Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

August 16, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Releases Second Update of Examination Procedures for Mortgage Rules. On August 15, the CFPB released new TILA and RESPA examination procedures, updated to cover all mortgage origination rules issued through May 29, 2013 and all mortgage servicing rules issued through July 10, 2013. The CFPB intends the updated procedures to help prepare financial institutions and mortgage companies for examinations regarding the new mortgage rules covering ability-to-repay requirements, qualified mortgages, high-cost mortgages, servicing, appraisals for higher-priced mortgage loans, and loan originator compensation. Please see our summaries of the key rules here and here.Notably, the new examination procedures do not reflect the amendments proposed by the CFPB in June, which are expected to be finalized shortly. It is unclear whether the CFPB intends to update the procedures to reflect these and any other amendments.

CFPB Releases Updated Ability-to-Repay / Qualified Mortgage Rule Implementation Resources. On August 14, the CFPB released an updated small business guide for the ability-to-repay / qualified mortgage rule it finalized early this year. The CFPB also released (i) a video that provides an overview of the rule and the recent changes and (ii) implementation guidance. The updated guide incorporates clarifications and amendments to the rules issued on May 29, 2013 and July 10, 2013, respectively. For analyses on the revisions incorporated into the update, see the Special Alerts released by BuckleySandler in May 2013 and July 2013.

Senate Committee Expands Review of Virtual Currency Policies. On August 12, Senators Tom Carper (D-DE) and Tom Coburn (R-OK), the leaders of the Senate Committee on Homeland Security and Government Affairs, sent a letter to Secretary of Homeland Security Janet Napolitano regarding federal virtual currency policy. The committee reportedly sent similar letters to the DOJ, the Federal Reserve Board, the Treasury Department, the SEC, the CFTC, and the OMB. Citing a federal court's recent holding that virtual currency Bitcoin is money or currency for the purpose of determining jurisdiction under the Securities Act of 1933, as well as other recent developments

related to virtual currencies, the lawmakers seek information about (i) the agencies' existing policies on virtual currencies, (ii) coordination among federal or state entities related to the treatment of virtual currencies, and (iii) "any plans" "strategies" or "ongoing initiatives" regarding virtual currencies. This recent scrutiny of virtual currencies follows regulatory and enforcement actions taken earlier this year, including guidance issued by FinCEN and federal criminal charges against a digital currency issuer and money transfer system. For a review of those actions and other state and federal regulatory challenges facing emerging payment providers, please see a recent article by BuckleySandler attorneys Margo Tank and Ian Spear.

CFPB Responds to Congressional Inquiry on Indirect Auto Lending Guidance. On August 2, the CFPB responded to a letter submitted by 35 republican members of Congress who were concerned about the fair lending guidance the CFPB issued to indirect auto lenders earlier this year. The CFPB's fair lending guidance (i) confirmed the CFPB's position that indirect auto finance companies are "creditors" subject to the fair lending requirements of ECOA and Regulation B and (ii) concluded that indirect auto finance companies may be liable under the legal theories of both disparate treatment and disparate impact when pricing disparities on a prohibited basis exist within their portfolios. The CFPB's August 2 response affirms its indirect auto lending guidance and explains the proxy methodology it employs to identify potential pricing disparities affecting protected classes. In support of its approach, the CFPB asserts that use of proxies for unavailable data is generally accepted and maintains that disparities will be considered "in view of all other evidence," including the finance companies' own analysis. The CFPB emphasized that "each supervisory examination or enforcement investigation is based on the particular facts presented" and that the CFPB "typically look[s] to whether there is a statistically significant basis point disparity in dealer markups received by the prohibited basis group."

HUD Explains Wait and See Approach to Eminent Domain Plans. On August 12, HUD responded to a congressional inquiry about plans announced by certain localities to seize mortgages via eminent domain and potentially refinance them through the FHA. HUD states that while it is concerned about the potential eminent domain actions threatened by some localities, including most recently and aggressively by Richmond, California, HUD also recognizes the "inherent and often indispensable tool" that eminent domain can be for local government to implement public policy. HUD suggests that disputes over this novel proposed use of eminent domain may be a question for the courts and states that, pending further legal and other developments, it does not know whether any new mortgage created out of a seizure would qualify for FHA insurance and cannot currently assess the impact of the seizure of mortgages on the FHA and the broader mortgage market.

