Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

March 22, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Issues Guidance on Indirect Auto Lending. On March 21, the CFPB issued Bulletin 2013-02, which provides guidance to bank and nonbank indirect auto lenders about compliance with federal fair lending requirements, and specifically addresses the practice by which auto dealers "mark up" the indirect lender's risk-based buy rate and receive compensation based on the increased interest revenues. The CFPB explains that indirect auto lenders are creditors under ECOA and Regulation B if they regularly participate in making credit decisions. Based on information the Bureau has collected to date, it believes the "standard practices" of indirect auto lenders constitute participation in a credit decision. The CFPB contends that by permitting dealer markup and compensating dealers on that basis, lenders may be liable under the legal theories of both disparate treatment and disparate impact when pricing disparities on a prohibited basis exist within their portfolios. As such, the CFPB urges indirect lenders to (i) impose controls on, or otherwise revise, dealer markup and compensation policies, and monitor the effects of those policies and address unexplained pricing disparities on prohibited bases; or (ii) eliminate dealer discretion to mark up buy rates and compensate dealers in some other way. The guidance also identifies what the CFPB considers to be core aspects of a robust fair lending compliance program, including: (i) an up-to-date fair lending policy statement; (ii) regular fair lending training for all employees involved with any aspect of the institution's credit transactions, as well as all officers and board members; (iii) ongoing monitoring for compliance with fair lending and other policies and procedures intended to reduce fair lending risk; (iv) review of lending policies for potential fair lending violations, including potential disparate impact; (v) depending on the size and complexity of the financial institution, regular analysis of loan data in all product areas for potential disparities on a prohibited basis in pricing, underwriting, or other aspects of the credit transaction; (vi) regular assessment of the marketing of loan products; and (vii) meaningful oversight of fair lending compliance by management and, where appropriate, the institution's board.

DOJ Financial Fraud Task Force Director Outlines Priorities. On March 20, Financial Fraud Enforcement Task Force Executive Director Michael Bresnick outlined the DOJ Task Force's priorities, including (i) the "government's ability to protect its interests and ensure that it does business only with ethical and responsible parties;" (ii) discrimination in indirect auto lending; and (iii) financial institutions' role in fraud by their customers. Mr. Bresnick focused most of his remarks on "the role of financial institutions in mass marketing fraud schemes-including deceptive payday loans, false offers of debt relief, fraudulent health care discount cards, and phony government grants, among other things-that cause billions of dollars in consumer losses and financially destroy some of our most vulnerable citizens." He added that the Task Force also is investigating third-party payment processors and explained that "financial institutions and payment processors . . . are the so-called bottlenecks, or choke-points, in the fraud committed by so many merchants that victimize consumers and launder their illegal proceeds." With respect to financial institutions' relationships with the payday lending industry, Mr. Bresnick stated that "the Bank Secrecy Act required banks to have an effective compliance program to prevent illegal use of the banking system by the banks' clients." He explained that financial institutions "should consider whether originating debit transactions on behalf of Internet payday lenders-particularly where the loans may violate state laws-is consistent with their BSA obligations." Although he acknowledged that it was not a simple task for a financial institution to determine whether the loans being processed through it are in violation of the state law where the borrower resides, he suggested "at a minimum, banks might consider determining the states where the payday lender makes loans, as well as what types of loans it offers, the APR of the loans, and whether it makes loans to consumers in violation of state, as well as federal, laws."

FHFA OIG Issues Report on Servicers' Borrower Complaint Handling. On March 21, the FHFA Office of Inspector General (OIG) issued a report on servicers' handling of borrower complaints, following an audit to assess FHFA's oversight of Freddie Mac's controls over servicers' handling of "escalated cases." Under the Servicing Alignment Initiative (SAI), servicers are required to track the escalated cases they receive-specifically defined to include any of five categories of complaints-and resolve those cases within 30 days. In addition, Freddie Mac's Servicing Guide requires servicers to report monthly on the status of the escalated cases, including when the complaints were received and how they were resolved. According to the OIG's report, the audit revealed that (i) most of Freddie Mac's servicers are not complying with the reporting requirements for escalated cases, (ii) Freddie Mac's oversight of servicer compliance has been inadequate, and (iii) the FHFA did not identify the foregoing problems through its own examination of Freddie Mac's implementation of the SAI. In response, the OIG recommended that the FHFA (i) ensure that Freddie Mac require its servicers to report, timely resolve, and accurately categorize escalated cases, (ii) ensure that Freddie Mac enhance its oversight of servicers through testing servicer performance and establishing fines for noncompliance, and (iii) improve its oversight of Freddie Mac by developing and implementing examination guidance related to testing the implementation of directives. Following receipt of the report, House Oversight Committee Ranking Member Cummings (D-MD) called for a hearing on borrower complaint handling by servicers.

NCUA Issues Fair Lending Guide, Plans Fair Lending Webinar. On March 19, the NCUA released a letter to credit unions to introduce its new fair lending guide and announce other fair lending tools. The fair lending guide includes (i) an overview of fair lending law and regulations, (ii) credit union operational requirements, (iii) fair lending compliance policy considerations, and (iv) checklists for testing compliance with laws and regulations, or developing a fair lending policy for compliance. The letter also explains that the NCUA's determinations about which credit unions will be examined for fair lending are based on (i) HMDA outliers, (ii) recent fair lending findings or violations identified in safety and soundness exams, (iii) general risk compliance ratings, and (iv) other factors such as volume, types, and complexity of products and services offered, types of communities served, and customer fair lending complaints. The NCUA also announced its plans to hold a fair lending webinar on April 4, 2013.

Banking Agencies Propose Revised CRA Guidance. On March 18, the Federal Reserve Board, the FDIC, and the OCC proposed revisions to the "Interagency Questions and Answers Regarding Community Reinvestment" (Q&As). Focused primarily on community development, the revised Q&As aim to (i) clarify how the agencies consider community development activities outside an institution's assessment area, both in the broader statewide or regional area and in nationwide funds, (ii) clarify how to determine whether recipients of community services are low- or moderate-income; (iii) explain the consideration of certain community development services, (iv) address the treatment of qualified investments to organizations that use only a portion of the investment to support a community development purpose, and (v) clarify that community development lending should be evaluated in such a way that it may have a positive, neutral, or negative impact on the large institution lending test rating. In remarks to the National Community Reinvestment Coalition on March, 20, 2013, Comptroller Thomas Curry described the proposed changes and stressed that they are the first steps the agencies will take to address issues raised during a 2010 outreach effort to reappraise the CRA and identify gaps between CRA implementation and changes in the structure of the banking industry, and how customers access and use credit and financial products. Mr. Curry also promised training and revised examination procedures to ensure more consistent application of CRA rules. The agencies will accept comments on the revisions for 60 days following publication in the Federal Register.

Senate Banking Committee Approves Nominees for Top CFPB, SEC Spots. On March 19, the Senate Banking Committee approved Mary Jo White to serve as SEC Commissioner/Chair through June 2014, and Richard Cordray to serve a five-year term as CFPB Director. The vote on Ms. White was 20-1. Senator Sherrod Brown (D-OH) was the lone dissenter, citing his general concern with nominees who previously worked for the industry they are intended to regulate. Mr. Cordray was approved on party lines, 12-10. In an opening statement Ranking Member Michael Crapo (R-ID) reiterated Republican opposition to any nominee until structural changes are made to the CFPB.

