Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

July 19, 2013

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FEDERAL ISSUES

Senate Confirms Richard Cordray as CFPB Director. On July 16, the U.S. Senate voted 66 to 34 to confirm Richard Cordray for a five year term as CFPB Director. Prior to his confirmation, Mr. Corday had served as CFPB Director pursuant to a recess appointment that was set to expire at the end of this year. Apart from its pending expiration, the recess appointment also had come under legal challenge from a law suit pending in the U.S. District Court for the District of Columbia. Additionally, the Supreme Court recently agreed to review a January 2013 decision by the Court of Appeals for the D.C. Circuit that invalidated similar recess appointments that the President made to the National Labor Relations Board in January 2012. The Senate vote on Mr. Cordray's nomination came after several days of Senate debate over its confirmation process and filibuster rules that resulted in an agreement to hold a series of up or down votes on several presidential nominations. Through its agreement, the Senate ended a two-year stalemate between Republicans and Democrats over Mr. Cordray's nomination, a stalemate based on a fundamental disagreement regarding the structure and oversight of the CFPB.

CFPB Names New Senior Staff. On July 15, the CFPB announced that it filled four senior staff positions. Sartaj Alag will serve as Chief Operating Officer. Prior to taking on this role, Mr. Alag had established the Bureau's Office of Consumer Response and had worked in the private sector both as President of a Capital One subsidiary and as a management consultant at McKinsey & Company. Christopher D'Angelo, who joined the CFPB in June 2011 as an enforcement attorney and who most recently served as Senior Advisor to Director Cordray, will be promoted to Chief of Staff. Prior to joining the Bureau, Mr. D'Angelo served as Senior Advisor to the Under Secretary for Domestic Finance at the Treasury Department. Nora Dowd Eisenhower will become the new Assistant Director for the Office of Older Americans. Prior to joining the CFPB, Ms. Eisenhower served on the National Council on Aging, where she was the Director of the National Center for

Benefits Outreach and Enrollment, and the Senior Vice President of Economic Security. Prior to her work with the National Council on Aging, Ms. Eisenhower served as Secretary of the Pennsylvania Department of Aging and as Executive Director for AARP Pennsylvania. Finally, Laurie Maggiano will join the Bureau as the Program Manager for Servicing and Securitization Markets in the Division of Research, Markets, and Regulations. Ms. Maggiano most recently served as the Director of Policy in the Office of Homeownership Preservation at the Treasury Department, where she was one of the principal architects of the Making Home Affordable program. Prior to joining Treasury, Ms. Maggiano managed servicing policy at HUD, and before that spent 20 years in the private sector as a director at Freddie Mac and as a senior vice president for two major mortgage banks.

CFPB, Federal Reserve Board, DOJ Plan Indirect Auto Fair Lending Compliance Event. On July 15, the Federal Reserve Board announced that it will co-host an upcoming consumer compliance webinar with the CFPB and the DOJ entitled "Indirect Auto Lending - Fair Lending Considerations." The event, which will be held August 6, 2013, 11:30 a.m. - 12:30 p.m. (ET), will feature Maureen Yap, special counsel and manager of the Federal Reserve's Fair Lending Enforcement Section; Coty Montag, deputy chief of the DOJ's Housing and Civil Enforcement Section of the Civil Rights Division; and Patrice Ficklin, assistant director of the CFPB's Office of Fair Lending and Equal Opportunity. The panelists plan to discuss (i) the CFPB's indirect auto lending bulletin and compliance with ECOA; (ii) supervisory guidance; (iii) examination procedures; (iv) public settlements; and (v) "emerging issues." Following their presentations, the panelists will take audience questions, which may be submitted in advance.

CFPB Outlines Financial Literacy Strategy in Report to Congress. On July 17, the CFPB published its first annual Financial Literacy Report to Congress. The report, required by the Dodd-Frank Act, outlines the CFPB's broad consumer education and outreach efforts. The report reviews the various resources the CFPB has developed on its website, including its complaint database and tools aimed at helping consumers understand college costs and payment options. The CFPB also highlights ongoing research to (i) determine how to measure financial well-being and identify the knowledge, skills, and habits associated with financially capable consumers; (ii) evaluate the effectiveness of existing approaches to improving financial decision-making and outcomes; and (iii) develop new approaches to financial education and evaluate their potential to improve financial well-being.

Senate Banking Leaders Offer Bipartisan FHA Reform Bill. On July 15, Senate Banking Committee Chairman Tim Johnson (D-SD) and Ranking Member Mike Crapo (R-ID) released a discussion draft of a bill intended to improve the solvency of the FHA's Mutual Mortgage Insurance Fund (MMI Fund). As with legislation recently passed by the House, the bill would allow HUD to manage its HECM program through mortgagee letters. Unlike the House bill, this draft further would require that, whenever HUD issues a HECM mortgagee letter, it also initiate a proposed rulemaking that addresses the subject of the mortgagee letter. The bill also would require that, for a mortgage to be eligible for insurance under the HECM program, the mortgage must contain terms and provisions for ensuring property maintenance, establishing escrow accounts, performing financial assessments, or limiting the amount of any payment made available under the mortgage. In addition, the bill includes changes to the broader FHA insurance program, including provisions similar to those in a bill passed by the House last year with overwhelming bipartisan support. It would, for example, (i) set a minimum annual mortgage insurance premium of at least 55 basis points and increase existing up-front and annual premium caps by 50 basis points, (ii) direct HUD to establish underwriting standards using criteria similar to the CFPB's criteria for Qualified Mortgages, and (iii) require that the MMI Fund achieve a capital reserve ratio of 3% within 10 years of enactment and establish escalating reporting requirements and program evaluations that take effect immediately if the capital ratio falls below required levels. Further, the bill would, among other things, (i) enhance HUD's ability to seek indemnification from FHA-approved mortgagees approved

to originate loans under the lender insurance program or the direct endorsement program, (ii) expand the criteria HUD uses to compare mortgagee performance and to allow HUD to terminate a mortgagee's approval on a national basis, and (iii) require HUD to develop a single resource guide for lenders and servicers regarding the requirements, policies, processes, and procedures that apply to loans insured by FHA. The committee has scheduled a legislative hearing on the bill for July 24, 2013.

