctrine, and (iii) the statutes of limitations on claims of fraud and on claims of money had and received are not tolled when notarial fees are collected in excess of, and without notice of, the statutorily-prescribed maximum notary fee when the actual fee charged was clearly specified in the contract as being "reasonable and necessary." For a copy of the opinion, please see http://www.gasupreme.us/sc-op/pdf/s10q0203.pdf.

Firm News

Jonice Gray Tucker will be speaking on issues related "Fair Servicing" at the American Bar Association's Annual Meeting on August 7, 2010.

Jonice Gray Tucker will be speaking at the California Mortgage Bankers Association's Servicing Conference on August 9, 2010. The topic is enforcement activity related to loan modifications and default servicing.

Andrew Sandler will be the chairperson for Banking Crisis Fallout 2010 at PLI New York Center in New York City on November 4, 2010; the topic will be Emerging Enforcement Trends.

Mortgages

HUD Announces Intent to Investigate Mortgage Lenders For Discrimination. On July 21, the U.S. Department of Housing and Urban Development (HUD) announced that it will begin several investigations to determine whether certain mortgage lenders illegally denied families mortgages because the mother is pregnant or a family member is experiencing a short-term disability. The announcement was triggered by a New York Times report suggesting that some lenders may be denying credit to borrowers because of a pregnancy or maternity leave, in violation of the Fair Housing Act. HUD's Federal Housing Administration requires its approved lenders to review a borrower's income to determine whether the borrower can reasonably be expected to continue paying their mortgage for the first three years of the loan, but lenders cannot inquire into a borrower's future maternity leave or discriminate against borrowers on the basis of a pregnancy or short-term disability if the borrower demonstrates that he or she intends to return to work and can otherwise continue to meet the income requirements to qualify for the loan. The investigations will be directed by HUD's Office of Fair Housing and Equal Opportunity. For a copy of the press release, please see http://1.usa.gov/akNUmv.

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FTC Settles Action Against Allegedly Fraudulent "Rapid Debt Reduction" Group. On July 19, the U.S. District Court for the Western District of Washington approved a settlement between the Federal Trade Commission (FTC) and Mutual Consolidated Savings and its affiliates and principals (the MCS defendants) after allegations that the MCS defendants had defrauded consumers with a promise to reduce their credit card interest rates for a fee of several hundred dollars. The MCS defendants allegedly marketed a phony "Rapid Debt Reduction" program to consumers through direct calls and the Internet and made false representations that the program could provide customers with a reduced credit card interest rate and an alternative payment plan, which together would reduce consumers' debt burden. The settlement bans the MCS defendants from working in the debt relief industry and requires them to pay approximately $1.5 million, which is all of their available assets, to be used to refund defrauded consumers. If the MCS defendants misrepresented their financial condition, they must pay $22.5 million, which is the full amount of the alleged consumer injury. For a copy of the press release, please see http://www.ftc.gov/opa/2010/07/mutualconsol.shtm.

Ninth Circuit Finds that Creditors Do Not Have a Purchase Money Security Interest in Negative Equity. On July 16, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the Bankruptcy Appellate Panel (BAP) and held that a creditor does not have a purchase money security interest in the negative equity of a vehicle traded in at the time the debtor purchased a new vehicle. *In re Penrod*, 2010 WL 2794409, No. 08-60037 (9th Cir. July 16, 2010). The creditor that financed the debtor's automobile purchase objected to the debtor's Chapter 13 plan to bifurcate its claim into unsecured and secured portions, claiming that it had a purchase money security interest in the entire amount of the claim, including the $7,000 of negative equity from the debtor's trade-in. The bankruptcy court held that the creditor did not have a purchase money security interest in the portion of the loan related to the negative equity, but found the creditor did have a purchase money security interest in the remainder, and the BAP affirmed. The Ninth Circuit also affirmed, creating a circuit split with eight other circuits. To reach its holding, the Ninth Circuit first examined the so-called "hanging paragraph" provision of the Bankruptcy Code, which prevents the bifurcation of a secured claim into secured and unsecured portions when the creditor has a "purchase money security interest" in a motor vehicle acquired for the debtor's personal use within 910 days preceding the debtor's bankruptcy filing. After examining the relevant portion of the Uniform Commercial Code and its Official Comment, the court rejected the creditor's argument that negative equity should be considered a purchase money security interest because "negative equity is antecedent debt [and a] seller or lender can obtain a purchase money security interest only for new value, and closely related costs." The court also found that the creditor's position was inconsistent with the Bankruptcy Code, because, under the Code, "security interests are given preferential treatment to the extent that the obligation relates to the receipt of truly new value, not just old obligations that have been repackaged." Finally, the Ninth Circuit found that the creditor erroneously relied on the California Automobile Sales Finance Act, which includes negative equity charges in the "cash price" of the vehicle, because the Act's definition is silent regarding whether those charges result in a purchase money security interest. For a copy of the opinion, please see http://bit.ly/p2P5Qc.