House, Senate Committees Hold Separate Hearings on Housing Finance Reform. On March 19, the Senate Banking Committee and the House Financial Services Committee each held a hearing to review issues related to housing finance post-federal conservatorship of Fannie Mae and Freddie Mac. The House committee heard from Acting FHFA Director Edward DeMarco, while the Senate committee heard from non-governmental groups with reform proposals. The hearings mark the beginning of a process expected to play out over the course of the coming months to develop consensus on legislation to reform the housing finance sector. Each of the hearings covered numerous topics, but in each the central issue for debate was the appropriate level of government involvement in the mortgage market. On that primary issue, there was broad consensus that the current conservatorship role of the government should end. However, some stakeholders argued the government should play no role in the reformed market, while others believe a limited, protected government backstop would be necessary to support an affordable, stable housing market. Mr. DeMarco did not take positions on the broad policy issues, but repeated his commitment to implementing the FHFA's Strategic Plan while positioning Fannie Mae and Freddie Mac to meet whatever requirements policymakers choose to impose.

Debate over FHFA Leadership Resurfaces. On March 15, the attorneys general (AGs) for nine states sent a letter to President Obama and Senate leaders seeking the appointment of a permanent director for the FHFA to replace Acting Director Edward DeMarco. The AGs complain that under Mr. DeMarco's leadership, "Fannie Mae and Freddie Mac remain an obstacle to progress by refusing to adopt policies that will help maximize relief for homeowners," identifying the FHFA's opposition to allowing the entities to offer principal forgiveness as the primary issue. The AGs follow federal lawmakers who made a similar plea last month. Recently, it was reported that the President is considering Representative Mel Watt (D-NC) for the position. During a Senate hearing this week, Senator Bob Corker (R-TN) defended Mr. DeMarco and responded that any nominee for FHFA director should lack political bias and possess technical expertise to help guide Congress through development and implementation of housing reform.

CFPB Presents Annual FDCPA Report. On March 20, the CFPB presented to Congress its annual report on implementation and enforcement of the FDCPA. The report (i) summarizes the Bureau's Consumer Response function, which does not currently cover debt collection complaints, and the number and types of consumer complaints regarding debt collection received by the FTC in 2012, (ii) describes the CFPB's debt collection supervision program, (iii) presents recent enforcement and advocacy program developments, (iv) discusses recent education and outreach, as well as research and policy initiatives, and (v) discusses coordination and cooperation between the CFPB and the FTC. Because the FTC and the CFPB share FDCPA implementation and enforcement responsibilities, the report incorporates a letter from the FTC regarding its FDCPA-related activities. The CFPB reported that the FTC continues to receive more complaints for the debt collection industry than for any other. The report also highlights (i) the debt collection aspects of a CFPB enforcement action against a credit card company, (ii) the Supreme Court's recent decision upholding court discretion to award costs to prevailing FDCPA defendant creditors, and (iii) FTC enforcement activities.

Freddie Mac Releases Additional Loan-Level Data. On March 21, Freddie Mac released historical loan-level credit performance data on a portion of the fully amortizing 30-year, fixed-rate single-family mortgages it purchased during the past 13 years. The data-set is comprised of 35 loan-level data elements, including credit score, loan purpose, actual unpaid principal balances, and repurchase flag, and covers delinquencies of up to and including 180-days. Specific performance information in the dataset includes voluntary prepayments, repurchases and loan modifications, and loans that were short sales, deeds-in-lieu of foreclosure, third party sales, and REOs. Further, the release includes publication of the (i) name of the seller that delivered each loan at the time Freddie Mac purchased or securitized the loan, and (ii) the name of the servicer as of the earlier loan termination or the active servicer as of June 2012. Freddie Mac plans to update the data each quarter and may in the future include more recent productions, other mortgage product types, and additional data elements.

FinCEN Issues Guidance on Virtual Currencies. On March 18, FinCEN issued guidance to clarify the applicability of Bank Secrecy Act regulations to persons creating, obtaining, distributing, exchanging, accepting, or transmitting virtual currencies. FinCEN clarifies that a person that obtains a virtual currency to purchase goods or service (a "user") does not fit within the regulatory definition of a money transmission service, and therefore is not subject to the relevant regulations. However, a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency (an "exchanger"), and a person engaged as a business in issuing a virtual currency, and who has the authority to redeem such virtual currency (an "administrator"), generally are considered money transmitters under FinCEN's regulations if they (i) accept and transmit a convertible virtual currency or (ii) buy or sell convertible virtual currency for any reason. The guidance reviews FinCEN's specific determinations regarding different activities involving virtual currencies and the appropriate regulatory treatment of administrators and exchangers under each of the scenarios. Specifically, the guidance addresses (i) brokers and dealers of e-currencies and e-precious metals; (ii) centralized convertible virtual currencies; and (iii) de-centralized convertible virtual currencies.

Banking Agencies Update Leveraged Lending Guidance. On March 21, the Federal Reserve Board, the OCC, and the FDIC issued final interagency guidance to ensure institutions provide leverage lending in a safe and sound manner by: (i) identifying the institution's risk appetite for leveraged finance, establishing appropriate credit limits, and ensuring prudent oversight and approval processes; (ii) establishing underwriting standards that clearly define expectations for cash flow capacity, amortization, covenant protection, collateral controls, and the underlying business premise for each transaction, and consider whether the borrower's capital structure is sustainable; (iii) concentrating valuation standards on the importance of sound methods in the determination and periodic revalidation of enterprise value; (iv) accurately measuring exposure on a timely basis, establish policies and procedures that address failed transactions and general market disruptions, and ensure periodic stress tests of exposures to loans not yet distributed to buyers; (v) developing information systems that accurately capture key obligor characteristics and aggregate them across business lines and legal entities on a timely basis, with periodic reporting to the institution's board of directors; (vi) considering in risk rating standards the use of realistic repayment assumptions to determine a borrower's ability to de-lever to a sustainable level within a reasonable period of time; (vii) establishing underwriting and monitoring standards similar to loans underwritten internally; and (viii) performing stress testing on leveraged loans held in portfolio as well as those planned for distribution. The new guidance took effect on March 22, 2013, and institutions have until May 21, 2013 to comply.

OCC Requests Comment on Annual Stress Test Reporting. On March 15, the OCC requested comment on its new regulatory reporting requirement for national banks and federal savings associations, which the OCC adopted in an October 2012 final rule. The notice and request for information describes the proposed scope of the reporting and the proposed reporting requirements for covered institutions with consolidated assets between $10 and $50 billion. The OCC also released copies of the reporting templates and instructions referenced in the notice. Comments on the notice are due by May 10, 2013.