Senate Banking Committee Approves FHFA Director Nominee, Other Nominees. On July 18, the Senate Banking Committee approved Rep. Mel Watt (D-NC) to be the next Director of the FHFA, on a 12-10 party line vote. On a voice vote, the Committee also approved Michael Piwowar and Kara Stein as members of the Securities Exchange Commission, Jason Furman to serve as member and chairman of the Council of Economic Advisers, and Richard Metsger to sit on the National Credit Union Administration Board. Finally, again by voice vote, the Committee voted to extend the term of SEC Chair Mary Jo White until June 5, 2019. The nominations could come before a vote of the full Senate in the coming weeks.

HUD Proposes Framework for Affirmatively Furthering Fair Housing, HUD Secretary Promises Increased Enforcement. On July 18, HUD released a proposed rule to refine the fair housing elements of the existing planning process that recipients of HUD funds - states, local governments, insular areas, and public housing agencies (Program Participants) - already undertake. To aid Program Participants, HUD will provide local and regional data to allow Program Participants (i) to evaluate patterns of integration and segregation in their area, (ii) to identify disparities in access to community assets by members of protected classes, (iii) to locate racial and ethnic concentrations of poverty, and disproportionate housing needs based on protected class; (iv) to uncover areas for improvement in their fair housing programs; and (v) to develop the tools, strategies, and priorities to respond to problems identified by the data. The proposed rule also (i) defines "affirmatively furthering fair housing" to clarify that the phrase requires proactive steps to foster more inclusive communities and greater access to community assets for all groups protected by the Fair Housing Act; (ii) refines current Analysis of Impediment requirements; (iii) requires Program Participants to incorporate fair housing planning in existing planning processes, such as the consolidated plan and PHA Annual Plan; and (iv) encourages Program Participants to take regional approaches to address fair housing issues. In a speech earlier in the week in which he previewed the proposed rule, HUD Secretary Donovan also promised increased enforcement of the Fair Housing Act, stating: "I want to send a message to all those outside these doors. There are no stones we won't turn. There are no places we won't go. And there are no complaints we won't explore in order to eliminate housing discrimination. Period. . . . HUD is enhancing its enforcement techniques by initiating investigations on our own without waiting for individuals to file complaints. We have more than tripled the number of Secretary-initiated complaints that we have filed since 2008."

HUD Seeks Comments on Potential Changes to FHA's Quality Assurance Process. Last week, HUD published a notice seeking public comments on "ways to improve the efficiency and effectiveness" of FHA's quality assurance process (QAP). In the notice, HUD explains that it is seeking to enhance its oversight of FHA single-family lenders by evaluating single family quality assurance alternatives that would better align with FHA's mission. Specifically, HUD aims to ensure that it maintains and improves a quality assurance framework that (i) does not hinder or dissuade lending to FHA-targeted populations; (ii) enhances the efficiency and effectiveness of the QAP; (iii) ensures compensation to FHA for defects resulting from the lender manufacturing process; and (iv) applies fairly to all lenders. In addition, HUD also endeavors to establish a framework that ensures that loans are reviewed within a reasonable time period, post-endorsement; in order to allow FHA to use loan quality findings to improve credit policy and to allow lenders to improve their FHA origination practices. HUD particularly seeks public comments on (i) the types of loan manufacturing

or compliance defects found in the QAP that should be subject to indemnification or other administrative remedies or a combination of responses; (ii) how the FHA's review and comparison of early defaults and claims may achieve an improved assessment of a mortgagee's performance - for example, HUD is considering establishing a specific standard of defaults and claims which mortgagees should not exceed within a given construct; (iii) whether FHA should establish a threshold manufacturing (or loan deficiency) risk tolerance; and (iv) whether FHA should establish a process to review a statistically significant random sample of loans for each mortgagee within a prescribed time frame after loan endorsement to estimate defect rates. Comments on the potential changes are due by September 9, 2013.

Freddie Mac Updates Numerous Selling Requirements. On July 18, Freddie Mac issued Bulletin Number 2013-13, which updates or revises numerous selling requirements. For Relief Refinance Mortgages sold under fixed rate cash commitments taken out on or after July 19, 2013, Freddie Mac is reinstating the cash adjustor for mortgages with loan-to-value ratios greater than 105% and less than or equal to 125% and is adjusting the cash adjustor value for mortgages with LTV ratios over 125%. Effective immediately, Freddie Mac is relaxing requirements regarding authorized user accounts to give sellers that option to evaluate the impact of authorized user accounts on a borrower's credit report. If a seller determines that the impact on a borrower's overall credit history is insignificant and the information on the credit report is representative of a borrower's credit reputation, then (i) for Loan Prospector mortgages, the Loan Prospector decision may be considered valid and (ii) for manually underwritten mortgages the FICO score may be considered usable. The Bulletin also (i) simplifies eligibility and review requirements for condominium projects; (ii) eliminates requirements contained within Section 22.24 of the Seller/Servicer Guide for properties in subdivisions that do not have resale restrictions; (iii) updates section 22.23 of the Guide with new terminology to eliminate references to "inclusionary zoning;" (iv) updates certain ULDD data point requirements for Condominium Projects and Manufactured Homes; and (v) clarifies the eligibility of living trusts for Texas Equity Section 50(a)(6) mortgages.

FinCEN Creates CTR Exemption for Armored Car Transactions. On July 12, FinCEN issued a ruling to exempt financial institutions from collecting data about certain armored car transactions required for Currency Transaction Reports (CTR). Under a 2009 ruling, FinCEN clarified that when a financial institution customer hires an armored car service (ACS) to conduct business on its behalf, the customer's financial institution is subject to the same CTR requirements as it would be with any other third-party facilitating a transaction for a customer. FinCEN now recognizes that the 2009 ruling created practical issues in application - financial institutions have had difficulty differentiating transactions conducted by a given ACS on behalf of the institution from those the ACS conducted on behalf of a customer, and have had trouble obtaining drivers' personal information required for the CTR. With its current ruling, FinCEN authorized an exception to the CTR data collection and aggregation requirements that applies only to deposits or withdrawals conducted by an ACS employee pursuant to instructions from the financial institution's customer or from a third party.

