Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

February 22, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Director Cordray Outlines CFPB Agenda. On February 20, in remarks during the public portion of the CFPB's Consumer Advisory Board meeting, CFPB Director Richard Cordray identified four "classes of problems" the CFPB will seek to address in the future. Mr. Cordray stated that the CFPB will focus on (i) deceptive and misleading marketing of consumer financial products and services; (ii) financial products that trigger a cycle of debt; (iii) certain markets - such as debt collection, loan servicing, and credit reporting - where consumers are unable to choose their provider; and (iv) discrimination. While the CFPB has already taken a number of enforcement actions to address the first set of problems, Mr. Cordray noted that with respect to the second class of problems the CFPB is still assessing how to deploy its various tools to best protect consumers while preserving access to responsible credit. Mr. Cordray also noted that loan servicing practices remain a concern, and again drew parallels between the mortgage servicing market and the student loan servicing market, noting that the CFPB is looking to take steps that may address the same kinds of problems faced by student loan borrowers. With respect to discrimination, Mr. Cordray argued that African-Americans and Hispanics have unequal access to responsible credit and pay more for mortgages and auto loans, and reiterated the CFPB's commitment to utilizing the disparate impact theory of discrimination when pursuing enforcement actions.

CFPB Seeks Information To Support Potential Student Loan Policies. On February 21, the CFPB Student Loan Ombudsman issued a notice and request for information regarding policy options to "increase the availability of affordable payment plans for borrowers with existing private student loans." The Ombudsman poses 16 questions related to student loan servicing and the broader impact of borrower hardship on other industries, including questions regarding: (i) scope of borrower hardship, (ii) current options for borrowers with hardship, (iii) modification programs for other types of debt, (iv) servicing infrastructure, (v) consumer reporting and credit scoring, (vi) lender participation, (vii) borrower awareness, and (viii) spillover impacts, including impacts on the auto market. The notice, which is based on recommendations contained in the Ombudsman's

October 2012 annual report and an Office of Financial Research report identifying student loan debt as a risk-though not systemic-to the broader economy, clarifies that the CFPB is not seeking feedback on changes to the treatment of private student loans in bankruptcy. Responses to the CFPB request are due April 8, 2013

DOJ Charges Community Bank with Discriminatory Pricing of Unsecured Consumer Loans. On February 19, the DOJ announced a settlement with a $338 million Texas community bank to resolve allegations that the bank engaged in a pattern or practice of pricing discrimination on the basis of national origin. Specifically, the DOJ alleged, based on its own investigation and an examination conducted by the FDIC, the bank violated ECOA by charging Hispanic borrowers higher interest rates on unsecured consumer loans compared to the rates charged to similarly situated white borrowers. The consent order requires the bank to establish a $700,000 fund to compensate borrowers who may have suffered harm as a result of the alleged ECOA violations. It also requires that the bank (i) establish uniform pricing policies, (ii) create a compliance monitoring program, (iii) provide borrower notices of non-discrimination, and (iv) conduct employee training. The new requirements apply not only to unsecured consumer loans, but also to all residential single-family real estate construction financing, automobile financing, home improvement loans, and mortgage loans.

National Mortgage Settlement Monitor Issues Implementation Report. On February 21, Joseph Smith, Jr., the Monitor charged with overseeing the borrower relief and servicing standards aspects of the national mortgage servicing settlement, issued an implementation status report. The report states that the servicers subject to the agreement have provided nearly $46 billion of borrower relief to date and that one of the five servicers has been certified as having satisfied its borrower relief obligations under the settlement. The report notes that, effective January 1, 2013, each of the five servicers' compliance with the servicing standards are being measured against a set of 29 metrics. The report does not provide any initial assessment of servicer compliance, but notes that the Monitor is currently reviewing each servicer's compliance review report and, after completing a consultation process with each servicer and the Monitoring Committee, the Monitor will file a compliance report during the second quarter of 2013. The report also notes an increase in consumer complaints collected by the Monitor to date, but does not conclude whether the increase is due to greater awareness about the settlement or persistent servicing problems.