Freddie Mac Updates Disaster Assistance, Other Servicing Policies. On August 15, Freddie Mac issued Bulletin 2013-15, which updates and revises many of its servicing requirements, including those related to assistance for borrowers impacted by an eligible disaster. With respect to such impacted borrowers, the Bulletin provides updated requirements related to (i) property protection activities, such as ascertaining the extent of the damage, and, if necessary, securing abandoned properties, (ii) managing the delinquency of a borrower whose mortgaged premises or place of employment was impacted by a disaster, (iii) the addition of the new Disaster Relief Modification for Borrowers who were current or less than 31 days delinquent at the time of a disaster, (iv) streamlined modifications for borrowers who were current or less than 31 days delinquent at the time of a disaster, (v) Trial Period Plan eligibility requirements, (vi) insurance loss settlements, and (vi) credit reporting. The Bulletin also instructs servicers to follow applicable state laws when handling Freddie Mac default legal matters (*e.g.* foreclosure) and adds a new Guide chapter about when servicers should take advantage of state procedures that allow for quickly completing foreclosures. Further, the Bulletin (i) revises requirements for servicemembers and their dependents, (ii) revises property inspection requirements, (iii) revises requirements for the

reimbursement of attorney fees and costs related to contested foreclosures and mediation, expenses incurred for title work, and condominium, homeowners association and Planned Unit Development assessments in super lien states, (iv) permanently extends the submission time frame for 104SF claims from 30 days to 45 days, and (v) updates unemployment forbearance requirements.

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STATE ISSUES

New York Considering Virtual Currency Regulations; Issues Subpoenas to Bitcoin-Associated Companies. On August 12, New York Department of Financial Services (NY DFS) Superintendent Benjamin Lawsky issued a notice of inquiry about the "appropriate regulatory guidelines that [the NY DFS] should put in place for virtual currencies." The NY DFS notes the emergence of Bitcoin and other virtual currency as the catalyst for its inquiry and states that it already has "conducted significant preliminary work." That preliminary work includes 22 subpoenas the NY DFS reportedly issued last week to companies associated with Bitcoin. The NY DFS is concerned that virtual currency exchangers may be engaging in money transmission as defined in New York. Under existing New York law, and the laws of a majority of other states, companies engaged in money transmission must obtain a license, post collateral, submit to periodic examinations, and comply with anti-money laundering laws. However, the NY DFS also suggests that regulating virtual currency under existing money transmission rules may not be the most beneficial approach. Instead, it is considering "new guidelines that are tailored to the unique characteristics of virtual currencies." The NY DFS notice does not provide any timeline for further action on these issues.

New York Joins Ranks of State AGs Suing Internet Payday Lenders. On August 12, New York Attorney General (AG) Eric Schneiderman announced a lawsuit against payday lending firms and their owners for allegedly violating the state's usury and licensed lender laws in connection with

their issuing of personal loans over the Internet. The AG claims that the companies charged annual interest rates from 89% to more than 355% to thousands of New York consumers, which rates far exceed the 16% rate cap set by state law. The AG joins the FTC and other state attorneys general who have acted against some of these and other Internet lending companies. Federal and state authorities more generally have been ratcheting up their scrutiny of online lending, and the AG's action follows an inquiry initiated last week by the New York Department of Financial Services concerning payday lending. The AG states that his investigation began last fall. He is seeking a court order prohibiting the companies and individuals from engaging in further illegal lending or enforcing existing usurious loan contracts, cancellation of all outstanding loans, restitution for borrowers of all interest collected above the legal limit of 16% interest, disgorgement of profits, and penalties of up to $5,000 per violation for deceptive acts and practices.

Illinois Enacts Auto Ancillary Products Bill. On August 9, Illinois enacted HB 1460, which expands the definition of "service contract" in the state's Insurance Code to include ancillary auto service contracts - e.g. contracts related to the repair or replacement of tires, repair of certain damage to motor vehicles, or that provide for protective systems applied to a vehicle. By expanding the definition, the new law requires any provider of such ancillary products operating in Illinois to register with the Illinois Department of Insurance, pay an annual registration fee, and to designate an individual for service of process. Ancillary auto product providers also will be subject to, among other things, financial requirements, disclosure rules, and record keeping requirements, and will be subject to examination and enforcement by the Illinois Department of Insurance. The changes take effect on January 1, 2014.

