Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

August 25, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Deputy Enforcement Director Discusses Enforcement Priorities. On August 22, C. Hunter Wiggins, the CFPB's Deputy Enforcement Director for Policy and Strategy, spoke to the D.C. Bar Antitrust and Consumer Law Section at a session titled "The Consumer Financial Protection Bureau's Enforcement Priorities." Mr. Wiggins explained that his team, which reports to the CFPB's Director of Enforcement, Kent Markus, is responsible for evaluating and setting strategic priorities that will allow the Bureau to be a proactive organization. In addition, the Enforcement Office has several "Issue Teams," which include members of the Policy and Strategy team and other Enforcement staff. Each of the "Issue Teams" is focused on one particular market, such as mortgage servicing or credit cards, and is responsible for identifying problems in those markets that should be prioritized for enforcement action. The criteria used include: (i) the number of consumers potentially impacted by a practice; (ii) the period of time that practice has been in place (including whether the practice is ongoing); (iii) the amount of harm to consumers; (iv) whether the practice targets a vulnerable population; (v) whether consumers have the ability to avoid the practice through shopping; (vi) whether the practice results in market distortions (such as a "race to the bottom" or competitive harm to legitimate businesses that do not engage in the practice); and (vii) barriers to other solutions (such the lack of a private right of action). See our full report on this event, including a review of how the Bureau allocates its enforcement resources.

CFPB Issues Report on Examination Findings, Other Supervisory Activities. On August 21, the CFPB released its summer 2013 Supervisory Highlights report, which covers supervisory activity from November 2012 through June 2013. This is the second such report the CFPB has released; the first report was released in October 2012 and covered activity from July 2011 through September 2012. The report provides a brief review of the CFPB's public enforcement actions and non-public supervisory actions and developments in the supervision program, including the issuance of bulletins, the issuance of new fair lending examination procedures, and the reorganization of supervision staff. The report also reviews the CFPB's risk-based approach to examinations, including the "Institution Product Lines" approach, and outlines the factors that influence examination priorities. The report does not identify any planned supervisory activities. The bulk of the report, however, summarizes the CFPB's examination findings. Read more...

CFPB Announces Suit Against Debt Settlement Firm. On August 20, the CFPB announced an enforcement action against a debt settlement company for violations of the Telemarketing Sales Rule and the Dodd-Frank Act. The complaint alleges that the company disguised illegal upfront fees charged for debt-relief services as bankruptcy-related charges and deceived consumers into believing they would become debt free when only "a tiny fraction" of its customers actually do. The enforcement action follows a lawsuit filed against the CFPB on July 22, in which the same debt settlement company and an attorney jointly accused the CFPB of "grossly overreaching its authority" in the investigation on which the enforcement action is based.

FHFA Plans Enhanced Oversight of Mortgage Servicing Transfers. On August 22, the FHFA Office of Inspector General (OIG) issued a report on its review of the FHFA's oversight of Fannie Mae's January 2013 representation and warranty settlement with a mortgage originator and the FHFA's related approval of the sale of certain of the originator's mortgage servicing rights (MSR) to specialty servicers. The OIG reviewed the process by which the FHFA assessed and approved the MSR transfer and concluded that the FHFA's review of the MSR transfer did not reflect the "depth of analysis that likely would have been accorded had FHFA followed a process comparable to that used in its newly established process for reviewing mortgage repurchase . . . settlements." As such, the OIG determined that the FHFA should establish a formal review process for "compensatory fee settlements and significant mortgage servicing rights transfers." In a letter attached to the report, the FHFA concurred with the OIG's recommendation, and committed to establish guidelines for compensatory fee settlements and significant MSR transfers by January 31, 2014.