House Financial Services Ranking Member Seeks Additional Information Regarding Foreclosure Review Settlements. On February 15, House Financial Services Committee Ranking Member Maxine Waters (D-CA) sent an amended set of requests to the Federal Reserve Board and the OCC regarding the recent agreements in principle to end the Independent Foreclosure Review (IFR) established by consent orders issued in April 2011. Ms. Waters asks that, in advance of finalizing the terms of the agreements, the agencies produce by March 1, 2013: (i) policies and procedures about how loan files were to be reviewed by the IFR independent consultants, and any checklists used; (ii) calls or reports from the consultants to the agencies regarding error rates of reviewed files, or errors by analysts conducting the reviews; (iii) guidelines issued by the agencies to any consultant related to interpretation of the remediation framework; (iv) correspondence between the agencies and any consultant with regard to the servicing platform identified as "Loss Mitigation Notes," and inconsistencies between the reported availability of borrower records provided by such a program and records entered into any other part of the servicing platform; and (v) any proposed plan for future reform or modification of servicing platforms or procedures generated or submitted by any consultant to the agencies. This request follows related requests made by Ms. Waters and other Democratic lawmakers seeking details pertaining to the settlement.

House Members Reiterate Small Bank Concerns over Basel III. On February 19, House Financial Services Committee members Shelley Moore Capito (R-WV) and Carolyn Maloney (D-NY)

sent a letter to the Federal Reserve Board, the OCC, and the FDIC regarding the lawmakers' concerns about the implementation of Basel III. Citing potential compliance costs and the potential derivative impact on consumers, Representatives Capito and Maloney ask that the agencies carefully tailor the Basel III capital requirements to ensure they are appropriate for community banks. The House and Senate have in recent months placed significant focus on the Basel III rulemakings, with both houses recently holding hearings on the issue and lawmakers previously sending letters
to the regulators.

Democratic Senators Urge Further Action on Credit Reporting. On February 15, Senate Banking Committee members Mark Warner (D-VA) and Elizabeth Warren (D-MA) sent a letter to the CFPB and the FTC following up on the agencies' recent reports regarding the consumer reporting market. The Senators ask for the agencies' help in "tak[ing] further action to improve consumer credit reporting," and request that they prepare a separate report on whether the current legal framework for the regulation of credit reporting is sufficient or whether additional legislation may be needed.

Freddie Mac Issues Numerous Loss Mitigation Policy Updates. On February 15, Freddie Mac issued Bulletin 2013-3, which provides a series of updates and revisions to its loss mitigation policies. The Bulletin reminds servicers of their obligations with regard to various transfers of property even where the only remaining borrower is a trust, and provides additional details about these obligations. Following Fannie Mae's announcement last week, Freddie Mac similarly revised certain state foreclosure timelines and policies regarding compensatory fee calculations and reimbursement for property inspections. Effective for mortgages that become delinquent as of June 1, 2013, Freddie Mac will no longer provide a list of states in which servicers are required to preserve Freddie Mac's right to pursue a deficiency. Instead, in all instances where additional attorney fees/costs will not be incurred above the approved expense limits, servicers must preserve Freddie Mac's right to pursue a deficiency so that Freddie Mac may decide on a case-by-case basis whether to pursue the deficiency. The Bulletin also notifies servicers that Freddie Mac is eliminating a requirement announced in Bulletin 2012-17 that, for servicers participating in state modification programs, the modification include partial principal forbearance. Finally, the Bulletin also (i) revises Guide Form 710, Uniform Borrower Assistance Form, and medical hardship documentation requirement; (ii) revises requirements related to the verification of alimony, child support and separate maintenance income; (iii) expands the Freddie Mac Service Loans application process to enable servicers to obtain a property value and minimum net proceeds for borrowers being considered for a standard short sales and are less than 31 days delinquent; and (iv) updates the Guide to reflect that the Home Affordable Foreclosure Alternatives initiative is no longer an option in the loss mitigation evaluation hierarchy.

