Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

May 18, 2012

Topics In This Issue

Federal Issues

Federal Prudential Regulators Issue Final Stress Test Guidance. On May 14, the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation issued guidance on stress tests for banks with more than $10 billion in total consolidated assets. The final guidance provides, in a manner largely consistent with the proposed guidance, principles for banks to follow when conducting stress tests, including: (i) a stress testing framework, (ii) general stress testing principles, (iii) stress testing approaches and applications, (iv) the importance of stress testing in assessing the adequacy of capital and liquidity, and (v) the need for internal governance and controls over the stress testing framework. The regulators amended the final guidance to clarify certain issues raised during the comment period, including changes to (i) incorporate an additional principle for stress testing, (ii) clarify application of the guidance to U.S. branches and agencies of foreign banking organizations, (iii) clarify the role of a bank's liabilities and operational risk in conducting a stress test, (iv) explain that senior management should have the primary responsibility for stress testing implementation and technical design, and (v) clarify that a banking organization's minimum annual review and assessment should ensure that stress testing coverage is comprehensive, tests are relevant and current, methodologies are sound, and results are properly considered. In a separate announcement, the banking regulators explicitly addressed concerns raised by community bankers by explaining that community banks are neither required nor expected to conduct the stress tests described above. However, the statement stresses that all banking organizations, regardless of size, should have the capacity to analyze the potential impact of adverse outcomes on their financial condition.

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State Issues

Alabama Enacts Residential Mortgage Satisfaction Act. On May 3,

Alabama enacted Senate Bill 347, which establishes procedures by which a borrower can obtain a payoff statement for a residential mortgage, including the form of such a request, deadlines for responding to a request (14 days), and the method for providing the statement, among other things. The bill also requires a secured creditor to record a mortgage satisfaction within 30 days after it receives full payment and performance of the obligation, and establishes a process for enforcing the recording requirement. The bill takes effect March 1, 2013.

West Virginia Amends Mortgage Record Keeping Requirements. Recently, West Virginia amended regulations that implement the record keeping requirements for all licensed residential mortgage lenders, brokers, and servicers. For lenders who provide the initial funding on a loan, the rules now make clear that the requirement to retain electronic records includes emails between the lender and borrower. Initial lenders and mortgage brokers also must maintain an itemized list of all fees and charges imposed on each loan and received by the lender or broker and by any third party. Further, the regulation adds a new requirement that a lender or broker document tangible net benefit to the borrower prior to refinancing a residential mortgage. The regulation also contains a new section on the process by which the state Division of Banking will determine if mortgage loan originator applicants meet certain standards of financial responsibility required by West Virginia law. The requirements took effect May 1, 2012.

Courts

Nationwide Class Certified in Overdraft Litigation. On May 16, the U.S. District Court for the Southern District of Florida

certified a nationwide class of plaintiffs alleging breach of contract, breach of the duty of good faith and fair dealing, unconscionability, unjust enrichment, and violations of state consumer protection statutes with regard to the overdraft practices of a national bank. *In re Checking Account Overdraft Litigation*, MDL No. 2036, slip op. (S.D. Fla. May 16, 2012). The plaintiffs claim that the bank created a scheme in which it manipulated debit card transactions to increase the number of overdraft fees charged to customers by re-ordering daily transactions from highest to lowest dollar amount, resulting in a higher number of individual overdraft transactions. After a year of class discovery, the court held that the class meets the four prerequisites for certification under Rule 23(a)-numerosity, commonality, typicality, and adequacy. The defendant argued that the claims made by the plaintiffs were similar to questions raised in the Supreme Court's decision in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), where the Court rejected class certification in an employment discrimination suit due to insufficient commonality. The district court disagreed, holding that because the plaintiffs all were subject to the same uniform corporate policy, the reason why each class member was harmed is not at issue, as it was in *Dukes*. Other bank defendants have faced and continue to face similar allegations in several other suits, including some that have been consolidated with the above action. Several of those

defendants have settled, including most recently a $62 million agreement announced on May 11, 2012.