STATE ISSUES

New York Obtains Major Lender-Placed Insurance Settlement. On March 21, the New York Department of Financial Services (DFS) announced that it obtained a settlement from a major lender-placed insurer to resolve an investigation into the company's practices. According to the DFS, the insurer allegedly drove up the price of lender-placed insurance by effectively offering banks a share in its profits by: (i) paying commissions to insurance agents and brokers affiliated with the banks even though the agents and brokers did not perform the customary tasks that would justify a commission, (ii) paying banks' "expenses" related to lender-placed insurance, (iii) paying lump sum amounts, such as one bank's $1 million termination fee for switching its business to another insurer, and (iv) allowing a reinsurance company owned by a bank to take as much as 75 percent of the premium. The DFS cited the insurer's low loss ratio as evidence of how profitable lender-placed insurance has been for the insurer. The settlement agreement requires the insurer pay restitution to borrowers who were lender-placed after January 1, 2008 and meet certain criteria, as well as a $14 million penalty. The insurer also must (i) take specific steps to lower the cost of non-flood lender-placed insurance, (ii) cease numerous delineated practices, (iii) provide improved disclosures and notices to borrowers; (iv) improve its email retention policy; and (v) ensure that the amount of coverage lender-placed on any homeowner does not exceed the last known amount of coverage.

NMLS Proposes Uniformed Authorized Agent Reporting Processing Fee. On March 20, the NMLS proposed a processing fee to support a uniform and automated method for state-licensed money transmitters to report information concerning authorized agents/delegates to NMLS participating state agencies. The proposal notes that as of March 2013, 10 state agencies manage their money transmitter licenses through NMLS and an additional 20 agencies intend to do so by the end of 2014. The NMLS proposes to support that functionality through a fee of no more than fifty cents ($.50) per active agent/delegate location, assessed once per year, based on the number of all active agent/delegate locations as of a certain date. Money transmitter licensees with less than 100 active agent/delegate locations reported through NMLS will not be assessed a fee. The fee, which is distinct from and independent of fees or assessments required by state agencies, would be charged starting in 2014. The NMLS seeks comments on the proposal by April 19, 2013.

Colorado Protects Pending Modifications on Transferred Mortgage Loans. On March 15, Colorado enacted HB 1017, which requires a loan servicer to whom servicing rights for a residential mortgage have been sold or transferred to honor or continue processing any pending loan modification, as long as the borrower's acceptance of the loan modification occurs prior to the sale or transfer of servicing rights. The bill also requires that, at the time of transfer, the prior servicer must disclose any pending loan modifications to the new servicer. The new provisions took effect immediately and apply to all modification offers made on or after March 15, 2013.

Idaho Amends Mortgage Licensing Provisions. On March 13, Idaho enacted HB 10, a bill to amend the licensing provisions of the Idaho Residential Mortgage Practices Act. The bill (i) provides a license exemption for individuals who originate mortgages on behalf of federal, state, or local government housing agencies, (ii) removes language inconsistent with federal interpretation of the SAFE Act relating to an exclusion from the definition of "mortgage loan originator," and (iii) makes it a prohibited practice for a person to violate license-related testing or education procedures. The bill also authorizes the director to subpoena records related to unlicensed activity by any person and also clarifies licensing exemptions for Idaho attorneys and accountants. By state rule, the law is set to take effect on July 1, 2013.

COURTS

Seventh Circuit Adopts "Net Trebling" Damage Calculation in False Claims Act Case. On March 21, the U.S. Court of Appeals for the Seventh Circuit held that damages awarded in a False Claims Act case should have been calculated using a "net trebling" method. *United States v. Anchor Mortgage Corp.*, No. 10-3122, 2013 WL 1150213 (7th Cir. Mar. 21, 2013). The court affirmed a district court holding that a defendant mortgage company violated the False Claims Act when it made false statements in applying for federal mortgage loan guarantees on eleven loans. The court also affirmed the district court's holding that the government should be awarded treble damages, finding that the statutory provision that limits damages to double damages for a person who meets certain self-reporting requirements applies only with regard to the specific false claims on which the person self-reports. In this case, although the company had self-reported information on some false claims, it had not self-reported any information about the false claims on the eleven loans on which the government sought damages. The Seventh Circuit disagreed with the district court's "gross trebling" calculation of damages. Under that method, the district court added together the amounts that the government had paid out on the guarantees on the eleven loans after they defaulted and then trebled that sum, before subtracting any amounts that the government had realized by selling the properties that secured the loans. The Seventh Circuit held that the district court should have employed a "net trebling" method, starting with the amount paid out by the government on a guarantee on a given loan, subtracting from that amount any money the government recovered by selling the property that secured the loan (or if unsold, the fair market value of the property held by the government), and then trebling the difference. In requiring the "net trebling" method, the court noted that most federal appellate decision have adopted that method, and that a Ninth Circuit decision to the contrary was unpersuasive and based on a misreading of the Supreme Court's holding in *United States v. Bornstein*, 423 U.S. 303 (1976).

Freddie Mac Files Suit over Losses Due to Alleged LIBOR Manipulation. On March 14, Freddie Mac sued 15 banks and the British Bankers' Association (BBA), claiming that the institutions manipulated the London Interbank Offered Rate (LIBOR) and caused substantial losses to Freddie Mac on investment activities tied to LIBOR. *Fed. Home Loan Mortg. Corp. v. Bank of Am. Corp.*, No. 13-342 (E.D. Va. filed Mar. 14, 2013). LIBOR is a global benchmark rate used in financial products and transactions, and during the time period covered by the complaint it was set using data from the banks, under the auspices of the BBA. Freddie Mac alleges that the banks deliberately suppressed the rate to hide their financial condition and boost profits, while the BBA participated in the rate fixing to protect revenue generated by selling LIBOR licenses. As a result, Freddie Mac claims it suffered losses on pay-fixed, receive-floating interest rate swap transactions indexed to LIBOR, and mortgage-backed securities in which coupon payments or the underlying collateral were indexed to LIBOR. The mortgage financing enterprise, which currently is in U.S. government conservatorship, alleges that the banks engaged in fraud, breached their contracts with Freddie Mac, and violated antitrust laws. Freddie Mac seeks full damages for all economic, monetary, actual, consequential, and compensatory damages, treble damages under the Sherman Act, and punitive damages. Some of the banks already have settled civil and criminal enforcement actions by U.S. and foreign authorities, and the institutions face other private claims related to the alleged LIBOR conduct.

Supreme Court Declines Review of Second Circuit Decision Reinstating MBS Class Action. On March 18, the U.S. Supreme Court denied a petition seeking review of a Second Circuit decision that reinstated a class action against an underwriter and an issuer of mortgage-backed securities. *Goldman Sachs & Co. v. NECA-IBEW*, No. 12-528, 2013 WL 1091772 (2013). An institutional purchaser of certain MBS filed suit on behalf of a putative class alleging that the offering documents contained material misstatements regarding the mortgage loan originators' underwriting guidelines, the property appraisals of the loans, and the risks associated with the certificates. After the district court dismissed the case, the Second Circuit reinstated and held that the plaintiff had standing to assert the claims of the class, even when the securities were purchased from different trusts, because the named plaintiff raised a "sufficiently similar set of concerns" to allow it to seek to represent proposed class members who purchased securities backed by loans made by common originators. With regard to the plaintiff's ability to plead a cognizable injury, the court reasoned that while it may be difficult to value illiquid assets, "the value of a security is not unascertainable simply because it trades in an illiquid market."