FTC Halts Alleged Illegal Consumer Account Billing Operation. On February 20, the FTC announced that it obtained a preliminary injunction in the U.S. District Court for the District of Nevada against a firm and affiliated entities alleged to have debited consumers' bank accounts and charged their credit cards small amounts, without authorization. Although the FTC does not yet know how the defendants obtained the consumers' financial information, the FTC states that some consumers had recently applied for payday loans via the Internet. The FTC's complaint alleges that the firms attempted to conceal the scheme by (i) creating dozens of shell companies to open merchant accounts with payment processors that enable merchants to get customers' money via electronic banking, (ii) registering more than 230 Internet domain names, often using identity-hiding services and auto-forward features, and (iii) inflating their total number of deposits and lowering their return rates by taking multiple unauthorized debits of a few pennies each, and then immediately refunding them before making a larger debit of about $30. The FTC is seeking, among other things, restitution and a permanent injunction. The FTC was assisted in its investigation by the

Utah Department of Commerce's Division of Consumer Protection and the Arkansas Attorney General Office's Consumer Protection Division.

STATE ISSUES

CSBS and AARMR Comment on CFPB Mortgage Servicing Transfer Bulletin. On February 20, the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) issued a statement commending the CFPB for its recent guidance regarding mortgage servicing transfers. The statement explains that state regulators, who generally have jurisdiction over state member and non-member banks and non-depository institutions, similarly have identified potential for consumer harm when loans are transferred during the loss mitigation process. CSBS and AARMR strongly encourage state-supervised servicers to familiarize themselves with applicable state requirements, the various federal laws, and the CFPB guidance, and stated that they plan to update state uniform servicing examination procedures through appropriate Multistate Mortgage Committee processes to account for the new CFPB Guidance.

COURTS

New York Federal Court Holds SEC's FCPA Enforcement Theory "Far Too Attenuated" for Jurisdiction. On February 19, the U.S. District Court for the Southern District of New York held that the SEC's allegations of personal jurisdiction over a former CEO of Siemens' Argentinian subsidiary - a German citizen with no direct ties to the United States - were "far too attenuated from the resulting harm to establish minimum contacts," and dismissed the case against him for lack of personal jurisdiction. *SEC v. Sharef*, No. 11-Civ-9073, 2013 WL 603135 (S.D.N.Y. Feb. 19, 2013). In the underlying case, the SEC alleged that, between 1996 and 2007, Siemens employees approved and paid millions of dollars of bribes to Argentinian government officials throughout the life of a contract with the Argentine government, during the renegotiation of that contract, and during an arbitration proceeding after the contract was canceled. The SEC alleged that the CEO participated in the renegotiation of the contract and "pressured" the CFO to approve the bribes. Applying the due process requirements of minimum contacts and reasonableness set forth in *International Shoe v. Washington*, 326 U.S. 310 (1945),the court reasoned, "[i]f this Court were to hold that [the CEO's] support for the bribery scheme satisfied the minimum contacts analysis, even though he neither authorized the bribe, nor directed the cover up, much less played any role in the falsified filings, minimum contacts would be boundless." This decision follows another recent decision in the Southern District of New York regarding personal jurisdiction over foreign FCPA defendants. In that case, the court reached the opposite outcome and found that the SEC had alleged personal jurisdiction because the defendants' alleged conduct was "designed to violate" U.S. securities laws and thus was "directed toward the United States." *SEC v. Straub*, No. 11-Civ-9645, 2013 WL 466600 (S.D.N.Y. Feb. 8, 2013). In *Sharef*, the court distinguished *Straub* on the basis that the individuals orchestrated a bribery scheme, "*and* as part of the bribery scheme signed off on misleading management representations to the company's auditors and signed false SEC filings."

First Circuit Holds Massachusetts Borrower Can Challenge the Validity of a Mortgage Assignment, but Holds the Assignment Valid. On February 15, the U.S. Court of Appeals for the First Circuit held a borrower had standing to challenge the assignment of the borrower's mortgage under certain circumstances, even though the borrower was not a party to the assignment of the mortgage. *Oratai Culhane v. Aurora Loan Servs. of Neb.*, 12-1285, 2013 WL 563374 (1st Cir. Feb. 15, 2013). The First Circuit reasoned that because Massachusetts law provides the borrower with the legal right to ensure any attempted foreclosure of her home was conducted lawfully, and because foreclosure is permitted without prior judicial authorization, the borrower had standing to