Illinois Law Enacted to Further Protect Seniors from Financial Exploitation. On July 17, Illinois passed a law enhancing the obligations of financial institutions to identify and report the financial exploitation of seniors. Under the new law, the state must develop training standards to be used by employees of financial institutions who have direct contact with customers. The employees will be trained how to identify and report financial exploitation. Compliance with the training standards will be part of the Illinois Department of Financial and Professional Regulation's bank examination checklist, which will then submit a compliance report to the Illinois Department on Aging twice a year. The law becomes effective immediately. For a copy of the press release, please click here.

Securities

SEC Adopts Changes to Principal Disclosure Document. On July 21, the Securities and Exchange Commission (SEC) unanimously approved amendments to the principal disclosure document that investment advisers registered with the SEC must provide to new and prospective clients. That document, Form ADV, Part 2, which is commonly referred to as the "brochure," explains to investors an investment adviser's qualifications, investment strategies, and business practices. Under existing, pre-amendment, rules, the brochure requires advisers to respond to a series of multiple-choice and fill-in-the-blank questions organized in a "check-the-box" format that frequently does not accurately describe the adviser's business or conflicts in a manner that is accessible to the investor. According to the SEC, the adopted amendments are intended to address these shortcomings by transforming the brochure into a plain English narrative that is better suited to inform investors about the advisers who are providing them with investment advice. The amendments adopted by the SEC will require advisers to (i) prepare a narrative, plain English, brochure, presented in a consistent, uniform manner that will make it easier for clients to compare different advisers' disclosures, (ii) expand the brochure's content to better address those topics the SEC believes are most relevant to clients, including an adviser's advisory business, fees and compensation, performance-based fees and side-by-side management, methods of analysis, investment strategies, and risk of loss, disciplinary information, code of ethics, participation or interest in client transactions, and personal trading, and brokerage practices, (iii) supplement the brochure with brief, resume-like disclosures about the specific individuals who will provide services to the clients, and (iv) electronically file brochures, which will be publicly available on the SEC's website, to ensure that investors have easy access. Many state-registered investment advisers also currently file Form ADV with their regulators. Publication of the revised Form ADV, Part 2 has been delayed for five business days in order to accommodate technical, state-specific changes to the items and instructions on the form. The amended rules and forms will become effective 60 days after publication in the *Federal Register*. Most investment advisers will begin distributing and publicly posting new brochures in the first quarter of 2011. For a copy of the press release, please see http://www.sec.gov/news/press/2010/2010-127.htm.

SEC Establishes New Offices to Streamline Staff Expertise. On July16, the Securities and Exchange Commission (SEC) announced the establishment of three new offices within the Division of Corporation Finance for the purpose of enhancing its disclosure review and policy operations. According to the SEC, the creation of these offices is meant to streamline and concentrate staff expertise and resources with a focus on critically important institutions and financial products. The new offices will (i) perform enhanced reviews of large and financially significant financial services institutions, (ii) focus on disclosure reviews and policy-making associated with asset-backed securities and other structured finance products, including monitoring their impact on the markets, and (iii) review and evaluate trends in securities offerings and capital markets to determine whether rules and regulations are working effectively, including conducting market research. For a copy of the press release, please click here.

Litigation

Virginia Federal Court Upholds Lender's Use of Incorrect Model Form in Refinancing Transaction. On July 15, the U.S. District Court for the Eastern District of Virginia rejected a borrower's argument that the lender's use of a model form intended for a new credit transaction, and not for a refinancing, was insufficient to give a borrower in a refinancing notice of the effects on his prior mortgage of exercising the right to rescission. *Watkins v. Suntrust Mortgage, Inc.*, 2010 U.S. Dist. LEXIS 71390, No. 3:10-CV-98 (E.D. Va. July 15, 2010). The borrower alleged that the lender failed to meet its disclosure obligations under the Truth-in-Lending Act (TILA) when, in connection with the refinancing of a home mortgage, the lender provided the borrower with Model Form H-8 (new credit transaction disclosure notice) and not with Model Form H-9 (refinancing transaction disclosure notice), as set forth in Appendix H to Federal Reserve Board Regulation Z. Relying on recent precedent from the Eastern District of Virginia (as reported in *InfoBytes*, June 11, 2010) established in *Larabee* that a notice satisfies the statutory requirements of TILA as long as it "recited the essential elements of a TILA disclosure set forth in Regulation Z," and rejecting precedent from the Seventh Circuit holding that the provision of two rescission notices, one of which contained language describing a refinancing transaction and the other describing a new line of credit, did not meet the TILA disclosure obligations, the court held that the borrower received "clear and conspicuous notice of his TILA rights" despite the lender's use of a new credit transaction disclosure notice in a refinancing transaction. The court therefore granted the lender's motion to dismiss the borrower's claim. For a copy of the opinion, please click here.