Supreme Court Holds Class Plaintiff Cannot Avoid Removal by Stipulating Damages Under CAFA's Jurisdictional Threshold. On March 19, the Supreme Court held that a class action plaintiff's pre-class certification stipulation that the class would not seek damages exceeding the Class Action Fairness Act's (CAFA) $5 million amount-in-controversy requirement could not be binding on the class, and therefore, the stipulation would not affect federal jurisdiction under CAFA. *Standard Fire Ins. Co. v. Knowles*, No. 11-1450, 2013 WL 1104735 (2013). The district court determined that the value of the putative class members' claims would have exceeded $5 million, but for the named plaintiff's stipulation limiting damages to less than that amount, and based on that stipulation, remanded the case to state court. On appeal, the Supreme Court explained that while a plaintiff may disclaim his or her own damages, such damages stipulations or any pre-certification stipulation "cannot legally bind members of the proposed class before the class is certified." The Court thus held that because the class representative "lacked the authority to concede the amount-in-controversy issue for the absent class members," the district court wrongly concluded that the "precertification stipulation could overcome its finding that the CAFA jurisdictional threshold had been met." The Court vacated the District Court's order remanding the case to state court, and remanded the class action for further proceedings in the federal district court.

Justices Question Agency Deference Doctrine. On March 20, an environmental case before the Supreme Court spurred two opinions from three Justices that question the continuing vitality of the agency deference doctrine known as *Auer* deference. *Decker v. Nw. Envtl. Defense Ctr.*, No. 11-338, slip op. (S. Ct. Mar. 20, 2013). *Auer* deference provides that a court should ordinarily defer to an agency's view of its own regulation, so long as the agency's view is not "plainly erroneous" or "inconsistent" with that regulation. But in a partial dissent, Justice Scalia criticized the basis for the doctrine and attacked each of the three reasons why the doctrine is invoked. Justice Scalia was not alone. Two other justices-including Chief Justice Roberts-said that they also felt it was appropriate to reconsider *Auer* when the proper case presented itself. Reconsidering *Auer* could in turn effect a significant change in how many federal administrative cases-including cases involving banking and financial regulators-are handled.

Federal Court Approves Lender Settlement of TILA, UDAP Claims Based on HELOC Reductions. On March 15, the U.S. District Court for the Northern District of California approved a lender's settlement with a class of borrowers who claimed that the bank suspended or reduced borrower home equity lines of credit (HELOCs) in violation of the Truth in Lending Act and California's Unfair Competition Law. *In Re Citibank HELOC Reduction Litig.*, No. 09-350 (N.D. Cal. Aug. 31, 2012). The borrowers claimed that the bank improperly utilized computerized automated valuation models (AVMs) as the basis for suspending or decreasing customer HELOCs because of the decline in the value of the underlying property. The complaint also charged that customers were injured because (i) the annual fee to maintain the HELOC was not adjusted to account for the decreased limit, and (ii) the borrowers' credit ratings were damaged as a result of the reduced credit limit. The named plaintiff also alleged injury because he was forced to obtain a replacement home equity line, which resulted in payment of an early termination fee on the old HELOC and additional costs related to the new HELOC. Under the agreement, class members will have a right to request reinstatement of their HELOC accounts, the bank will expand the information contained in credit-line reduction notices based on collateral deterioration, and customers who incurred an early closure release fee when closing the account subsequent to the suspension or reduction may make a claim for the cash payment of $120. The court reduced the incentive payments owed to the six named plaintiffs by $1,000 each, but approved the proposed $1.2 million in attorneys' fees.

MISCELLANY

EU Parliament Approves Online Transaction Dispute Resolution Platform. On March 12, the European Commission announced that the European Parliament voted to support new legislation governing the out-of-court resolution of contractual disputes resulting from online transactions for the sale of goods or services, referred to as Online Dispute Resolution (ODR). The ODR legislation establishes a single EU-wide platform to handle disputes between traders and consumers arising from cross-border online transactions. The platform, which would not be applicable to offline transactions, will: (1) allow consumers and traders to electronically submit complaints related to online transactions along with related documents to an alternative dispute resolution entity; (2) allow alternative dispute resolution entities to receive and transmit information electronically; and (3) allow the parties to conduct and resolve the dispute resolution process via the platform. The platform is intended to be operational by 2015.

Report Blames Servicers for California Foreclosure Problems. Recently, a collection of community advocacy organizations released a report that attacks mortgage servicers for their handling of foreclosures in California. The report argues that foreclosures decrease the value of the foreclosed home, result in residual property value losses in the surrounding neighborhood, and rob governments of tax revenue as a result of the property depreciation. The report also reviews foreclosures in seven California jurisdictions and claims that foreclosure practices disproportionately impact minority neighborhoods. The groups advocate for servicers to halt foreclosures until they (i) commit to a broad principal reduction program and (ii) report data on principal reduction, short sales, and foreclosures by race, income, and zip code.

FIRM NEWS

Complimentary Webinar - Whistleblowers 101: DOJ, SEC, and CFPB Enforcement Trends. Please join BuckleySandler LLP attorneys Andrew Schilling, Thomas Sporkin, and Michelle Rogers on April 11, 2013 at 2:00-3:00 PM ET, for a complimentary webinar that will provide an overview of whistleblower and recovery programs under the FCA, FIRREA, Dodd-Frank, SOX, and by the CFPB; a discussion of recent enforcement trends; and tips for preventing or mitigating whistleblower risk. For registration and other information, please click here.

Andrew Sandler will participate in an American Association of Bank Directors webinar titled "Legal Actions by the FDIC to Recover Losses of Failed Banks: The Potential Liability of Officers and Directors" on April 2, 2013, 2:00-3:15 PM ET. The complimentary webinar will the review FDIC's professional liability program, including the FDIC's program to investigate potential claims against certain directors and officers of failed banks and savings institutions, strategies to avoid or defend such suits, and strategies for ensuring that your bank's board and officers comply with their duties and mitigate the potential for personal liability from FDIC suits.

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

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

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

Andrea Mitchell and Lori Sommerfield will present a session titled "Fair & Responsible Lending in the Regulatory Crosshairs" at the 2013 Minnesota Banking Law Institute, on April 5, 2013 in Minneapolis, MN.

David Baris will speak on lessons to be learned from FDIC suits against bank directors on April 11, 2013 at the NACD/AABD Bank Directors Conference in Ft. Lauderdale.

David Whitaker will speak at Silanis' Regional E-Banking Forums for Banking Executives in Chicago, IL on April 17, 2013 and San Francisco, CA on April 18, 2013. David will discuss recent judicial and regulatory developments affecting electronic financial services.

David Baris will speak at the American Bankers Association Risk Management Forum on April 26, 2013 at the Baltimore Marriott Waterfront Hotel in Baltimore, MD. His session is entitled "Developing Effective Board Risk Management Committees".

Jonice Gray Tucker will speak to the Financial Services Roundtable on May 1, 2013 on the topic of Managing Fair Lending and on May 2, 2013 on the topic of Litigation Trends.

James Parkinson will speak in New York, NY on May 14-15, 2013 at the ACI conference on "FCPA and Anti-Corruption for the Life Sciences Industry."