challenge the assignment of a mortgage to the extent such a challenge was necessary to contest the foreclosing entity's status as the mortgagee. Though MERS was named the legal owner of the mortgage in the original mortgage documents, the plaintiff alleged that MERS had no beneficial interest in the loan and, as such, had no ability to assign the mortgage to the noteholder. The First Circuit affirmed the lower court's ruling, finding the MERS assignment of the mortgage to the defendant was valid because the note and mortgage need not be held by the same entity and MERS had transferred what interest it held - bare legal title. Thus, the court determined, the defendant properly held the mortgage and possessed the authority to foreclose.

Washington Federal Court Holds Standard Business Practices Insufficient to Support Arbitration Claim. On February 15, the U.S. District Court for the Western District of Washington held that a cable company could not force arbitration of a dispute by relying only on its standard business practices to support its claim that the plaintiff agreed to arbitrate. *Permison v. Comcast Holdings Corp.*, No. C12-5714, 2013 WL 594304 (W.D. Wash. Feb. 15, 2013).A cable customer with accounts in Colorado and Washington sued the company alleging TCPA violations. The cable company sought to compel arbitration, claiming that "Welcome Kit" materials executed by the customer included an agreement to arbitrate. In support of its motion to compel arbitration with regard to the Colorado accounts, the cable company submitted an affidavit describing its standard business practice, which requires technicians to provide customers with the Welcome Kit, and obtain customer signatures on certain terms and conditions included in the Kit. The court held that reliance on standard business practices is insufficient. Instead, the court stated, the cable company must produce business records or testimony showing that the customer actually received the arbitration agreement and assented to its terms. The court noted that the cable company presented actual evidence with regard to the Washington account, but held that it is not clear whether that contract, and its arbitration clause, impact the customer's TCPA claims because of imprecise pleading. The court denied the company's motion to compel arbitration and granted the customer leave to clarify his claims. The court's holding follows a recent 10th Circuit decision that affirmed a district court's dismissal of claims based on unrefuted declarations submitted by a TV and internet service provider's employees concerning its standard practices for entering into agreements provided to customers in writing by the installation technician at the time the services were installed.

MISCELLANY

U.K. FSA Fines Banks for Slow Response to Payment Protection Insurance Customer Complaints. On February 19, the U.K.'s Financial Services Authority announced a fine against three related banks for failing to promptly redress customers lodging complaints about the banks' payment protection insurance (PPI) product. The FSA states that over a 10 month period, the bank failed to pay redress within the FSA-required 28-day period for nearly a quarter of the banks' customers who submitted complaints regarding PPI, with some customers waiting over six months for payment. The FSA states that its investigation revealed (i) the banks failed to establish an adequate process for preparing redress payments to send to PPI complainants; (ii) bank staff engaged on the redress process did not have the collective knowledge and experience to ensure that the process worked properly; (iii) the banks failed to effectively track PPI redress payments; (iv) the banks failed to monitor effectively whether they were making all payments of PPI redress promptly and did not gather sufficient management information to identify, in a timely manner, the full nature and extent of the payments failings; and (v) the banks' approach to risk management when preparing redress payments to send to PPI complainants was ineffective. The FSA has been active in addressing PPI issues. Last month, the FSA and the Office of Fair Trading jointly published final guidance to help prevent the problems associated with PPI recurring in a new generation of products. The FSA's guidance for payment protection products within its jurisdiction stresses that firms should ensure that product features reflect the needs of the consumers they are targeting. It

describes the importance of (i) identifying the target market for protection products; (ii) ensuring that the cover offered meets the needs of that target market; and (iii) avoiding the creation of barriers to comparing, exiting or switching cover.