COURTS

Third Circuit Affirms Disparate Impact Class Certification Denial. On August 12, the U.S. Court of Appeals for the Third Circuit affirmed a district court's denial of class certification to a putative class of borrowers who claimed that a bank's policy that allegedly allowed individual brokers and loan officers to add points, fees, and credit costs to an otherwise risk-based financing rate disparately impacted minority applicants for residential mortgage loans. *Rodriguez v. Nat'l City Bank*, No. 11-8079, 2013 WL 4046385 (3rd Cir. Aug. 12, 2013). The district court denied class certification following the U.S. Supreme Court's holding in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) that a policy that allows local units discretion to act can only present a common question if the local units share a common mode of exercising that discretion.The district court did so sua sponte notwithstanding the parties' joint motion to approve a class settlement. On appeal, the Third Circuit held that the trial court did not overstep its role in denying the class because the parties' voluntary settlement did not eliminate or avoid the need for a rigorous judicial analysis to ensure that Rule 23 class certification requirements are satisfied. The Third Circuit further held that, in conducting that rigorous analysis, the district court correctly applied *Dukes* because "the exercise of broad discretion by an untold number of unique decision-makers in the making of thousands upon thousands of individual decisions undermines the attempt to claim, on the basis of statistics alone, that the decisions are bound together by a common discriminatory mode." As such, the court held that the borrowers failed to meet their burden of demonstrating that the alleged conduct was common to all class members and affirmed the district court's order denying class certification.

Sixth Circuit Affirms Dismissal of ECOA Discrimination Claims. On August 14, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court's dismissal of claims by a borrower of Iraqi origin that a bank violated ECOA when it refused to restructure the borrower's loan. *16630 Southfield L.P. v. Flagstar Bank, F.S.B.*, No. 12-2620, 2013 WL 4081909 (6th Cir. Aug. 14, 2013). In this case, a naturalized citizen of Iraqi origin obtained a loan from the bank for use in real estate ventures. When the borrower did not repay the loan in full when it came due, the bank agreed to

restructure the loan, but later refused a second request to restructure when the borrower again could not repay on time. The borrower claimed the bank did so without explanation and despite new collateral and a guarantee from the borrower's wife. The borrower then sued the bank, alleging that the bank discriminated against him and his family based on their national origin. The court held that the borrower's national origin does not itself establish the requisite inference of discrimination and the borrower failed to allege other facts sufficient to support that inference. The court explained that despite the borrower's new collateral and guarantee, "banks often refuse to provide secured loans," and in this case common sense suggests the bank did so not based on discrimination but because the borrower failed to pay the initial loan on time. Further, the court held that the bank's refusal to explain its decision does not itself suggest discrimination and the borrower failed to identify any similarly situated individuals whom the bank treated better. The court affirmed the district court's dismissal.

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FIRM NEWS

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.

Andrew Sandler will speak on fair lending at the Compliance Testing Manager's Annual Conference in Minneapolis, MN on September 19, 2013.

Ben Olson will speak at the National Mortgage News Annual Mortgage Regulatory Forum taking place September 23-24 in Arlington, Virginia. His panel, scheduled for September 24, is titled, "Navigating Future Regulatory Compliance Challenges and Enhancing Regulatory Relationship Management."

Richard Gottlieb will speak at ACI's Residential Mortgage Litigation and Regulatory Enforcement conference in Dallas, TX on September 27, 2013. He will participate in the panel, "Fair Lending: Managing and Defending Against Claims of Discriminatory Lending and Assessing the Status of 'Disparate Impact' in Lending Litigation and Enforcement," and will speak specifically on UDAAP interplay with fair lending enforcement.

Jeffrey Naimonwill participate in the American Bar Association's Consumer Financial Services Basics seminar on September 30, 2013. Mr. Naimon will speak on "Truth-in-Lending" and address key consumer financial services disclosure regulations and the future of disclosures as a regulatory technique.

Andrew Sandler will speak at the Mortgage Bankers Association's Regulatory Compliance Conference taking place September 29 - October 1, 2013 in Washington, DC. His panel, "Litigation and Enforcement Trends," is scheduled for September 30.

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.

Andrew Sandler will be a panelist at the CRA and Fair Lending Colloquium taking place in Orlando, FL from November 3 - 6, 2013. He will participate on the panel, "Cool Head, Hot Topics: Reform Impact, Oversight Trends, and Regulator Expectations Realigning Priorities to Today's Hottest Trends," which will discuss recent Congressional and regulatory actions affecting the financial services industry

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."

Richard Gottlieb will speak at ACI's Bank and Non-Bank Forum on Mortgage Servicing Compliance taking place Thursday, November 21 - 22, 2013 in Washington, DC. His panel, "When Is a Residential Mortgage Loan Servicer Considered a Debt-Collector and Thus Potentially Subject to Liability for Violations of the FDCPA," will analyze federal and state laws relating to mortgage

servicers and any potential inconsistencies, discuss the requirements for mortgage servicers who qualify as a debt collectors, and examine how to avoid violations under the FDCPA when servicing mortgage loans.

FIRM PUBLICATIONS

Margo Tank, Sara Emley, and David Whitaker published "A Brief Guide to Using Electronic Signatures in Securities Transactions" in the July-August 2013 issue of Practical Compliance and Risk Management for the Securities Industry.