FDIC to Consider QRM Proposal Next Week. This week, the FDIC released the agenda for an August 28, 2013 Board Meeting at which the Board will consider the re-proposal of a rule to implement the credit risk retention requirements of the Dodd-Frank Act, including provisions regarding "qualified residential mortgages" or QRMs. The FDIC and other federal banking and housing agencies originally proposed a rule in April 2011 that would have required sponsors of asset-backed securities (ABS) to retain at least five percent of the credit risk of the assets underlying the securities. Exemptions to the proposed rule included U.S. government-guaranteed ABS and mortgage-backed securities that are collateralized exclusively by residential mortgages that qualify as QRMs. The proposed rule would have established a definition of QRMs incorporating criteria designed to ensure that such QRMs were of very high credit quality, including a 20% down payment requirement or a requirement that the borrower's debt-to-income ratio not exceed 36%. It recently has been reported that, in response to overwhelming objections from industry participants, the re-proposed rule will loosen those standards and align the QRM definition with the CFPB's qualified mortgage or QM definition.

Senator Warren Presses DOJ on National Mortgage Servicing Settlement FHA-Related Releases. On August 21, Senator Elizabeth Warren (D-MA) sent a letter to Attorney General Eric Holder raising concerns about the provisions of the National Mortgage Settlement that relate to the government's release of potential FHA-related False Claims Act-based claims against the settling servicers. Senator Warren's letter questions the settlement amount that the government obtained for the release of such claims. The Senator calls for a "clearer and more public accounting of the [alleged] damages FHA incurred" as a result of the settling servicers' conduct, and presses DOJ more broadly on its enforcement approach to large financial institutions. Senator Warren is seeking information and documents relating to the DOJ's assessment of any potential FHA claims and the process by which it agreed to settle those claims.

Fannie Mae, Freddie Mac Update Selling Policies Based on CFPB QM Rule. On August 20, Fannie Mae issued Announcement SEL-2013-06 and Freddie Mac published Bulletin 2013-16, both of which update numerous selling requirements in response to the CFPB's final Ability-to-

Repay/Qualified Mortgage (ATR/QM) rule. As promised in their July 2013 notices to sellers, the issuances (i) detail new mortgage eligibility requirements (e.g., retirement of mortgages with original maturities in excess of 30 years and making mortgages with prepayment penalties ineligible for sale) (ii) revise thresholds for points and fees, (iii) revise higher-priced mortgage loans eligibility requirements, and (iv) remind sellers of other policies, including those related to the representation and warranty framework announced in September 2012. The changes take effect when the ATR/QM rule goes into effect on January 10, 2014.

Freddie Mac Updates SCRA Servicing Requirements. On August 15, Freddie Mac issued Bulletin 2013-05, which, among other things,revises requirements relating to the SCRA and similar state laws and explains servicer responsibilities to effectively implement military relief legal protections. Specifically, Freddie Mac eliminated the requirement that servicers collect and report official documentation of a servicemember's disability or death and available government benefits in the event a servicemember dies or becomes disabled while on active duty. In addition, Freddie Mac added a new guide section to include the additional foreclosure relief Freddie Mac provides to servicemembers and their dependents, and repurposed another guide section to remind servicers of their responsibilities to evaluate servicemembers and their dependents for the most appropriate relief or workout option from Freddie Mac's existing options when a servicemember or dependent: (i) does not qualify for mortgage relief under the provisions of the SCRA or similar state laws; or (ii) qualifies for mortgage relief under the provisions of the SCRA or similar state law, but chooses to explore other relief options.

HUD Issues Three Mortgagee Letters. On August 15, HUD issued three mortgagee letters to announce various changes related to the origination of FHA-insured mortgage loans. Effective for case numbers assigned on or after October 15, 2013, Mortgagee Letter 2013-24 (i) sets forth documentation requirements for conducting credit analysis of collections and judgments, (ii) requires a specified capacity analysis of collection accounts with an aggregate balance equal to or greater than $2,000, (iii) details the required treatment of judgments, and (iv) revises the FHA's policy on manual downgrades for applications with disputed accounts to reflect the risk associated with derogatory and non-derogatory disputed accounts for factors such as age and size of outstanding balance. In Mortgagee Letter 2013-25, HUD updates FHA's TOTAL Mortgage Scorecard User Guide to reflect the changes announced in Mortgagee Letter 2013-24. Finally, Mortgagee Letter 2013-26 loosens eligibility requirements for certain borrowers adversely impacted by the recession. Specifically, the letter allows for the consideration of borrowers who have experienced a loss of employment or income, or a combination of both, and can document that: (i) certain credit impairments were the result of a loss of employment or a significant loss of household income beyond the borrower's control, (ii) the borrower has demonstrated full recovery from the event, and (iii) the borrower has completed housing counseling.