Eleventh Circuit Court of Appeals Finds that "Dunning" Notice Enforcing a Security Interest May Give Rise to FDCPA Claim. On May 1, the U.S. Court of Appeals for the Eleventh Circuit reversed and remanded a lower court's dismissal of an FDCPA claim, finding that the contents of a "dunning" notice from the lender's foreclosing law firm constitutes an attempt to collect a debt under the FDCPA. *Reese v. Ellis, Painter, Rattertree & Adams, LLP*, No. 10-14366, 2012 WL 1500108 (11th Cir. May 1, 2012). The borrowers received a letter and documents from the lender's law firm demanding payment of the debt on the borrowers' defaulted mortgage loan and threatening to foreclose on their home if they did not pay the outstanding debt. The borrowers filed a class action lawsuit against the law firm alleging that the communication violated the FDCPA. The district court dismissed the complaint for failure to state a claim under the FDCPA. On appeal, the court held that the borrowers' obligation to pay off the promissory note, which the court distinguished from a security interest, represents a debt under the FDCPA. The court then rejected the law firm's argument that the purpose of the letter and accompanying documents was not to collect a debt, but rather to inform the borrowers of the lender's intent to enforce its security interest through possible foreclosure. The court determined that the documents at issue, which contained disclaimers such as "This law firm is acting as a debt collector attempting to collect a debt," had a dual purpose of providing notice of foreclosure and collecting a debt. In so holding, the court noted that following the law firm's reasoning would create a giant loophole in the FDCPA wherein the law only would apply to efforts to collect on unsecured debt and would permit collectors to "harass or mislead [secured] debtors without violating the FDCPA."

Miscellany

Two Largest U.S. Cities Adopt Responsible Banking Ordinances. On May 15,

the cities of New York and Los Angeles adopted ordinances that will require banks doing business with those cities to report certain information about their banking and lending activities. In New York, the City Council adopted a Local Law that, once approved by the mayor or passed over the mayor's veto, will establish a community investment advisory board comprised of city officials, banking industry representatives, community development or consumer protection groups, and small business owners. The board will assess the banking needs of the city and evaluate the performance of the city's depository banks in meeting those needs. To conduct the assessment and evaluation, the board will collect from depository banks information regarding each institution's efforts to, among other things, (i) meet small business credit needs, (ii) conduct consumer outreach and other steps to provide mortgage assistance and foreclosure prevention, and (iii) offer financial products for low and moderate income individuals throughout the city. The board will be required to publish the information collected and prepare an annual report, which city officials can consider in deciding with which institutions the city will place its deposits. The ordinance adopted by the Los Angeles City Council establishes a monitoring program headed by the City Treasurer. Under the program, a depository bank doing business with the city or wishing to do so will be required to report each year information regarding its small business, mortgage, and community development lending, as well as information

about its participation in foreclosure prevention and principal reduction programs. Investment banks will be required to file a statement describing their corporate citizenship in areas such as participation in charitable programs or scholarships and internal policies regarding the utilization of subcontractors designated as women-owned, minority-owned, or disadvantaged businesses. The disclosures will be posted online for public viewing within 30 days of the beginning of each new fiscal year. The cities of Cleveland, Pittsburgh, Philadelphia, and San Diego already have laws in place designed for the same general purposes, and other cities are considering similar laws.

UK Upper Tribunal Finds Bank Executive's Compliance Actions Reasonable, Overturns FSA Decision. Recently, the United Kingdom's Upper Tribunal overturned a decision of the Financial Services Authority (FSA) that held a top bank executive liable for failure to take reasonable steps to adequately address certain regulatory compliance problems. Specifically, the FSA charged that the executive failed to take reasonable steps to identify and remediate serious flaws in the design and operational effectiveness of the firm's governance and risk management frameworks and was too slow to initiate a comprehensive review of systems and controls across the business, which should have been conducted when he was appointed to lead the firm. The executive challenged the FSA penalty, arguing that his actions to investigate every specific compliance issue that arose and remedy problems in accordance with a defined plan were sufficient and reasonable and that he had undertaken efforts to strengthen his company's compliance monitoring team. The Upper Tribunal agreed, holding that the FSA's expectation that the executive institute a broad overhaul at an earlier date was beyond the bounds of reasonableness. The Upper Tribunal also noted that the majority of the compliance failures originated in one division, that the firm was addressing those issues, and that no one within that or other departments of the firm, nor anyone from the FSA, had ever suggested to the executive a need for a more comprehensive review. The Upper Tribunal directed the FSA to take no action against the executive.

Firm News

Andrew Sandler, **Benjamin Klubes**, **Jeff Naimon**, **Benjamin Saul**, and **Margo Tank** will be speaking at the Mortgage Bankers Association Legal Issues and Regulatory Compliance Conference in Palm Springs, CA on May 20, 2012. Mr. Klubes will provide updates on developments in both regulatory and litigation matters in the use of various privileges. Mr. Saul's session will provide an overview and update of the Fair Credit Reporting Act (FCRA), Fair Housing Act, Equal Credit Opportunity Act (ECOA) and Home Mortgage Disclosure Act (HMDA) requirements including recent proposed and final changes.

Jonathan Cannon will be speaking at the Predictive Methods Conference in Dana Point, CA on June 4, 2012 in a session entitled "The Dodd-Frank Act: Understanding its Impact on the Mortgage Industry."

Andrew Sandler will be speaking at the American Bankers Association's Regulatory Compliance Conference in Orlando, Florida on Monday, June 11, 2012. Mr. Sandler's session is entitled: "Hot Topics in Fair Lending."

Mortgages

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