FTC Extends Time to Comment on Proposed TSR Changes. On July 12, the FTC extended the comment deadline on proposed changes to its Telemarketing Sales Rule (TSR). In May, the FTC proposed to prohibit the use of certain payment methods it believes are favored by "fraudulent telemarketers," and sought comments by July 29, 2013. Because a slightly modified version of the original proposal was published in the Federal Register on July 9, 2013, the FTC now will accept comments through August 8, 2013.

Federal, State Officials Focus on Employee Payroll Cards. On July 11, a group of Democratic Senators urged the CFPB and the Department of Labor to "take swift action" regarding prepaid payroll cards. The Senators expressed concern that workers do not understand the "excessive fees"

and "harmful practices" associated with such cards, and suggested that those fees and practices - specifically, those relating to ATM use, balance inquiry, swipe purchases, overdraft, and inactivity, among others - may violate the Electronic Funds Transfer Act and its implementing regulation, Regulation E. The lawmakers asked the CFPB to conduct a study to better understand these fees and their impact on workers, and to clarify through a rulemaking or other supervisory action the options employers must provide to their employees under Regulation E. The Senators' letter follows reports of an investigation by New York Attorney General Eric Schneiderman into potential state law violations related to employers' use of payroll cards.

NCUA Announces New Consumer Protection Position. On July 15, the NCUA announced that Matthew Biliouris will fill a new position, Deputy Director for the Office of Consumer Protection. Mr. Biliouris most recently served as the Director, Division of Supervision, in NCUA's Office of Examination and Insurance.

STATE ISSUES

California Enacts Fair Debt Buying Bill. On July 11, California Governor Jerry Brown signed into law SB 233, the Fair Debt Buyers Practices Act, which establishes numerous new rules related to the purchase and collection of consumer debts, including five key protections for debtors. First, the Act prohibits a debt buyer from making any written statement in an attempt to collect a consumer debt unless the debt buyer can verify certain information, such as the amount of the debt balance at charge off, the date of default or last payment, and the name and address of the charge-off creditor at the time of charge off. Second, the Act prohibits a debt buyer from making any written statement to a debtor in an attempt to collect a consumer debt unless the debt buyer has access to a copy of a contract or other document evidencing the debtor's agreement to the debt. In instances where no signed debt contract exists, the debtor must obtain sufficient evidence to demonstrate that the debt was incurred by the debtor. Third, the Act requires a debt buyer to provide a written notice with its initial written communication to the debtor that, among other things, informs the debtor of his or her right to request certain records from the debt buyer. Fourth, the Act prohibits a debt buyer from bringing suit, initiating another proceeding, or taking any other action to collect a consumer debt if the applicable statute of limitations on the cause of action to enforce the debt has expired. Finally, the Act establishes new requirements for default judgments, such as a requirement that a debt buyer submit business records to confirm a debt prior to seeking a default judgment against a debtor. Additionally, the debt buyer must authenticate the records it submits via a sworn declaration to the court. The new rules will apply to debt buyers with respect to all consumer debt sold or resold on or after January 1, 2014.

New York Financial Regulator Issues Guidance on Determination of Subprime Home Loans Under State Law. On July 3, the New York Department of Financial Services (DFS) sent a letter to regulated institutions and issued a temporary order relating to the determination of thresholds for "subprime home loans" under Section 6-m of the New York Banking Law. Due to recent increases in interest rates, many lenders who utilize a loan's closing date as the time period for determining the "fully indexed rate" feared that they may be originating loans that meet the definition of subprime home loans under Section 6-m. The letter reminds lenders that in 2009, DFS amended Section 6-m of the Banking Law to instruct lenders to use the date that they provide good faith estimates to borrowers as the date for calculating the "fully indexed rate." The letter also states that the DFS believes that calculating the "fully indexed rate" properly should allay many lenders fears that they may be triggering Section 6-m. Relatedly, recent changes to the calculation of Mortgage Insurance Premiums mandated by the FHA in Mortgagee Letter 2013-04 has increased the annual percentage rate on subject loans and is causing them to fall under Section 6-m's definition of subprime home loan. To address the issue, the DFS issued a temporary order that, for 60 days from the date of the

order, directs lenders not to use the MIP changes effectuated by FHA when calculating the APR and fully indexed rates for purposes of Section 6-m.

Missouri Increases Credit Advance Fees. On July 12, Missouri enacted SB 254, which increases credit advance fees for open-end credit loans of 31 days or longer. Under current Missouri law, lenders may charge a credit advance fees of up to the lesser of $25 or 5% of the credit advanced from the line of credit. Effective August 28, 2013, lenders may charge a credit advance fee of up to the lesser of $75 or 10%of the credit advanced from the line of credit.

COURTS

California Federal District Court Allows Government's FIRREA-Based RMBS Suit to Proceed. On July 16, the U.S. District Court for the Central District of California denied a major credit rating agency's motion to dismiss a DOJ complaint alleging that the firm defrauded investors in residential mortgage-backed securities (RMBS) and collateralized debt obligations (CDOs) by issuing inflated ratings that misrepresented the securities' true credit risks, and by falsely representing that its ratings were uninfluenced by its relationships with investment banks. *U.S. v. McGraw-Hill Cos., Inc.*, No. 13-779, slip. op (C.D. Cal. Jul. 16, 2013). The court held that the government met its initial pleading burden, in part, because it sufficiently had alleged that the rating agency "engaged in a 'scheme to defraud investors in RMBS and CDOs tranches' and 'to obtain money from these investors by means of material false and fraudulent pretenses, representations, and promises, and the concealment of material facts' with 'intent to defraud.'" In doing so, the court allowed the government to pursue its $5 billion claims grounded in the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). The court did not, however, consider the weight of the government's evidence, specifically whether the rating agency's alleged statements and conduct were part of an actual "scheme to defraud," a key element to any FIRREA claim.