Electronic Transactions Association Releases Resources for Mobile Payment Solutions. On February 19, the Electronic Transactions Association's (ETA) Mobile Payments Committee released three resources to help firms navigate emerging issues in the mobile payments market. The Committee is an industry-wide task force of representatives from credit card networks, processors, mobile network operators, developers, financial institutions, and device manufacturers. The first resource, "Best Practices and Guidelines for Mobile Payment Solutions," addresses security, privacy and competition issues relevant to merchants, consumers, federal and state legislators, federal regulators, merchant acquirers, credit card issuers, and infrastructure providers. In the second, a white paper entitled "Beyond the Hype: Mobile Payments for Merchants," the Committee provides a comprehensive overview of the current state of mobile payments, as well as analysis of the risks and costs for merchants to consider before deploying mobile payments solutions. Finally, the Committee issued a "Mobile Payments Glossary of Terms."

PCI Security Standards Council Offers Guidance for Protecting Payment Card Data. On February 14, the PCI Security Standards Council, the open global forum responsible for setting payment security standards, issued guidelines for merchants on the factors and risks they must address to protect card data when using mobile devices. The guidance addresses the three main risks associated with mobile payment transactions: account data entering the device, account data residing in the device, and account data leaving the device. The guidance also (i) provides recommended measures for merchants regarding the physical and logical security of mobile devices used for payment acceptance, and (ii) recommendations regarding the different components of the payment acceptance solution, including the hardware, software, the use of the payment acceptance solution, and the relationship with the customer. The PCI Security Standards Council also recently released guidance for securing payment card data in cloud environments, and guidance regarding security for payment transactions conducted over the Internet.

FIRM NEWS

Jeffrey Naimon spoke on the American Bankers Association teleseminar entitled "In-depth: Parsing CFPB's New Servicing Rule" on February 19, 2013.

Margo Tank will speak about ESIGN and eRecording at the Property Records Industry Association Winter Symposium, being held in Washington, DC, on February 27, 2013.

Katy Ryan will speak at the 2013 NMLS Annual Conference & Training in San Antonio, TX on February 27-28, 2013. The session, "Advance Change Notifications",will examine NMLS updates in the second quarter of 2013 meant to accommodate changes to a licensee's record resulting from change of control or other branch or company amendments.

James Shreve will speak at the RSA Conference in San Francisco, California on February 28, 2013. The session, "Who Owns the Data in Mobile Payments and Why that Matters," will examine regulatory and contractual issues that may arise from data ownership in mobile payments systems.

James Parkinson will speak on corruption risks associated with doing business in India at a panel produced by the Association of the Bar of the City of New York City on March 1, 2013.

Jonathan Cannon will speak at the Lenders One Winter Conference in Kissimmee, Florida, on

March 4, 2013. His topics are the new qualified mortgage/ability to repay rules, and the new loan originator compensation rules.

Thomas Sporkin and James Shreve will speak at the International Association of Privacy Professionals Global Privacy Summit in Washington, DC on March 7, 2013. The session, "Demystifying SEC Guidance on Cybersecurity Risk," will discuss guidance from the SEC's Division of Corporate Finance on how and when actual or possible cybersecurity incidents and their costs should be included in public filings.

Donna Wilson will be a panelist at the Second Annual Round Table on Current "Hot Topics" and Legal Developments Facing the Retail and Fashion Industries on March 7, 2013 in New York, NY.

Andrew Sandler will participate in the "Fair Lending Forum" at CBA Live 2013, the Consumer Bankers Association's annual conference for retail banking leaders, to be held March 11-13, 2013 in Phoenix, AZ.

John Redding will speak on March 12, 2013 at the Independent Community Bankers of America National Convention in Las Vegas, NV about the impact of the CFPB's new mortgage origination and servicing rules on community banks.

Andrew Schilling will be a panelist for "False Claims Act: Enforcement and Compliance Issues Explored," a Knowledge Congress CLE webcast, on March 13, 2013. This event will present an overview of the False Claims Act and address regulatory updates and enforcement developments, key takeaways from related cases, identifying risks for potential FCA violations, and developing a robust compliance program.

Andrew Sandler will speak at the National Community Reinvestment Coalition Annual Conference, March 20-23, 2013 in Washington, D.C. Mr. Sandler's workshop is entitled "The Future of Fair Lending: Key Lessons from 2012".

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 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

Donna Wilson and Brandon Reilly published "California's Homeowner Bill of Rights" in the January

2013 edition of Mortgage Banking.