Federal Reserve Board Paper Reviews Large Bank Capital Planning. On August 19, the Federal Reserve Board released a paper that details its expectations for internal capital planning at large bank holding companies and describes the range of practices the Board has observed during the stress test exercises conducted to date. The Federal Reserve conducts the stress tests annually to assess companies' capital planning processes and ensure that the processes account for unique risks and result in sufficient capital to enable the institutions to continue lending to households and businesses during times of economic and financial stress. The Board stated that the paper is intended to promote better capital planning at bank holding companies generally, and to provide greater clarity on the standards against which those practices are evaluated as part of the stress test exercise. The Board found that firms needed to improve a number of aspects of their capital planning processes, including their accounting for risks most relevant to the specific business activities, their methods of projecting the effect of certain stresses on their capital needs, and their governance of the capital planning processes, and emphasized that bank holding companies, when

considering their capital needs, should focus on the specific risks they could face under potentially stressful conditions.

Federal Reserve Board Issues Final Large Bank Assessment Rule. On August 16, the Federal Reserve Board issued a final rule establishing the process by which it will assess annual fees for its supervision and regulation of large financial companies. The Dodd-Frank Act directed the Board to collect assessment fees equal to the expenses it estimates are necessary or appropriate to supervise and regulate bank holding companies and savings and loan holding companies with $50 billion or more in total consolidated assets and nonbank financial companies designated by the Financial Stability Oversight Council. The final rule outlines how the Board will (i) determine which companies are assessed, (ii) estimate the total anticipated expenses, (iii) determine the assessment for each of the covered companies, and (iv) bill for and collect the assessment from the companies. For the 2012 assessment period, the first year for which assessment fees will be collected, the Board will notify each company of the amount of its assessment when the rule becomes effective in late October. Payments for the 2012 assessment period will be due no later than December 15, 2013. The Board estimates it will collect about $440 million for the 2012 assessment period. Beginning with the 2013 assessment period, the Federal Reserve will notify each company of the amount of its assessment fee no later than June 30 of the year following the assessment period. Payments will be due by September 15.

Prudential Regulators Propose Leverage Ratio Rule. On August 20, the Federal Reserve Board, the OCC, and the FDIC proposed a rule to strengthen the leverage ratio standards for the largest U.S. banking organizations. The proposed rule is the same as that approved last month by the FDIC and the OCC. The rule would require bank holding companies with more than $700 billion in consolidated total assets or $10 trillion in assets under custody to maintain a tier 1 capital leverage buffer of at least 2% above the minimum supplementary leverage ratio requirement of 3%, for a total of 5%. Failure to exceed the 5% ratio would subject covered companies to restrictions on discretionary bonus payments and capital distributions. The proposed rule also would require insured depository institutions of covered holding companies to meet a 6% supplementary leverage ratio to be considered "well capitalized" for prompt corrective action purposes. The proposal suggests a phase-in period for the rule with an effective date of January 1, 2018. Comments on the proposal are due by October 21, 2013.

OCC Updates Handbook to Reflect Current CRE Lending Guidance. On August 20, the OCC issued bulletin OCC 2013-19, which attaches the Commercial Real Estate Lending booklet of the Comptroller's Handbook to replace the OCC's Commercial Real Estate and Construction Lending booklet. The new booklet reflects guidance issued since the prior booklet was released in 1995. That updated guidance relates to prudent loan workouts, management of concentrations, stress testing, updated interagency appraisal guidelines, and statutory and regulatory developments in environmental risk management. The booklet also incorporates discussions of statutes and regulations governing federal savings associations.