Federal District Court Compels Arbitration of Debt Collection Robosigning Suit. On July 12, the U.S. District Court for the Southern District of New York held that members of a putative class must arbitrate their claims against creditors for allegedly unlawful debt collection practices individually. *Shetiwy v. Midland Credit Management*, No. 12-7068, 2013 WL 3530524 (S.D.N.Y. Jul. 12, 2013). A group of creditors facing allegations that they violated the RICO Act and the FDCPA by conspiring with third party debt collectors to collect debts through fraudulently obtained default judgments, including judgments obtained through practices associated with robosigning, moved to compel arbitration based on the terms of their cardmember agreements, which require mandatory arbitration on an individual basis of any claims arising from a cardmember's account. The court held that even if the plaintiffs could show that costs associated with individual arbitration would preclude vindicating their statutory rights under RICO and the FDCPA, the U.S. Supreme Court's recent holding in *American Express Co. v. Italian Colors Restaurant*, "made clear that a generalized congressional intent to vindicate statutory rights cannot override the FAA's mandate that courts enforce arbitration clauses" like the one at issue here. The court explained that "[n]othing in the text of RICO or the FDCPA indicate [sic] a more explicit 'contrary congressional command' than that contained in the federal antitrust laws at issue in *Italian Colors*" and that "[i]n fact, the FDCPA explicitly limits recovery obtained by unnamed class members in a class action, without regard to how that will affect total recover for each individual." The court enforced the arbitration agreements and stayed the case as to the creditors pending arbitration.

Ninth Circuit Holds FAA Preempts Montana's Public Policy Against Enforcing Contracts of Adhesion. On July 15, the U.S. Court of Appeals for the Ninth Circuit held that the Federal Arbitration Act (FAA) preempts Montana's public policy invalidating adhesive agreements running contrary to the reasonable expectations of a party. *Mortensen v. Bresnan Comms. LLC*, No. 11-

35823, 2013 WL 3491415 (9th Cir. Jul. 15, 2013). In this case, the plaintiffs filed a putative class action against an internet service provider (ISP) that participated in a trial program in which the ISP's customer's personal information allegedly was passed on to an advertising company in violation of the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act, and state privacy and property laws. The ISP moved to compel arbitration, arguing that the welcome kit's its service technicians delivered included mandatory arbitration provisions that required application of New York law to any disputes. The court vacated a trial court's order declining to enforce arbitration, holding that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), requires that the FAA preempt Montana's reasonable expectations/fundamental rights rule, despite the state's interest in protecting its consumers from unfair agreements, because that rule has a disproportionate impact on arbitration agreements. As a result, the court also held that the district court erred in not applying New York law because a state's preempted public policy was an impermissible basis on which to reject the parties' choice-of-law selection. The court vacated the district court's order declining to enforce the arbitration clause and choice-of-law clause and remanded with instructions to apply New York law to the arbitration agreement.

MISCELLANY

NACHA Bulletin Addresses Reinitiation of Returned Debits. On July 15, the Electronic Payments Association (NACHA), the organization that manages the ACH Network, issued a bulletin that describes the provisions of NACHA's operating rules regarding the "reinitiation" of returned ACH debit entries and the collection of return fees. With respect to the "reinitiation" of returned ACH debit entries the bulletin outlines the limited circumstances under which the rules permits originators and originating depository financial institutions (ODFIs) to reinitiate returned entries. First, an originator or an ODFI may reinitiate a returned entry up to two times if the entry was returned for reasons of insufficient or uncollected funds. Second, an originator or an ODFI may reinitiate a returned entry for reason of stop payment, but only if the receiver of the entry reauthorized the reinitiation after the return of the original entry. Finally, unless authorization has been revoked, an originator or an ODFI may reinitiate an entry returned for any other reason, as long as the originator or ODFI has corrected or remedied the reason for the return. In instances where authorization has been revoked, an originator or ODFI may not be reinitiated. Additionally, in order for a reinitiation of a returned entry to take place within the ACH Network, it must take place within 180 days of the settlement date of the original entry. With respect to the collection of return fees, the bulletin explains that (i) a return fee entry may be initiated only to the extent permitted by applicable law, and only for an entry that was returned for reasons of insufficient or uncollected funds; (ii) originators and ODFIs must provide specific prior notice prior to charging return fees; (iii) return fees must be specifically labeled as return fees in any entry description; (iv) only one return fee may be assessed with respect to any returned entry; and (v) a return fee may not be assessed with respect to the return of a return fee entry (i.e., no "fees on fees").

FIRM NEWS

BuckleySandler Expands Its Litigation Practice With Three New Lawyers

BuckleySandler LLP is pleased to announce that Richard E. Gottlieb, a highly regarded class action defense litigator with over 25 years of experience, and Fredrick S. Levin, a notable class action and securities litigator, have joined the firm as Partners. Also joining the firm as an Associate is Brett J. Natarelli, a consumer financial services litigator. Gottlieb and Levin will be co-located in BuckleySandler's Los Angeles and soon-to-be-opened Chicago office, and Natarelli will be resident in the firm's Chicago office.

As former head of the Financial Industry Group and chair of the firm's National Consumer Financial Services practice at Dykema Gossett PLLC, Gottlieb managed oversight of the firm's various financial institution practice areas while devoting his practice exclusively to counseling and representation of financial institutions, retailers and insurance companies, notably in defense of class actions. Gottlieb, an experienced litigator who represents clients primarily in the defense of class action suits alleging false or deceptive lending practices and statutory consumer lending violations, also has substantial experience in arbitrations, regulatory matters (including market conduct examinations) and administrative proceedings before federal and state agencies. He is a recognized leader in the field, having been elected by his peers as a Fellow of the American College of Consumer Financial Services Lawyers. He is a frequent lecturer on consumer financial services, class actions and trial practice matters, and is an active member of various bar and trade associations. Chambers USA: America's Leading Lawyers for Business has described Gottlieb as "incredibly client focused" and "among the best" in a crowded field. Gottlieb holds a juris doctor from the State University of New York at Buffalo, an LL.M. from Georgetown University and a B.A. *cum laude* from Vanderbilt University.