Andrew Schilling published "U.S. Using Subpoenas Under 1989 Act as New Tool to Probe Financial Firms," on January 3, 2013 on Reuters' Financial Regulatory Forum.

Margo Tank and David Whitaker authored "Is Regulatory Uncertainty an Impediment to Mobile Payments," which was published on PaymentsJournal.com on January 23, 2013.

Amanda Raines and A.J. Dhaliwal published "Petitions to Modify or Set Aside CFPB Civil Investigative Demands (CIDs): Analysis of Recent Decisions" on January 29, 2013, as part of the LexisNexis 2013 Emerging Issues commentary series.

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.

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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New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400
Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (310) 424-3900
Orange County: 3121 Michelson Drive, Suite 210, Irvine, CA 92612, (949)398-1360

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

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

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examination conducted by the FDIC, the bank violated ECOA by charging Hispanic borrowers higher interest rates on unsecured consumer loans compared to the rates charged to similarly situated white borrowers. The consent order requires the bank to establish a $700,000 fund to compensate borrowers who may have suffered harm as a result of the alleged ECOA violations. It also requires that the bank (i) establish uniform pricing policies, (ii) create a compliance monitoring program, (iii) provide borrower notices of non-discrimination, and (iv) conduct employee training. The new requirements apply not only to unsecured consumer loans, but also to all residential single-family real estate construction financing, automobile financing, home improvement loans, and mortgage loans.

House Members Reiterate Small Bank Concerns over Basel III. On February 19, House Financial Services Committee members Shelley Moore Capito (R-WV) and Carolyn Maloney (D-NY) sent a letter to the Federal Reserve Board, the OCC, and the FDIC regarding the lawmakers' concerns about the implementation of Basel III. Citing potential compliance costs and the potential derivative impact on consumers, Representatives Capito and Maloney ask that the agencies carefully tailor the Basel III capital requirements to ensure they are appropriate for community banks. The House and Senate have in recent months placed significant focus on the Basel III rulemakings, with both houses recently holding hearings on the issue and lawmakers previously sending letters to the regulators.

U.K. FSA Fines Banks for Slow Response to Payment Protection Insurance Customer Complaints. On February 19, the U.K.'s Financial Services Authority announced a fine against three related banks for failing to promptly redress customers lodging complaints about the banks' payment protection insurance (PPI) product. The FSA states that over a 10 month period, the bank failed to pay redress within the FSA-required 28-day period for nearly a quarter of the banks' customers who submitted complaints regarding PPI, with some customers waiting over six months for payment. The FSA states that its investigation revealed (i) the banks failed to establish an adequate process for preparing redress payments to send to PPI complainants; (ii) bank staff engaged on the redress process did not have the collective knowledge and experience to ensure that the process worked properly; (iii) the banks failed to effectively track PPI redress payments; (iv) the banks failed to monitor effectively whether they were making all payments of PPI redress promptly and did not gather sufficient management information to identify, in a timely manner, the full nature and extent of the payments failings; and (v) the banks' approach to risk management when preparing redress payments to send to PPI complainants was ineffective. The FSA has been active in addressing PPI issues. Last month, the FSA and the Office of Fair Trading jointly published final guidance to help prevent the problems associated with PPI recurring in a new generation of products. The FSA's guidance for payment protection products within its jurisdiction stresses that firms should ensure that product features reflect the needs of the consumers they are targeting. It describes the importance of (i) identifying the target market for protection products; (ii) ensuring that the cover offered meets the needs of that target market; and (iii) avoiding the creation of barriers to comparing, exiting or switching cover.