Andrea Mitchell will speak at an American Bankers Association Fair Lending Workshop on June 8, 2013 in Chicago, IL, offered in connection with the ABA Regulatory Compliance Conference. The Fair Lending Workshop will review current fair lending hot topics and how institutions can manage or mitigate fair lending obstacles and demonstrate compliance with fair lending laws and regulations.

FIRM PUBLICATIONS

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

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

Jonice Gray Tucker and Kendra Kinnaird wrote "Mortgage Crisis Triggers Stronger Focus on Vendors," published by the National Notary Association on March 8, 2013.

Andrew Schilling, Ross Morrison, and Michelle Rogers published "Finally, 8 Factors Governing FIRREA Civil Penalty Awards," in Law360 on March 12, 2013.

About BuckleySandler LLP (www.buckleysandler.com)

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

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MORTGAGES

FHFA OIG Issues Report on Servicers' Borrower Complaint Handling. On March 21, the FHFA Office of Inspector General (OIG) issued a report on servicers' handling of borrower complaints, following an audit to assess FHFA's oversight of Freddie Mac's controls over servicers' handling of "escalated cases." Under the Servicing Alignment Initiative (SAI), servicers are required to track the escalated cases they receive-specifically defined to include any of five categories of complaints-and resolve those cases within 30 days. In addition, Freddie Mac's Servicing Guide requires servicers to report monthly on the status of the escalated cases, including when the complaints were received and how they were resolved. According to the OIG's report, the audit revealed that (i) most of Freddie Mac's servicers are not complying with the reporting requirements for escalated cases, (ii) Freddie Mac's oversight of servicer compliance has been inadequate, and (iii) the FHFA did not identify the foregoing problems through its own examination of Freddie Mac's implementation of the SAI. In response, the OIG recommended that the FHFA (i) ensure that Freddie Mac require its servicers to report, timely resolve, and accurately categorize escalated cases, (ii) ensure that Freddie Mac enhance its oversight of servicers through testing servicer performance and establishing fines for noncompliance, and (iii) improve its oversight of Freddie Mac by developing and implementing examination guidance related to testing the implementation of directives. Following receipt of the report, House Oversight Committee Ranking Member Cummings (D-MD) called for a hearing on borrower complaint handling by servicers.

Seventh Circuit Adopts "Net Trebling" Damage Calculation in False Claims Act Case. On March 21, the U.S. Court of Appeals for the Seventh Circuit held that damages awarded in a False Claims Act case should have been calculated using a "net trebling" method. *United States v. Anchor Mortgage Corp.*, No. 10-3122, 2013 WL 1150213 (7th Cir. Mar. 21, 2013). The court affirmed a district court holding that a defendant mortgage company violated the False Claims Act when it made false statements in applying for federal mortgage loan guarantees on eleven loans. The court also affirmed the district court's holding that the government should be awarded treble damages, finding that the statutory provision that limits damages to double damages for a person who meets certain self-reporting requirements applies only with regard to the specific false claims on which the person self-reports. In this case, although the company had self-reported information on some false claims, it had not self-reported any information about the false claims on the eleven loans on which the government sought damages. The Seventh Circuit disagreed with the district court's "gross trebling" calculation of damages. Under that method, the district court added together the amounts that the government had paid out on the guarantees on the eleven loans after they defaulted and then trebled that sum, before subtracting any amounts that the government had realized by selling the properties that secured the loans. The Seventh Circuit held that the district court should have employed a "net trebling" method, starting with the amount paid out by the government on a guarantee on a given loan, subtracting from that amount any money the government recovered by selling the property that secured the loan (or if unsold, the fair market value of the property held by the government), and then trebling the difference. In requiring the "net trebling" method, the court noted that most federal appellate decision have adopted that method, and that a Ninth Circuit decision to the contrary was unpersuasive and based on a misreading of the Supreme Court's holding in *United States v. Bornstein*, 423 U.S. 303 (1976).

NCUA Issues Fair Lending Guide, Plans Fair Lending Webinar. On March 19, the NCUA released a letter to credit unions to introduce its new fair lending guide and announce other fair lending tools. The fair lending guide includes (i) an overview of fair lending law and regulations, (ii) credit union operational requirements, (iii) fair lending compliance policy considerations, and (iv) checklists for testing compliance with laws and regulations, or developing a fair lending policy for compliance. The letter also explains that the NCUA's determinations about which credit unions will be examined for fair lending are based on (i) HMDA outliers, (ii) recent fair lending findings or violations identified in safety and soundness exams, (iii) general risk compliance ratings, and (iv) other factors such as volume, types, and complexity of products and services offered, types of communities served, and customer fair lending complaints. The NCUA also announced its plans to hold a fair lending webinar on April 4, 2013.

House, Senate Committees Hold Separate Hearings on Housing Finance Reform. On March 19, the Senate Banking Committee and the House Financial Services Committee each held a hearing to review issues related to housing finance post-federal conservatorship of Fannie Mae and Freddie Mac. The House committee heard from Acting FHFA Director Edward DeMarco, while the Senate committee heard from non-governmental groups with reform proposals. The hearings mark the beginning of a process expected to play out over the course of the coming months to develop consensus on legislation to reform the housing finance sector. Each of the hearings covered numerous topics, but in each the central issue for debate was the appropriate level of government involvement in the mortgage market. On that primary issue, there was broad consensus that the current conservatorship role of the government should end. However, some stakeholders argued the government should play no role in the reformed market, while others believe a limited, protected government backstop would be necessary to support an affordable, stable housing market. Mr. DeMarco did not take positions on the broad policy issues, but repeated his commitment to implementing the FHFA's Strategic Plan while positioning Fannie Mae and Freddie Mac to meet whatever requirements policymakers choose to impose.

Debate over FHFA Leadership Resurfaces. On March 15, the attorneys general (AGs) for nine states sent a letter to President Obama and Senate leaders seeking the appointment of a permanent director for the FHFA to replace Acting Director Edward DeMarco. The AGs complain that under Mr. DeMarco's leadership, "Fannie Mae and Freddie Mac remain an obstacle to progress by refusing to adopt policies that will help maximize relief for homeowners," identifying the FHFA's opposition to allowing the entities to offer principal forgiveness as the primary issue. The AGs follow federal lawmakers who made a similar plea last month. Recently, it was reported that the President is considering Representative Mel Watt (D-NC) for the position. During a Senate hearing this week, Senator Bob Corker (R-TN) defended Mr. DeMarco and responded that any nominee for FHFA director should lack political bias and possess technical expertise to help guide Congress through development and implementation of housing reform.

Freddie Mac Releases Additional Loan-Level Data. On March 21, Freddie Mac released historical loan-level credit performance data on a portion of the fully amortizing 30-year, fixed-rate single-family mortgages it purchased during the past 13 years. The data-set is comprised of 35 loan-level data elements, including credit score, loan purpose, actual unpaid principal balances, and repurchase flag, and covers delinquencies of up to and including 180-days. Specific performance information in the dataset includes voluntary prepayments, repurchases and loan modifications, and loans that were short sales, deeds-in-lieu of foreclosure, third party sales, and REOs. Further, the release includes publication of the (i) name of the seller that delivered each loan at the time Freddie Mac purchased or securitized the loan, and (ii) the name of the servicer as of the earlier loan termination or the active servicer as of June 2012. Freddie Mac plans to update the data each quarter and may in the future include more recent productions, other mortgage product types, and additional data elements.