Levin's practice has focused on defending financial institutions in consumer and securities class action litigation. He spent 19 years at Mayer Brown in both Chicago and Los Angeles and most recently was a Member of Dykema. He represents local, national and multinational corporations in trial and appeals courts in complex commercial and consumer financial services litigation. He received his juris doctor from the University of Michigan and a B.A. cum laude from Princeton University.

Natarelli's practice focuses on consumer financial litigation and compliance matters. He defends financial institutions in class action litigation including cases arising under the Telephone Consumer Protection Act and the federal HAMP loan modification program, among other areas, and litigates all manner of consumer financial issues in the context of handling complex contested mortgage foreclosures. He received his juris doctor from the University of Chicago and a B.A. *cum laude* from Benedictine University and practiced at Dykema for five years.

Jonice Gray Tucker will speak at the Thomson Reuters workshop, Preparing for a CFPB Examination in Washington, DC on August 1, 2013.

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

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

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

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

Emerging Regulations in Compliance," and Ben Olson will speak on the panel, "Get to Know CFPB and What's on the Agenda."

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

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

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

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

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

FIRM PUBLICATIONS

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

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

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

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

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

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

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

About BuckleySandler LLP (www.buckleysandler.com)

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

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

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

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MORTGAGES

Senate Banking Leaders Offer Bipartisan FHA Reform Bill. On July 15, Senate Banking Committee Chairman Tim Johnson (D-SD) and Ranking Member Mike Crapo (R-ID) released a discussion draft of a bill intended to improve the solvency of the FHA's Mutual Mortgage Insurance Fund (MMI Fund). As with legislation recently passed by the House, the bill would allow HUD to manage its HECM program through mortgagee letters. Unlike the House bill, this draft further would require that, whenever HUD issues a HECM mortgagee letter, it also initiate a proposed rulemaking that addresses the subject of the mortgagee letter. The bill also would require that, for a mortgage to be eligible for insurance under the HECM program, the mortgage must contain terms and provisions for ensuring property maintenance, establishing escrow accounts, performing financial assessments, or limiting the amount of any payment made available under the mortgage. In addition, the bill includes changes to the broader FHA insurance program, including provisions similar to those in a bill passed by the House last year with overwhelming bipartisan support. It would, for example, (i) set a minimum annual mortgage insurance premium of at least 55 basis points and increase existing up-front and annual premium caps by 50 basis points, (ii) direct HUD to establish underwriting standards using criteria similar to the CFPB's criteria for Qualified Mortgages, and (iii) require that the MMI Fund achieve a capital reserve ratio of 3% within 10 years of enactment and establish escalating reporting requirements and program evaluations that take effect immediately if the capital ratio falls below required levels. Further, the bill would, among other things, (i) enhance HUD's ability to seek indemnification from FHA-approved mortgagees approved to originate loans under the lender insurance program or the direct endorsement program, (ii) expand the criteria HUD uses to compare mortgagee performance and to allow HUD to terminate a mortgagee's approval on a national basis, and (iii) require HUD to develop a single resource guide for lenders and servicers regarding the requirements, policies, processes, and procedures that apply to loans insured by FHA. The committee has scheduled a legislative hearing on the bill for

July 24, 2013.

Senate Banking Committee Approves FHFA Director Nominee, Other Nominees. On July 18, the Senate Banking Committee approved Rep. Mel Watt (D-NC) to be the next Director of the FHFA, on a 12-10 party line vote. On a voice vote, the Committee also approved Michael Piwowar and Kara Stein as members of the Securities Exchange Commission, Jason Furman to serve as member and chairman of the Council of Economic Advisers, and Richard Metsger to sit on the National Credit Union Administration Board. Finally, again by voice vote, the Committee voted to extend the term of SEC Chair Mary Jo White until June 5, 2019. The nominations could come before a vote of the full Senate in the coming weeks.

HUD Proposes Framework for Affirmatively Furthering Fair Housing, HUD Secretary Promises Increased Enforcement. On July 18, HUD released a proposed rule to refine the fair housing elements of the existing planning process that recipients of HUD funds - states, local governments, insular areas, and public housing agencies (Program Participants) - already undertake. To aid Program Participants, HUD will provide local and regional data to allow Program Participants (i) to evaluate patterns of integration and segregation in their area, (ii) to identify disparities in access to community assets by members of protected classes, (iii) to locate racial and ethnic concentrations of poverty, and disproportionate housing needs based on protected class; (iv) to uncover areas for improvement in their fair housing programs; and (v) to develop the tools, strategies, and priorities to respond to problems identified by the data. The proposed rule also (i) defines "affirmatively furthering fair housing" to clarify that the phrase requires proactive steps to foster more inclusive communities and greater access to community assets for all groups protected by the Fair Housing Act; (ii) refines current Analysis of Impediment requirements; (iii) requires Program Participants to incorporate fair housing planning in existing planning processes, such as the consolidated plan and PHA Annual Plan; and (iv) encourages Program Participants to take regional approaches to address fair housing issues. In a speech earlier in the week in which he previewed the proposed rule, HUD Secretary Donovan also promised increased enforcement of the Fair Housing Act, stating: "I want to send a message to all those outside these doors. There are no stones we won't turn. There are no places we won't go. And there are no complaints we won't explore in order to eliminate housing discrimination. Period. . . . HUD is enhancing its enforcement techniques by initiating investigations on our own without waiting for individuals to file complaints. We have more than tripled the number of Secretary-initiated complaints that we have filed since 2008."