CONSUMER FINANCE

CFPB Director Cordray Outlines CFPB Agenda. On February 20, in remarks during the public portion of the CFPB's Consumer Advisory Board meeting, CFPB Director Richard Cordray identified four "classes of problems" the CFPB will seek to address in the future. Mr. Cordray stated that the CFPB will focus on (i) deceptive and misleading marketing of consumer financial products and services; (ii) financial products that trigger a cycle of debt; (iii) certain markets - such as debt collection, loan servicing, and credit reporting - where consumers are unable to choose their provider; and (iv) discrimination. While the CFPB has already taken a number of enforcement

actions to address the first set of problems, Mr. Cordray noted that with respect to the second class of problems the CFPB is still assessing how to deploy its various tools to best protect consumers while preserving access to responsible credit. Mr. Cordray also noted that loan servicing practices remain a concern, and again drew parallels between the mortgage servicing market and the student loan servicing market, noting that the CFPB is looking to take steps that may address the same kinds of problems faced by student loan borrowers. With respect to discrimination, Mr. Cordray argued that African-Americans and Hispanics have unequal access to responsible credit and pay more for mortgages and auto loans, and reiterated the CFPB's commitment to utilizing the disparate impact theory of discrimination when pursuing enforcement actions.

CFPB Seeks Information To Support Potential Student Loan Policies. On February 21, the CFPB Student Loan Ombudsman issued a notice and request for information regarding policy options to "increase the availability of affordable payment plans for borrowers with existing private student loans." The Ombudsman poses 16 questions related to student loan servicing and the broader impact of borrower hardship on other industries, including questions regarding: (i) scope of borrower hardship, (ii) current options for borrowers with hardship, (iii) modification programs for other types of debt, (iv) servicing infrastructure, (v) consumer reporting and credit scoring, (vi) lender participation, (vii) borrower awareness, and (viii) spillover impacts, including impacts on the auto market. The notice, which is based on recommendations contained in the Ombudsman's October 2012 annual report and an Office of Financial Research report identifying student loan debt as a risk-though not systemic-to the broader economy, clarifies that the CFPB is not seeking feedback on changes to the treatment of private student loans in bankruptcy. Responses to the CFPB request are due April 8, 2013

DOJ Charges Community Bank with Discriminatory Pricing of Unsecured Consumer Loans. On February 19, the DOJ announced a settlement with a $338 million Texas community bank to resolve allegations that the bank engaged in a pattern or practice of pricing discrimination on the basis of national origin. Specifically, the DOJ alleged, based on its own investigation and an examination conducted by the FDIC, the bank violated ECOA by charging Hispanic borrowers higher interest rates on unsecured consumer loans compared to the rates charged to similarly situated white borrowers. The consent order requires the bank to establish a $700,000 fund to compensate borrowers who may have suffered harm as a result of the alleged ECOA violations. It also requires that the bank (i) establish uniform pricing policies, (ii) create a compliance monitoring program, (iii) provide borrower notices of non-discrimination, and (iv) conduct employee training. The new requirements apply not only to unsecured consumer loans, but also to all residential single-family real estate construction financing, automobile financing, home improvement loans, and mortgage loans.

Democratic Senators Urge Further Action on Credit Reporting. On February 15, Senate Banking Committee members Mark Warner (D-VA) and Elizabeth Warren (D-MA) sent a letter to the CFPB and the FTC following up on the agencies' recent reports regarding the consumer reporting market. The Senators ask for the agencies' help in "tak[ing] further action to improve consumer credit reporting," and request that they prepare a separate report on whether the current legal framework for the regulation of credit reporting is sufficient or whether additional legislation may be needed.

U.K. FSA Fines Banks for Slow Response to Payment Protection Insurance Customer Complaints. On February 19, the U.K.'s Financial Services Authority announced a fine against three related banks for failing to promptly redress customers lodging complaints about the banks' payment protection insurance (PPI) product. The FSA states that over a 10 month period, the bank failed to pay redress within the FSA-required 28-day period for nearly a quarter of the banks' customers who submitted complaints regarding PPI, with some customers waiting over six months

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FTC Halts Alleged Illegal Consumer Account Billing Operation. On February 20, the FTC announced that it obtained a preliminary injunction in the U.S. District Court for the District of Nevada against a firm and affiliated entities alleged to have debited consumers' bank accounts and charged their credit cards small amounts, without authorization. Although the FTC does not yet know how the defendants obtained the consumers' financial information, the FTC states that some consumers had recently applied for payday loans via the Internet. The FTC's complaint alleges that the firms attempted to conceal the scheme by (i) creating dozens of shell companies to open merchant accounts with payment processors that enable merchants to get customers' money via electronic banking, (ii) registering more than 230 Internet domain names, often using identity-hiding services and auto-forward features, and (iii) inflating their total number of deposits and lowering their return rates by taking multiple unauthorized debits of a few pennies each, and then immediately refunding them before making a larger debit of about $30. The FTC is seeking, among other things, restitution and a permanent injunction. The FTC was assisted in its investigation by the Utah Department of Commerce's Division of Consumer Protection and the Arkansas Attorney General Office's Consumer Protection Division.