John Redding authored "How the CFPB's Servicing Rules Apply to Small Servicers," which was published by BankNews Mobile on July 1, 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 by Law360 on July 12, 2013.

Jeffrey Naimon and Valerie Hletko published "HUD Sets the Stage for FCA Claims against Fund Recipients," in Law360 on July 23, 2013.

Margo Tank was interviewed for Law360's Rainmaker Q&A series on July 23, 2013.

Joseph Reilly and Shara Chang published "An Overview of the CFPB's Ability-to-Repay/Qualified Mortgage Rule" in the July 2013 issue of the Banking & Financial Services Policy Report.

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.

Jonice Gray Tucker and Amanda Raines authored "The CFPB's Amicus Program - Friend or Foe?" for the August 6, 2013 issue of BNA's Banking Report.

Valerie Hletko and Sarah Hager authored "Which One of Us is the Service Provider? The Dodd-Frank Act's Infinite Loop of Oversight," which was published on August 9, 2013 in LexisNexis Emerging Issues Analysis.

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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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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dispute resolution procedures, (ii) implement reasonable procedures to ensure the accuracy of information the firm provided to retailers, (iii) create a streamlined process for consumers to obtain free annual reports, and (iv) implement reasonable written policies and procedures regarding the accuracy and integrity of information it furnishes to other CRAs. This is the first FTC action alleging violations of the Furnisher Rule, which took effect on July 1, 2010. To resolve the FTC's allegations, the CRA, without admitting any violations of the law, will pay $3.5 million and is required to comply with the Furnisher Rule and maintain a streamlined process so that consumers can request their free annual reports.

PAYMENTS

Senate Committee Expands Review of Virtual Currency Policies. On August 12, Senators Tom Carper (D-DE) and Tom Coburn (R-OK), the leaders of the Senate Committee on Homeland Security and Government Affairs, sent a letter to Secretary of Homeland Security Janet Napolitano regarding federal virtual currency policy. The committee reportedly sent similar letters to the DOJ, the Federal Reserve Board, the Treasury Department, the SEC, the CFTC, and the OMB. Citing a federal court's recent holding that virtual currency Bitcoin is money or currency for the purpose of determining jurisdiction under the Securities Act of 1933, as well as other recent developments related to virtual currencies, the lawmakers seek information about (i) the agencies' existing policies on virtual currencies, (ii) coordination among federal or state entities related to the treatment of virtual currencies, and (iii) "any plans" "strategies" or "ongoing initiatives" regarding virtual currencies. This recent scrutiny of virtual currencies follows regulatory and enforcement actions taken earlier this year, including guidance issued by FinCEN and federal criminal charges against a digital currency issuer and money transfer system. For a review of those actions and other state and federal regulatory challenges facing emerging payment providers, please see a recent article by BuckleySandler attorneys Margo Tank and Ian Spear.

New York Considering Virtual Currency Regulations; Issues Subpoenas to Bitcoin-Associated Companies. On August 12, New York Department of Financial Services (NY DFS) Superintendent Benjamin Lawsky issued a notice of inquiry about the "appropriate regulatory guidelines that [the NY DFS] should put in place for virtual currencies." The NY DFS notes the emergence of Bitcoin and other virtual currency as the catalyst for its inquiry and states that it already has "conducted significant preliminary work." That preliminary work includes 22 subpoenas the NY DFS reportedly issued last week to companies associated with Bitcoin. The NY DFS is concerned that virtual currency exchangers may be engaging in money transmission as defined in New York. Under existing New York law, and the laws of a majority of other states, companies engaged in money transmission must obtain a license, post collateral, submit to periodic examinations, and comply with anti-money laundering laws. However, the NY DFS also suggests that regulating virtual currency under existing money transmission rules may not be the most beneficial approach. Instead, it is considering "new guidelines that are tailored to the unique characteristics of virtual currencies." The NY DFS notice does not provide any timeline for further action on these issues.

INSURANCE

Illinois Enacts Auto Ancillary Products Bill. On August 9, Illinois enacted HB 1460, which expands the definition of "service contract" in the state's Insurance Code to include ancillary auto service contracts - e.g. contracts related to the repair or replacement of tires, repair of certain damage to motor vehicles, or that provide for protective systems applied to a vehicle. By expanding the definition, the new law requires any provider of such ancillary products operating in Illinois to register with the Illinois Department of Insurance, pay an annual registration fee, and to designate an individual for service of process. Ancillary auto product providers also will be subject to, among

other things, financial requirements, disclosure rules, and record keeping requirements, and will be subject to examination and enforcement by the Illinois Department of Insurance. The changes take effect on January 1, 2014.

E-COMMERCE

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