HUD Seeks Comments on Potential Changes to FHA's Quality Assurance Process. Last week, HUD published a notice seeking public comments on "ways to improve the efficiency and effectiveness" of FHA's quality assurance process (QAP). In the notice, HUD explains that it is seeking to enhance its oversight of FHA single-family lenders by evaluating single family quality assurance alternatives that would better align with FHA's mission. Specifically, HUD aims to ensure that it maintains and improves a quality assurance framework that (i) does not hinder or dissuade lending to FHA-targeted populations; (ii) enhances the efficiency and effectiveness of the QAP; (iii) ensures compensation to FHA for defects resulting from the lender manufacturing process; and (iv) applies fairly to all lenders. In addition, HUD also endeavors to establish a framework that ensures that loans are reviewed within a reasonable time period, post-endorsement; in order to allow FHA to use loan quality findings to improve credit policy and to allow lenders to improve their FHA origination practices. HUD particularly seeks public comments on (i) the types of loan manufacturing or compliance defects found in the QAP that should be subject to indemnification or other administrative remedies or a combination of responses; (ii) how the FHA's review and comparison of early defaults and claims may achieve an improved assessment of a mortgagee's performance - for example, HUD is considering establishing a specific standard of defaults and claims which mortgagees should not exceed within a given construct; (iii) whether FHA should establish a

threshold manufacturing (or loan deficiency) risk tolerance; and (iv) whether FHA should establish a process to review a statistically significant random sample of loans for each mortgagee within a prescribed time frame after loan endorsement to estimate defect rates. Comments on the potential changes are due by September 9, 2013.

Freddie Mac Updates Numerous Selling Requirements. On July 18, Freddie Mac issued Bulletin Number 2013-13, which updates or revises numerous selling requirements. For Relief Refinance Mortgages sold under fixed rate cash commitments taken out on or after July 19, 2013, Freddie Mac is reinstating the cash adjustor for mortgages with loan-to-value ratios greater than 105% and less than or equal to 125% and is adjusting the cash adjustor value for mortgages with LTV ratios over 125%. Effective immediately, Freddie Mac is relaxing requirements regarding authorized user accounts to give sellers that option to evaluate the impact of authorized user accounts on a borrower's credit report. If a seller determines that the impact on a borrower's overall credit history is insignificant and the information on the credit report is representative of a borrower's credit reputation, then (i) for Loan Prospector mortgages, the Loan Prospector decision may be considered valid and (ii) for manually underwritten mortgages the FICO score may be considered usable. The Bulletin also (i) simplifies eligibility and review requirements for condominium projects; (ii) eliminates requirements contained within Section 22.24 of the Seller/Servicer Guide for properties in subdivisions that do not have resale restrictions; (iii) updates section 22.23 of the Guide with new terminology to eliminate references to "inclusionary zoning;" (iv) updates certain ULDD data point requirements for Condominium Projects and Manufactured Homes; and (v) clarifies the eligibility of living trusts for Texas Equity Section 50(a)(6) mortgages.

New York Financial Regulator Issues Guidance on Determination of Subprime Home Loans Under State Law. On July 3, the New York Department of Financial Services (DFS) sent a letter to regulated institutions and issued a temporary order relating to the determination of thresholds for "subprime home loans" under Section 6-m of the New York Banking Law. Due to recent increases in interest rates, many lenders who utilize a loan's closing date as the time period for determining the "fully indexed rate" feared that they may be originating loans that meet the definition of subprime home loans under Section 6-m. The letter reminds lenders that in 2009, DFS amended Section 6-m of the Banking Law to instruct lenders to use the date that they provide good faith estimates to borrowers as the date for calculating the "fully indexed rate." The letter also states that the DFS believes that calculating the "fully indexed rate" properly should allay many lenders fears that they may be triggering Section 6-m. Relatedly, recent changes to the calculation of Mortgage Insurance Premiums mandated by the FHA in Mortgagee Letter 2013-04 has increased the annual percentage rate on subject loans and is causing them to fall under Section 6-m's definition of subprime home loan. To address the issue, the DFS issued a temporary order that, for 60 days from the date of the order, directs lenders not to use the MIP changes effectuated by FHA when calculating the APR and fully indexed rates for purposes of Section 6-m.

BANKING

FinCEN Creates CTR Exemption for Armored Car Transactions. On July 12, FinCEN issued a ruling to exempt financial institutions from collecting data about certain armored car transactions required for Currency Transaction Reports (CTR). Under a 2009 ruling, FinCEN clarified that when a financial institution customer hires an armored car service (ACS) to conduct business on its behalf, the customer's financial institution is subject to the same CTR requirements as it would be with any other third-party facilitating a transaction for a customer. FinCEN now recognizes that the 2009 ruling created practical issues in application - financial institutions have had difficulty differentiating transactions conducted by a given ACS on behalf of the institution from those the ACS conducted on behalf of a customer, and have had trouble obtaining drivers' personal

information required for the CTR. With its current ruling, FinCEN authorized an exception to the CTR data collection and aggregation requirements that applies only to deposits or withdrawals conducted by an ACS employee pursuant to instructions from the financial institution's customer or from a third party.

CONSUMER FINANCE

Senate Confirms Richard Cordray as CFPB Director. On July 16, the U.S. Senate voted 66 to 34 to confirm Richard Cordray for a five year term as CFPB Director. Prior to his confirmation, Mr. Corday had served as CFPB Director pursuant to a recess appointment that was set to expire at the end of this year. Apart from its pending expiration, the recess appointment also had come under legal challenge from a law suit pending in the U.S. District Court for the District of Columbia. Additionally, the Supreme Court recently agreed to review a January 2013 decision by the Court of Appeals for the D.C. Circuit that invalidated similar recess appointments that the President made to the National Labor Relations Board in January 2012. The Senate vote on Mr. Cordray's nomination came after several days of Senate debate over its confirmation process and filibuster rules that resulted in an agreement to hold a series of up or down votes on several presidential nominations. Through its agreement, the Senate ended a two-year stalemate between Republicans and Democrats over Mr. Cordray's nomination, a stalemate based on a fundamental disagreement regarding the structure and oversight of the CFPB.