PAYMENTS

Electronic Transactions Association Releases Resources for Mobile Payment Solutions. On February 19, the Electronic Transactions Association's (ETA) Mobile Payments Committee released three resources to help firms navigate emerging issues in the mobile payments market. The Committee is an industry-wide task force of representatives from credit card networks, processors, mobile network operators, developers, financial institutions, and device manufacturers. The first resource, "Best Practices and Guidelines for Mobile Payment Solutions," addresses security, privacy and competition issues relevant to merchants, consumers, federal and state legislators, federal regulators, merchant acquirers, credit card issuers, and infrastructure providers. In the second, a white paper entitled "Beyond the Hype: Mobile Payments for Merchants," the Committee provides a comprehensive overview of the current state of mobile payments, as well as analysis of the risks and costs for merchants to consider before deploying mobile payments solutions. Finally, the Committee issued a "Mobile Payments Glossary of Terms."

PCI Security Standards Council Offers Guidance for Protecting Payment Card Data. On February 14, the PCI Security Standards Council, the open global forum responsible for setting payment security standards, issued guidelines for merchants on the factors and risks they must address to protect card data when using mobile devices. The guidance addresses the three main

risks associated with mobile payment transactions: account data entering the device, account data residing in the device, and account data leaving the device. The guidance also (i) provides recommended measures for merchants regarding the physical and logical security of mobile devices used for payment acceptance, and (ii) recommendations regarding the different components of the payment acceptance solution, including the hardware, software, the use of the payment acceptance solution, and the relationship with the customer. The PCI Security Standards Council also recently released guidance for securing payment card data in cloud environments, and guidance regarding security for payment transactions conducted over the Internet.

SECURITIES

New York Federal Court Holds SEC's FCPA Enforcement Theory "Far Too Attenuated" for Jurisdiction. On February 19, the U.S. District Court for the Southern District of New York held that the SEC's allegations of personal jurisdiction over a former CEO of Siemens' Argentinian subsidiary - a German citizen with no direct ties to the United States - were "far too attenuated from the resulting harm to establish minimum contacts," and dismissed the case against him for lack of personal jurisdiction. *SEC v. Sharef*, No. 11-Civ-9073, 2013 WL 603135 (S.D.N.Y. Feb. 19, 2013).In the underlying case, the SEC alleged that, between 1996 and 2007, Siemens employees approved and paid millions of dollars of bribes to Argentinian government officials throughout the life of a contract with the Argentine government, during the renegotiation of that contract, and during an arbitration proceeding after the contract was canceled. The SEC alleged that the CEO participated in the renegotiation of the contract and "pressured" the CFO to approve the bribes. Applying the due process requirements of minimum contacts and reasonableness set forth in *International Shoe v. Washington*, 326 U.S. 310 (1945),the court reasoned, "[i]f this Court were to hold that [the CEO's] support for the bribery scheme satisfied the minimum contacts analysis, even though he neither authorized the bribe, nor directed the cover up, much less played any role in the falsified filings, minimum contacts would be boundless." This decision follows another recent decision in the Southern District of New York regarding personal jurisdiction over foreign FCPA defendants. In that case, the court reached the opposite outcome and found that the SEC had alleged personal jurisdiction because the defendants' alleged conduct was "designed to violate" U.S. securities laws and thus was "directed toward the United States." *SEC v. Straub*, No. 11-Civ-9645, 2013 WL 466600 (S.D.N.Y. Feb. 8, 2013). In *Sharef*, the court distinguished *Straub* on the basis that the individuals orchestrated a bribery scheme, "*and* as part of the bribery scheme signed off on misleading management representations to the company's auditors and signed false SEC filings."