OCC Issues Bulletin on Lending Limits Rule. On August 15, the OCC issued a bulletin, OCC 2013-17, regarding its final lending limits rule. In June 2012, the OCC promulgated an interim final rule to apply its existing lending limits rule to certain credit exposures arising from derivative transactions and securities financing transactions, as required by the Dodd-Frank Act. With the interim final rule and subsequent actions, the OCC extended the compliance date while it accepted comments and prepared a final rule. As explained in the bulletin, the final rule outlines permissible methods available to banks to measure credit exposures arising from derivative transactions and securities financing transactions. For derivative transactions, banks can generally choose to measure credit exposure through (i) the Conversion Factor Matrix Method, which uses a lookup table that locks in the attributable exposure at the execution of the transaction, (ii) the Current

Exposure Method, which replaces the Remaining Maturity Method included in the interim final rule and provides a more precise calculation of credit exposure, or (iii) an OCC-approved internal model. For securities financing transactions, the final rule specifically exempts securities financing transactions relating to Type I securities and for other securities financing transactions allows banks to (i) lock in the attributable exposure based on the type of transaction, (ii) use an OCC-approved internal model, or (iii) use the Basel Collateral Haircut Method, which applies standard supervisory haircuts for measuring counterparty credit risk for such transactions under the capital rules' Basel II Advanced Internal Ratings-Based Approach or the Basel III Advanced Approaches. The final rule also extends the compliance period through October 1, 2013.

STATE ISSUES

Tribes Seek to Halt New York Internet Lending Investigation; Meet with DOJ on Parallel Investigation. On August 21, two Native American tribes and related entities announced a lawsuit against the New York Department of Financial Services (DFS) in response to its recent effort to halt the offering of online payday loans to New York borrowers. On August 6, the DFS, among other related actions, sent letters to 35 online lenders, including lenders affiliated with Native American tribes, demanding that they cease and desist offering allegedly illegal payday loans to New York borrowers. The tribes argue that the DFS actions are "intimidation tactics" that will deny the tribes' rights as sovereign entities and will result in irreparable injury to the tribes absent injunctive relief. The tribes claim that the investigation already has led to "significant harm" to tribes' business relationships, which impacts the funding of tribal government operations. The suing tribes also met with the DOJ on August 21 regarding its Internet lending enforcement activities. The tribes sent a follow up letter quoting DOJ officials who reportedly stated they are concerned only with financial fraud, and that the DOJ's actions are not aimed at tribal short-term lending businesses. The letter also indicates that tribal governments will join the Financial Fraud Enforcement Task Force's Consumer Protection Working Group.

COURTS

Eighth Circuit Extends Recent TILA Rescission Holding. On August 19, the U.S. Court of Appeals for the Eighth Circuit held that borrowers facing foreclosure were required to file suit prior to the foreclosure sale to complete the exercise of their right to rescind under TILA. *Hartman v. Smith*, No. 12-1947, 2013 WL 4407058 (8th Cir. Aug. 19, 2013). In this case, the bank moved to foreclose after the borrowers failed to make payments to a real estate financing firm with which the borrowers had placed mortgages on the property. After the property was sold at a sheriff's sale, the borrowers sued the bank and the financing firm, seeking, among other things, to rescind the loans under TILA on the basis that they provided written notice of rescission prior to the foreclosure sale. Applying its recent holding in *Keiran v. Home Capital, Inc.*, 720 F.3d 721 (8th Cir. Jul. 12, 2013) that a borrower seeking rescission under TILA must file suit within three years to preserve the borrower's right of rescission, the court again held that providing notice under TILA is a necessary but not sufficient predicate to exercising the right to rescind. Here, where the foreclosure sale occurred within the three-year rescission period, the court held that the borrowers were required to file a rescission action in a court prior to the foreclosure sale. Because they failed to do so, the court held that their rescission claim was barred.