Federal Court Approves Lender Settlement of TILA, UDAP Claims Based on HELOC Reductions. On March 15, the U.S. District Court for the Northern District of California approved a lender's settlement with a class of borrowers who claimed that the bank suspended or reduced borrower home equity lines of credit (HELOCs) in violation of the Truth in Lending Act and California's Unfair Competition Law. *In Re Citibank HELOC Reduction Litig.*, No. 09-350 (N.D. Cal. Aug. 31, 2012). The borrowers claimed that the bank improperly utilized computerized automated valuation models (AVMs) as the basis for suspending or decreasing customer HELOCs because of the decline in the value of the underlying property. The complaint also charged that customers were injured because (i) the annual fee to maintain the HELOC was not adjusted to account for the decreased limit, and (ii) the borrowers' credit ratings were damaged as a result of the reduced credit limit. The named plaintiff also alleged injury because he was forced to obtain a replacement home equity line, which resulted in payment of an early termination fee on the old HELOC and additional costs related to the new HELOC. Under the agreement, class members will have a right to request reinstatement of their HELOC accounts, the bank will expand the information contained in credit-line reduction notices based on collateral deterioration, and customers who incurred an early closure release fee when closing the account subsequent to the suspension or reduction may make a claim for the cash payment of $120. The court reduced the incentive payments owed to the six named plaintiffs by $1,000 each, but approved the proposed $1.2 million in attorneys' fees.

New York Obtains Major Lender-Placed Insurance Settlement. On March 21, the New York Department of Financial Services (DFS) announced that it obtained a settlement from a major lender-placed insurer to resolve an investigation into the company's practices. According to the DFS, the insurer allegedly drove up the price of lender-placed insurance by effectively offering banks a share in its profits by: (i) paying commissions to insurance agents and brokers affiliated with the banks even though the agents and brokers did not perform the customary tasks that would justify a commission, (ii) paying banks' "expenses" related to lender-placed insurance, (iii) paying lump sum amounts, such as one bank's $1 million termination fee for switching its business to another insurer, and (iv) allowing a reinsurance company owned by a bank to take as much as 75 percent of the premium. The DFS cited the insurer's low loss ratio as evidence of how profitable lender-placed insurance has been for the insurer. The settlement agreement requires the insurer pay restitution to borrowers who were lender-placed after January 1, 2008 and meet certain criteria, as well as a $14 million penalty. The insurer also must (i) take specific steps to lower the cost of non-flood lender-placed insurance, (ii) cease numerous delineated practices, (iii) provide improved disclosures and notices to borrowers; (iv) improve its email retention policy; and (v) ensure that the amount of coverage lender-placed on any homeowner does not exceed the last known amount of coverage.

Colorado Protects Pending Modifications on Transferred Mortgage Loans. On March 15, Colorado enacted HB 1017, which requires a loan servicer to whom servicing rights for a residential mortgage have been sold or transferred to honor or continue processing any pending loan modification, as long as the borrower's acceptance of the loan modification occurs prior to the sale or transfer of servicing rights. The bill also requires that, at the time of transfer, the prior servicer must disclose any pending loan modifications to the new servicer. The new provisions took effect immediately and apply to all modification offers made on or after March 15, 2013.

Idaho Amends Mortgage Licensing Provisions. On March 13, Idaho enacted HB 10, a bill to amend the licensing provisions of the Idaho Residential Mortgage Practices Act. The bill (i) provides a license exemption for individuals who originate mortgages on behalf of federal, state, or local government housing agencies, (ii) removes language inconsistent with federal interpretation of the SAFE Act relating to an exclusion from the definition of "mortgage loan originator," and (iii) makes it a prohibited practice for a person to violate license-related testing or education procedures. The bill also authorizes the director to subpoena records related to unlicensed activity by any person and also clarifies licensing exemptions for Idaho attorneys and accountants. By state rule, the law is set to take effect on July 1, 2013.

Report Blames Servicers for California Foreclosure Problems. Recently, a collection of community advocacy organizations released a report that attacks mortgage servicers for their handling of foreclosures in California. The report argues that foreclosures decrease the value of the foreclosed home, result in residual property value losses in the surrounding neighborhood, and rob governments of tax revenue as a result of the property depreciation. The report also reviews foreclosures in seven California jurisdictions and claims that foreclosure practices disproportionately impact minority neighborhoods. The groups advocate for servicers to halt foreclosures until they (i) commit to a broad principal reduction program and (ii) report data on principal reduction, short sales, and foreclosures by race, income, and zip code.

BANKING

DOJ Financial Fraud Task Force Director Outlines Priorities. On March 20, Financial Fraud Enforcement Task Force Executive Director Michael Bresnick outlined the DOJ Task Force's priorities, including (i) the "government's ability to protect its interests and ensure that it does business only with ethical and responsible parties;" (ii) discrimination in indirect auto lending; and (iii) financial institutions' role in fraud by their customers. Mr. Bresnick focused most of his remarks on "the role of financial institutions in mass marketing fraud schemes-including deceptive payday loans, false offers of debt relief, fraudulent health care discount cards, and phony government grants, among other things-that cause billions of dollars in consumer losses and financially destroy some of our most vulnerable citizens." He added that the Task Force also is investigating third-party payment processors and explained that "financial institutions and payment processors . . . are the so-called bottlenecks, or choke-points, in the fraud committed by so many merchants that victimize consumers and launder their illegal proceeds." With respect to financial institutions' relationships with the payday lending industry, Mr. Bresnick stated that "the Bank Secrecy Act required banks to have an effective compliance program to prevent illegal use of the banking system by the banks' clients." He explained that financial institutions "should consider whether originating debit transactions on behalf of Internet payday lenders-particularly where the loans may violate state laws-is consistent with their BSA obligations." Although he acknowledged that it was not a simple task for a financial institution to determine whether the loans being processed through it are in violation of the state law where the borrower resides, he suggested "at a minimum, banks might consider determining the states where the payday lender makes loans, as well as what types of loans it offers, the APR of the loans, and whether it makes loans to consumers in violation of state, as well as federal, laws."

Freddie Mac Files Suit over Losses Due to Alleged LIBOR Manipulation. On March 14, Freddie Mac sued 15 banks and the British Bankers' Association (BBA), claiming that the institutions manipulated the London Interbank Offered Rate (LIBOR) and caused substantial losses to Freddie Mac on investment activities tied to LIBOR. *Fed. Home Loan Mortg. Corp. v. Bank of Am. Corp.*, No. 13-342 (E.D. Va. filed Mar. 14, 2013). LIBOR is a global benchmark rate used in financial products and transactions, and during the time period covered by the complaint it was set using data from the banks, under the auspices of the BBA. Freddie Mac alleges that the banks deliberately suppressed the rate to hide their financial condition and boost profits, while the BBA participated in the rate fixing to protect revenue generated by selling LIBOR licenses. As a result, Freddie Mac claims it suffered losses on pay-fixed, receive-floating interest rate swap transactions indexed to LIBOR, and mortgage-backed securities in which coupon payments or the underlying collateral were indexed to LIBOR. The mortgage financing enterprise, which currently is in U.S. government conservatorship, alleges that the banks engaged in fraud, breached their contracts with Freddie Mac, and violated antitrust laws. Freddie Mac seeks full damages for all economic, monetary, actual, consequential, and compensatory damages, treble damages under the Sherman Act, and punitive damages. Some of the banks already have settled civil and criminal enforcement actions by U.S. and foreign authorities, and the institutions face other private claims related to the alleged LIBOR conduct.