CFPB Names New Senior Staff. On July 15, the CFPB announced that it filled four senior staff positions. Sartaj Alag will serve as Chief Operating Officer. Prior to taking on this role, Mr. Alag had established the Bureau's Office of Consumer Response and had worked in the private sector both as President of a Capital One subsidiary and as a management consultant at McKinsey & Company. Christopher D'Angelo, who joined the CFPB in June 2011 as an enforcement attorney and who most recently served as Senior Advisor to Director Cordray, will be promoted to Chief of Staff. Prior to joining the Bureau, Mr. D'Angelo served as Senior Advisor to the Under Secretary for Domestic Finance at the Treasury Department. Nora Dowd Eisenhower will become the new Assistant Director for the Office of Older Americans. Prior to joining the CFPB, Ms. Eisenhower served on the National Council on Aging, where she was the Director of the National Center for Benefits Outreach and Enrollment, and the Senior Vice President of Economic Security. Prior to her work with the National Council on Aging, Ms. Eisenhower served as Secretary of the Pennsylvania Department of Aging and as Executive Director for AARP Pennsylvania. Finally, Laurie Maggiano will join the Bureau as the Program Manager for Servicing and Securitization Markets in the Division of Research, Markets, and Regulations. Ms. Maggiano most recently served as the Director of Policy in the Office of Homeownership Preservation at the Treasury Department, where she was one of the principal architects of the Making Home Affordable program. Prior to joining Treasury, Ms. Maggiano managed servicing policy at HUD, and before that spent 20 years in the private sector as a director at Freddie Mac and as a senior vice president for two major mortgage banks.

CFPB, Federal Reserve Board, DOJ Plan Indirect Auto Fair Lending Compliance Event. On July 15, the Federal Reserve Board announced that it will co-host an upcoming consumer compliance webinar with the CFPB and the DOJ entitled "Indirect Auto Lending - Fair Lending Considerations." The event, which will be held August 6, 2013, 11:30 a.m. - 12:30 p.m. (ET), will feature Maureen Yap, special counsel and manager of the Federal Reserve's Fair Lending Enforcement Section; Coty Montag, deputy chief of the DOJ's Housing and Civil Enforcement Section of the Civil Rights Division; and Patrice Ficklin, assistant director of the CFPB's Office of Fair Lending and Equal Opportunity. The panelists plan to discuss (i) the CFPB's indirect auto lending bulletin and compliance with ECOA; (ii) supervisory guidance; (iii) examination procedures; (iv) public settlements; and (v) "emerging issues." Following their presentations, the panelists will

take audience questions, which may be submitted in advance.

CFPB Outlines Financial Literacy Strategy in Report to Congress. On July 17, the CFPB published its first annual Financial Literacy Report to Congress. The report, required by the Dodd-Frank Act, outlines the CFPB's broad consumer education and outreach efforts. The report reviews the various resources the CFPB has developed on its website, including its complaint database and tools aimed at helping consumers understand college costs and payment options. The CFPB also highlights ongoing research to (i) determine how to measure financial well-being and identify the knowledge, skills, and habits associated with financially capable consumers; (ii) evaluate the effectiveness of existing approaches to improving financial decision-making and outcomes; and (iii) develop new approaches to financial education and evaluate their potential to improve financial well-being.

NCUA Announces New Consumer Protection Position. On July 15, the NCUA announced that Matthew Biliouris will fill a new position, Deputy Director for the Office of Consumer Protection. Mr. Biliouris most recently served as the Director, Division of Supervision, in NCUA's Office of Examination and Insurance.

California Enacts Fair Debt Buying Bill. On July 11, California Governor Jerry Brown signed into law SB 233, the Fair Debt Buyers Practices Act, which establishes numerous new rules related to the purchase and collection of consumer debts, including five key protections for debtors. First, the Act prohibits a debt buyer from making any written statement in an attempt to collect a consumer debt unless the debt buyer can verify certain information, such as the amount of the debt balance at charge off, the date of default or last payment, and the name and address of the charge-off creditor at the time of charge off. Second, the Act prohibits a debt buyer from making any written statement to a debtor in an attempt to collect a consumer debt unless the debt buyer has access to a copy of a contract or other document evidencing the debtor's agreement to the debt. In instances where no signed debt contract exists, the debtor must obtain sufficient evidence to demonstrate that the debt was incurred by the debtor. Third, the Act requires a debt buyer to provide a written notice with its initial written communication to the debtor that, among other things, informs the debtor of his or her right to request certain records from the debt buyer. Fourth, the Act prohibits a debt buyer from bringing suit, initiating another proceeding, or taking any other action to collect a consumer debt if the applicable statute of limitations on the cause of action to enforce the debt has expired. Finally, the Act establishes new requirements for default judgments, such as a requirement that a debt buyer submit business records to confirm a debt prior to seeking a default judgment against a debtor. Additionally, the debt buyer must authenticate the records it submits via a sworn declaration to the court. The new rules will apply to debt buyers with respect to all consumer debt sold or resold on or after January 1, 2014.

Missouri Increases Credit Advance Fees. On July 12, Missouri enacted SB 254, which increases credit advance fees for open-end credit loans of 31 days or longer. Under current Missouri law, lenders may charge a credit advance fees of up to the lesser of $25 or 5% of the credit advanced from the line of credit. Effective August 28, 2013, lenders may charge a credit advance fee of up to the lesser of $75 or 10%of the credit advanced from the line of credit.

Federal District Court Compels Arbitration of Debt Collection Robosigning Suit. On July 12, the U.S. District Court for the Southern District of New York held that members of a putative class must arbitrate their claims against creditors for allegedly unlawful debt collection practices individually. *Shetiwy v. Midland Credit Management*, No. 12-7068, 2013 WL 3530524 (S.D.N.Y. Jul. 12, 2013). A group of creditors facing allegations that they violated the RICO Act and the FDCPA by conspiring with third party debt collectors to collect debts through fraudulently obtained default judgments, including judgments obtained through practices associated with robosigning, moved to

compel arbitration based on the terms of their cardmember agreements, which require mandatory arbitration on an individual basis of any claims arising from a cardmember's account. The court held that even if the plaintiffs could show that costs associated with individual arbitration would preclude vindicating their statutory rights under RICO and the FDCPA, the U.S. Supreme Court's recent holding in *American Express Co. v. Italian Colors Restaurant*, "made clear that a generalized congressional intent to vindicate statutory rights cannot override the FAA's mandate that courts enforce arbitration clauses" like the one at issue here. The court explained that "[n]othing in the text of RICO or the FDCPA indicate [sic] a more explicit 'contrary congressional command' than that contained in the federal antitrust laws at issue in *Italian Colors*" and that "[i]n fact, the FDCPA explicitly limits recovery obtained by unnamed class members in a class action, without regard to how that will affect total recover for each individual." The court enforced the arbitration agreements and stayed the case as to the creditors pending arbitration.