Ninth Circuit Finds that Creditors Do Not Have a Purchase Money Security Interest in Negative Equity. On July 16, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the Bankruptcy Appellate Panel (BAP) and held that a creditor does not have a purchase money security interest in the negative equity of a vehicle traded in at the time the debtor purchased a new vehicle. *In re Penrod*, 2010 WL 2794409, No. 08-60037 (9th Cir. July 16, 2010). The creditor that financed the debtor's automobile purchase objected to the debtor's Chapter 13 plan to bifurcate its claim into unsecured and secured portions, claiming that it had a purchase money security interest in the entire amount of the claim, including the $7,000 of negative equity from the debtor's trade-in. The bankruptcy court held that the creditor did not have a purchase money security interest in the portion of the loan related to the negative equity, but found the creditor did have a purchase money security interest in the remainder, and the BAP affirmed. The Ninth Circuit also affirmed, creating a circuit split with eight other circuits. To reach its holding, the Ninth Circuit first examined the so-called "hanging paragraph" provision of the Bankruptcy Code, which prevents the bifurcation of a secured claim into secured and unsecured portions when the creditor has a "purchase money security interest" in a motor vehicle acquired for the debtor's personal use within 910 days preceding the debtor's bankruptcy filing. After examining the relevant portion of the Uniform Commercial Code and its Official Comment, the court rejected the creditor's argument that negative equity should be considered a purchase money security interest because "negative equity is antecedent debt [and a] seller or lender can obtain a purchase money security interest only for new value, and closely related costs." The court also found that the creditor's position was inconsistent with the Bankruptcy Code, because, under the Code, "security interests are given preferential treatment to the extent that the obligation relates to the receipt of truly new value, not just old obligations that have been repackaged." Finally, the Ninth Circuit found that the creditor erroneously relied on the California Automobile Sales Finance Act, which includes negative equity charges in the "cash price" of the vehicle, because the Act's definition is silent regarding whether those charges result in a purchase money security interest. For a copy of the opinion, please see http://bit.ly/p2P5Qc.

Virginia Federal Court Rules FCRA Preempts Tennessee Statutory & Common Law Claims. On July 16, the U.S. District Court for the Eastern District of Tennessee held that the Fair Credit Reporting Act (FCRA) preempts both common law and statutory state law claims. *Lufkin v. Capital One Bank*, 2010 WL 2813437, No. 3:10-CV-18 (E.D. Tenn. July 16, 2010). The plaintiff in *Lufkin*claimed that he was prevented from refinancing on certain real estate loans because the defendants caused his credit score to decline by incorrectly reporting that his credit card accounts were delinquent. The plaintiff brought both federal claims, under the FCRA and the Fair Debt Collection Practices Act (FDCPA), and state law claims, under the Tennessee Consumer Protection Act, the Tennessee Credit Services Business Act, and common law fraud, defamation and breach of contract claims. Noting a split in authority, the court sided with the majority of courts which have found that § 1681t(b)(1)(F) of the FCRA "applies to preempt both statutory and common law claims under state law that are based on allegations involving a subject matter regulated under the FCRA." The court went on to grant the defendants' motion to dismiss because the plaintiff failed to state a claim under either the FCRA or the FDCPA. For a copy of the opinion, please click here.

Georgia Supreme Court Holds Corporations May Not Be Directly or Vicariously Liable Under Law Limiting Notary Fees. The Supreme Court of Georgia recently held that a statute limiting fees for providing notarial services applies to notaries public, but does not apply directly or vicariously to corporations employing notaries public. *Anthony v. American General Financial Services, Inc.*, 2010 WL 2553586, No. S10Q0203 (Ga. June 28, 2010). The plaintiffs sought to recover a $350.00 notary fee charged by the defendant lender to refinance a mortgage loan that allegedly exceeded the statutory maximum permitted by OCGA § 45-17-11(b). The court first found that corporations employing notaries public are not directly liable under the statute because the relevant statutory text makes it "clear that consumers were directly protected against 'notary publics,' not anyone else[,]" and also because "a corporation cannot serve as a notary public." The court next found that a corporation may not be held vicariously liable for the acts of a notary public employed by the corporation because a notary acting in his or her official capacity is a public officer, and the private employer has no control over the performance of his or her notarial duties. The court did find, however, that a corporation may be held liable where it "procures or otherwise qualifies as a party to or participant in such a violation by a[] notary." Other holdings by the court were that (i) a private civil cause of action does not arise under OCGA § 45-17-11 against a corporation employing notaries public to recover notarial fees paid in excess of, and without notice of, the statutorily-prescribed maximum notary fee, (ii) recovery under a breach of contract claim for notarial fees paid in excess of, and without notice of, the statutorily-prescribed maximum notary fee when the actual fee charged was clearly specified in the contract as being "reasonable and necessary" is not barred by the voluntary payment doctrine, and (iii) the statutes of limitations on claims of fraud and on claims of money had and received are not tolled when notarial fees are collected in excess of, and without notice of, the statutorily-prescribed maximum notary fee when the actual fee charged was clearly specified in the contract as being "reasonable and necessary." For a copy of the opinion, please see http://www.gasupreme.us/sc-op/pdf/s10q0203.pdf.

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