NCUA Issues Fair Lending Guide, Plans Fair Lending Webinar. On March 19, the NCUA released a letter to credit unions to introduce its new fair lending guide and announce other fair lending tools. The fair lending guide includes (i) an overview of fair lending law and regulations, (ii) credit union operational requirements, (iii) fair lending compliance policy considerations, and (iv) checklists for testing compliance with laws and regulations, or developing a fair lending policy for compliance. The letter also explains that the NCUA's determinations about which credit unions will be examined for fair lending are based on (i) HMDA outliers, (ii) recent fair lending findings or violations identified in safety and soundness exams, (iii) general risk compliance ratings, and (iv) other factors such as volume, types, and complexity of products and services offered, types of communities served, and customer fair lending complaints. The NCUA also announced its plans to hold a fair lending webinar on April 4, 2013.

Banking Agencies Propose Revised CRA Guidance. On March 18, the Federal Reserve Board, the FDIC, and the OCC proposed revisions to the "Interagency Questions and Answers Regarding Community Reinvestment" (Q&As). Focused primarily on community development, the revised Q&As aim to (i) clarify how the agencies consider community development activities outside an institution's assessment area, both in the broader statewide or regional area and in nationwide funds, (ii) clarify how to determine whether recipients of community services are low- or moderate-income; (iii) explain the consideration of certain community development services, (iv) address the treatment of qualified investments to organizations that use only a portion of the investment to support a community development purpose, and (v) clarify that community development lending should be evaluated in such a way that it may have a positive, neutral, or negative impact on the large institution lending test rating. In remarks to the National Community Reinvestment Coalition on March, 20, 2013, Comptroller Thomas Curry described the proposed changes and stressed that they are the first steps the agencies will take to address issues raised during a 2010 outreach effort to reappraise the CRA and identify gaps between CRA implementation and changes in the structure of the banking industry, and how customers access and use credit and financial products. Mr. Curry also promised training and revised examination procedures to ensure more consistent application of CRA rules. The agencies will accept comments on the revisions for 60 days following publication in the Federal Register.

Banking Agencies Update Leveraged Lending Guidance. On March 21, the Federal Reserve Board, the OCC, and the FDIC issued final interagency guidance to ensure institutions provide leverage lending in a safe and sound manner by: (i) identifying the institution's risk appetite for leveraged finance, establishing appropriate credit limits, and ensuring prudent oversight and approval processes; (ii) establishing underwriting standards that clearly define expectations for cash flow capacity, amortization, covenant protection, collateral controls, and the underlying business premise for each transaction, and consider whether the borrower's capital structure is sustainable; (iii) concentrating valuation standards on the importance of sound methods in the determination and periodic revalidation of enterprise value; (iv) accurately measuring exposure on a timely basis, establish policies and procedures that address failed transactions and general market disruptions, and ensure periodic stress tests of exposures to loans not yet distributed to buyers; (v) developing information systems that accurately capture key obligor characteristics and aggregate them across business lines and legal entities on a timely basis, with periodic reporting to the institution's board of directors; (vi) considering in risk rating standards the use of realistic repayment assumptions to determine a borrower's ability to de-lever to a sustainable level within a reasonable period of time; (vii) establishing underwriting and monitoring standards similar to loans underwritten internally; and (viii) performing stress testing on leveraged loans held in portfolio as well as those planned for distribution. The new guidance took effect on March 22, 2013, and institutions have until May 21, 2013 to comply.

OCC Requests Comment on Annual Stress Test Reporting. On March 15, the OCC requested comment on its new regulatory reporting requirement for national banks and federal savings associations, which the OCC adopted in an October 2012 final rule. The notice and request for information describes the proposed scope of the reporting and the proposed reporting requirements for covered institutions with consolidated assets between $10 and $50 billion. The OCC also released copies of the reporting templates and instructions referenced in the notice. Comments on the notice are due by May 10, 2013.

CONSUMER FINANCE

CFPB Issues Guidance on Indirect Auto Lending. On March 21, the CFPB issued Bulletin 2013-02, which provides guidance to bank and nonbank indirect auto lenders about compliance with federal fair lending requirements, and specifically addresses the practice by which auto dealers "mark up" the indirect lender's risk-based buy rate and receive compensation based on the increased interest revenues. The CFPB explains that indirect auto lenders are creditors under ECOA and Regulation B if they regularly participate in making credit decisions. Based on information the Bureau has collected to date, it believes the "standard practices" of indirect auto lenders constitute participation in a credit decision. The CFPB contends that by permitting dealer markup and compensating dealers on that basis, lenders may be liable under the legal theories of both disparate treatment and disparate impact when pricing disparities on a prohibited basis exist within their portfolios. As such, the CFPB urges indirect lenders to (i) impose controls on, or otherwise revise, dealer markup and compensation policies, and monitor the effects of those policies and address unexplained pricing disparities on prohibited bases; or (ii) eliminate dealer discretion to mark up buy rates and compensate dealers in some other way. The guidance also identifies what the CFPB considers to be core aspects of a robust fair lending compliance program, including: (i) an up-to-date fair lending policy statement; (ii) regular fair lending training for all employees involved with any aspect of the institution's credit transactions, as well as all officers and board members; (iii) ongoing monitoring for compliance with fair lending and other policies and procedures intended to reduce fair lending risk; (iv) review of lending policies for potential fair lending violations, including potential disparate impact; (v) depending on the size and complexity of the financial institution, regular analysis of loan data in all product areas for potential disparities on a prohibited basis in pricing, underwriting, or other aspects of the credit transaction; (vi) regular assessment of the marketing of loan products; and (vii) meaningful oversight of fair lending compliance by management and, where appropriate, the institution's board.

Senate Banking Committee Approves Nominees for Top CFPB, SEC Spots. On March 19, the Senate Banking Committee approved Mary Jo White to serve as SEC Commissioner/Chair through June 2014, and Richard Cordray to serve a five-year term as CFPB Director. The vote on Ms. White was 20-1. Senator Sherrod Brown (D-OH) was the lone dissenter, citing his general concern with nominees who previously worked for the industry they are intended to regulate. Mr. Cordray was approved on party lines, 12-10. In an opening statement Ranking Member Michael Crapo (R-ID) reiterated Republican opposition to any nominee until structural changes are made to the CFPB.