SECURITIES

California Federal District Court Allows Government's FIRREA-Based RMBS Suit to Proceed. On July 16, the U.S. District Court for the Central District of California denied a major credit rating agency's motion to dismiss a DOJ complaint alleging that the firm defrauded investors in residential mortgage-backed securities (RMBS) and collateralized debt obligations (CDOs) by issuing inflated ratings that misrepresented the securities' true credit risks, and by falsely representing that its ratings were uninfluenced by its relationships with investment banks. *U.S. v. McGraw-Hill Cos., Inc.*, No. 13-779, slip. op (C.D. Cal. Jul. 16, 2013). The court held that the government met its initial pleading burden, in part, because it sufficiently had alleged that the rating agency "engaged in a 'scheme to defraud investors in RMBS and CDOs tranches' and 'to obtain money from these investors by means of material false and fraudulent pretenses, representations, and promises, and the concealment of material facts' with 'intent to defraud.'" In doing so, the court allowed the government to pursue its $5 billion claims grounded in the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). The court did not, however, consider the weight of the government's evidence, specifically whether the rating agency's alleged statements and conduct were part of an actual "scheme to defraud," a key element to any FIRREA claim.

PRIVACY/DATA SECURITY

Ninth Circuit Holds FAA Preempts Montana's Public Policy Against Enforcing Contracts of Adhesion. On July 15, the U.S. Court of Appeals for the Ninth Circuit held that the Federal Arbitration Act (FAA) preempts Montana's public policy invalidating adhesive agreements running contrary to the reasonable expectations of a party. *Mortensen v. Bresnan Comms. LLC*, No. 11-35823, 2013 WL 3491415 (9th Cir. Jul. 15, 2013). In this case, the plaintiffs filed a putative class action against an internet service provider (ISP) that participated in a trial program in which the ISP's customer's personal information allegedly was passed on to an advertising company in violation of the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act, and state privacy and property laws. The ISP moved to compel arbitration, arguing that the welcome kit's its service technicians delivered included mandatory arbitration provisions that required application of New York law to any disputes. The court vacated a trial court's order declining to enforce arbitration, holding that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), requires that the FAA preempt Montana's reasonable expectations/fundamental rights rule, despite the state's interest in protecting its consumers from unfair agreements, because that rule has a disproportionate impact on arbitration agreements. As a result, the court also held that the district court erred in not applying New York law because a state's preempted public policy was an impermissible basis on which to reject the parties' choice-of-law selection. The court vacated the

district court's order declining to enforce the arbitration clause and choice-of-law clause and remanded with instructions to apply New York law to the arbitration agreement.

PAYMENTS

FTC Extends Time to Comment on Proposed TSR Changes. On July 12, the FTC extended the comment deadline on proposed changes to its Telemarketing Sales Rule (TSR). In May, the FTC proposed to prohibit the use of certain payment methods it believes are favored by "fraudulent telemarketers," and sought comments by July 29, 2013. Because a slightly modified version of the original proposal was published in the Federal Register on July 9, 2013, the FTC now will accept comments through August 8, 2013.

Federal, State Officials Focus on Employee Payroll Cards. On July 11, a group of Democratic Senators urged the CFPB and the Department of Labor to "take swift action" regarding prepaid payroll cards. The Senators expressed concern that workers do not understand the "excessive fees" and "harmful practices" associated with such cards, and suggested that those fees and practices - specifically, those relating to ATM use, balance inquiry, swipe purchases, overdraft, and inactivity, among others - may violate the Electronic Funds Transfer Act and its implementing regulation, Regulation E. The lawmakers asked the CFPB to conduct a study to better understand these fees and their impact on workers, and to clarify through a rulemaking or other supervisory action the options employers must provide to their employees under Regulation E. The Senators' letter follows reports of an investigation by New York Attorney General Eric Schneiderman into potential state law violations related to employers' use of payroll cards.

NACHA Bulletin Addresses Reinitiation of Returned Debits. On July 15, the Electronic Payments Association (NACHA), the organization that manages the ACH Network, issued a bulletin that describes the provisions of NACHA's operating rules regarding the "reinitiation" of returned ACH debit entries and the collection of return fees. With respect to the "reinitiation" of returned ACH debit entries the bulletin outlines the limited circumstances under which the rules permits originators and originating depository financial institutions (ODFIs) to reinitiate returned entries. First, an originator or an ODFI may reinitiate a returned entry up to two times if the entry was returned for reasons of insufficient or uncollected funds. Second, an originator or an ODFI may reinitiate a returned entry for reason of stop payment, but only if the receiver of the entry reauthorized the reinitiation after the return of the original entry. Finally, unless authorization has been revoked, an originator or an ODFI may reinitiate an entry returned for any other reason, as long as the originator or ODFI has corrected or remedied the reason for the return. In instances where authorization has been revoked, an originator or ODFI may not be reinitiated. Additionally, in order for a reinitiation of a returned entry to take place within the ACH Network, it must take place within 180 days of the settlement date of the original entry. With respect to the collection of return fees, the bulletin explains that (i) a return fee entry may be initiated only to the extent permitted by applicable law, and only for an entry that was returned for reasons of insufficient or uncollected funds; (ii) originators and ODFIs must provide specific prior notice prior to charging return fees; (iii) return fees must be specifically labeled as return fees in any entry description; (iv) only one return fee may be assessed with respect to any returned entry; and (v) a return fee may not be assessed with respect to the return of a return fee entry (i.e., no "fees on fees")

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