CFPB Presents Annual FDCPA Report. On March 20, the CFPB presented to Congress its annual report on implementation and enforcement of the FDCPA. The report (i) summarizes the Bureau's Consumer Response function, which does not currently cover debt collection complaints, and the number and types of consumer complaints regarding debt collection received by the FTC in 2012, (ii) describes the CFPB's debt collection supervision program, (iii) presents recent enforcement and advocacy program developments, (iv) discusses recent education and outreach, as well as research and policy initiatives, and (v) discusses coordination and cooperation between the CFPB and the FTC. Because the FTC and the CFPB share FDCPA implementation and enforcement responsibilities, the report incorporates a letter from the FTC regarding its FDCPA-related activities. The CFPB reported that the FTC continues to receive more complaints for the debt collection industry than for any other. The report also highlights (i) the debt collection aspects of a CFPB enforcement action against a credit card company, (ii) the Supreme Court's recent decision upholding court discretion to award costs to prevailing FDCPA defendant creditors, and (iii) FTC enforcement activities.

Supreme Court Holds Class Plaintiff Cannot Avoid Removal by Stipulating Damages Under CAFA's Jurisdictional Threshold. On March 19, the Supreme Court held that a class action plaintiff's pre-class certification stipulation that the class would not seek damages exceeding the Class Action Fairness Act's (CAFA) $5 million amount-in-controversy requirement could not be binding on the class, and therefore, the stipulation would not affect federal jurisdiction under CAFA. *Standard Fire Ins. Co. v. Knowles*, No. 11-1450, 2013 WL 1104735 (2013). The district court determined that the value of the putative class members' claims would have exceeded $5 million, but for the named plaintiff's stipulation limiting damages to less than that amount, and based on that stipulation, remanded the case to state court. On appeal, the Supreme Court explained that while a plaintiff may disclaim his or her own damages, such damages stipulations or any pre-certification stipulation "cannot legally bind members of the proposed class before the class is certified." The Court thus held that because the class representative "lacked the authority to concede the amount-in-controversy issue for the absent class members," the district court wrongly concluded that the "precertification stipulation could overcome its finding that the CAFA jurisdictional threshold had been met." The Court vacated the District Court's order remanding the case to state court, and remanded the class action for further proceedings in the federal district court.

Justices Question Agency Deference Doctrine. On March 20, an environmental case before the Supreme Court spurred two opinions from three Justices that question the continuing vitality of the agency deference doctrine known as *Auer* deference. *Decker v. Nw. Envtl. Defense Ctr.*, No. 11-338, slip op. (S. Ct. Mar. 20, 2013). *Auer* deference provides that a court should ordinarily defer to an agency's view of its own regulation, so long as the agency's view is not "plainly erroneous" or "inconsistent" with that regulation. But in a partial dissent, Justice Scalia criticized the basis for the doctrine and attacked each of the three reasons why the doctrine is invoked. Justice Scalia was not alone. Two other justices-including Chief Justice Roberts-said that they also felt it was appropriate to reconsider *Auer* when the proper case presented itself. Reconsidering *Auer* could in turn effect a significant change in how many federal administrative cases-including cases involving banking and financial regulators-are handled.

SECURITIES

Supreme Court Declines Review of Second Circuit Decision Reinstating MBS Class Action. On March 18, the U.S. Supreme Court denied a petition seeking review of a Second Circuit decision that reinstated a class action against an underwriter and an issuer of mortgage-backed securities. *Goldman Sachs & Co. v. NECA-IBEW*, No. 12-528, 2013 WL 1091772 (2013). An institutional purchaser of certain MBS filed suit on behalf of a putative class alleging that the offering documents contained material misstatements regarding the mortgage loan originators' underwriting guidelines, the property appraisals of the loans, and the risks associated with the certificates. After the district court dismissed the case, the Second Circuit reinstated and held that the plaintiff had standing to assert the claims of the class, even when the securities were purchased from different trusts, because the named plaintiff raised a "sufficiently similar set of concerns" to allow it to seek to represent proposed class members who purchased securities backed by loans made by common originators. With regard to the plaintiff's ability to plead a cognizable injury, the court reasoned that while it may be difficult to value illiquid assets, "the value of a security is not unascertainable simply because it trades in an illiquid market."

Senate Banking Committee Approves Nominees for Top CFPB, SEC Spots. On March 19, the Senate Banking Committee approved Mary Jo White to serve as SEC Commissioner/Chair through June 2014, and Richard Cordray to serve a five-year term as CFPB Director. The vote on Ms. White was 20-1. Senator Sherrod Brown (D-OH) was the lone dissenter, citing his general concern with nominees who previously worked for the industry they are intended to regulate. Mr. Cordray was approved on party lines, 12-10. In an opening statement Ranking Member Michael Crapo (R-ID) reiterated Republican opposition to any nominee until structural changes are made to the CFPB.

E-COMMERCE

FinCEN Issues Guidance on Virtual Currencies. On March 18, FinCEN issued guidance to clarify the applicability of Bank Secrecy Act regulations to persons creating, obtaining, distributing, exchanging, accepting, or transmitting virtual currencies. FinCEN clarifies that a person that obtains a virtual currency to purchase goods or service (a "user") does not fit within the regulatory definition of a money transmission service, and therefore is not subject to the relevant regulations. However, a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency (an "exchanger"), and a person engaged as a business in issuing a virtual currency, and who has the authority to redeem such virtual currency (an "administrator"), generally are considered money transmitters under FinCEN's regulations if they (i) accept and transmit a convertible virtual currency or (ii) buy or sell convertible virtual currency for any reason. The guidance reviews FinCEN's specific determinations regarding different activities involving virtual currencies and the appropriate regulatory treatment of administrators and exchangers under each of the scenarios. Specifically, the guidance addresses (i) brokers and dealers of e-currencies and e-precious metals; (ii) centralized convertible virtual currencies; and (iii) de-centralized convertible virtual currencies.

EU Parliament Approves Online Transaction Dispute Resolution Platform. On March 12, the European Commission announced that the European Parliament voted to support new legislation governing the out-of-court resolution of contractual disputes resulting from online transactions for the sale of goods or services, referred to as Online Dispute Resolution (ODR). The ODR legislation establishes a single EU-wide platform to handle disputes between traders and consumers arising from cross-border online transactions. The platform, which would not be applicable to offline transactions, will: (1) allow consumers and traders to electronically submit complaints related to online transactions along with related documents to an alternative dispute resolution entity; (2) allow alternative dispute resolution entities to receive and transmit information electronically; and (3) allow the parties to conduct and resolve the dispute resolution process via the platform. The platform is intended to be operational by 2015.

PAYMENTS

NMLS Proposes Uniformed Authorized Agent Reporting Processing Fee. On March 20, the NMLS proposed a processing fee to support a uniform and automated method for state-licensed money transmitters to report information concerning authorized agents/delegates to NMLS participating state agencies. The proposal notes that as of March 2013, 10 state agencies manage their money transmitter licenses through NMLS and an additional 20 agencies intend to do so by the end of 2014. The NMLS proposes to support that functionality through a fee of no more than fifty cents ($.50) per active agent/delegate location, assessed once per year, based on the number of all active agent/delegate locations as of a certain date. Money transmitter licensees with less than 100 active agent/delegate locations reported through NMLS will not be assessed a fee. The fee, which is distinct from and independent of fees or assessments required by state agencies, would be charged starting in 2014. The NMLS seeks comments on the proposal by April 19, 2013.