Southern District of New York Endorses Use of FIRREA in Mortgage Fraud Cases. On August 16, the U.S. District Court for the Southern District of New York issued a written opinion in support of its May 8, 2013 dismissal of claims for damages and civil penalties under the False Claims Act (FCA) brought by the federal government against a mortgage lender alleged to have sold defective loans to Freddie Mac and Fannie Mae while representing that the loans complied with the enterprises' requirements. *U.S. v. Countrywide Fin. Corp.*, No. 12-1422, 2013 WL 4437232

(S.D.N.Y. Aug. 16, 2013). Although it dismissed the FCA claims, the court did not dismiss the government's claims under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) that the lender's conduct "affected" a federally insured financial institution - the lender itself. In its opinion, the court rejected the lender's arguments that FIRREA's legislative history and policy considerations contradict the government's position, and instead applied a plain meaning analysis and held that the lender allegedly has paid billions of dollars to settle repurchase claims by Fannie Mae and Freddie Mac as a result of the alleged fraud, which "affected" the lender itself and as such is sufficient to sustain the FIRREA counts. The court also rejected the lender's argument that the government failed to adequately allege the FIRREA predicate offenses of mail fraud and wire fraud because the alleged misrepresentations were "mere breaches of contract that cannot separately support an action for fraud," holding that the argument is premised on the "fundamental error" that "mail fraud and wire fraud are subject to the same arcane limitations as common law fraud." Notably, the court dismissed the government's FCA claims "with prejudice" because the government failed to plead fraud with particularity with respect to loans sold after the enactment of the Fraud Enforcement and Recovery Act of 2009, which extended the FCA to cover indirect recipients of federal funds.

Tenth Circuit Asks Oklahoma Supreme Court to Decide Application of Internet Based Terms to Written Contract. On August 15, the U.S. Court of Appeals for the Tenth Circuit asked the Oklahoma Supreme Court to decide whether a written consumer contract for the sale of goods incorporates by reference a separate document entitled "Terms of Sale" available on the seller's website, when the contract states that it is "subject to" the seller's "Terms of Sale" but does not specifically reference the website. *Walker v. BuildDirect.com Techs., Inc.*, No. 12-6261, slip op. (10th Cir. Aug. 15, 2013). In this case, the plaintiffs filed a putative class action over allegedly defective home building products they ordered from the seller by telephone and subsequently agreed to purchase by written contract. The seller moved to compel arbitration, arguing that the written contract for the sale of goods incorporated by reference the Terms of Sale provided on the seller's website, which included an arbitration clause. The district court denied the motion to compel, holding that the contract was ambiguous and that it could not determine as a matter of law that the contract incorporated the Internet-based terms. On appeal, the court noted that, although Oklahoma courts have held that a written contract can incorporate an extrinsic document by reference, the state's highest court has not set standards for incorporation by reference that would resolve this case, nor has it addressed a case similar to this one. Finding no precedent in Oklahoma state law, and that the question can be resolved on the undisputed facts presented, the appeals court certified the question to the Oklahoma Supreme Court.

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 the interplay between UDAAP and fair lending enforcement.

Jeffrey Naimon will 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."

James Parkinson will be speaking at ACI's 30th International Conference on the Foreign Corrupt Practices Act on November 19, 2013 in Washington, DC. His topic will be, "Anticipating and Managing Litigation Collateral to an FCPA Investigation: What May Happen when Allegations Become Public."

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, Chicago, 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).

Please visit us at the following locations:

Washington: 1250 24th Street NW, Suite 700, Washington, DC 20037, (202) 349-8000
New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400
Chicago: 155 N. Wacker Drive, Suite 4250, Chicago, IL 60606, (312) 924-4330

Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

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.

For back issues of InfoBytes, please see: http://www.buckleysandler.com/infobytes/infobytes.

InfoBytes is not intended as legal advice to any person or firm. It is provided as a client service and information herein is drawn from various public sources, including other publications.

MORTGAGES

FHFA Plans Enhanced Oversight of Mortgage Servicing Transfers. On August 22, the FHFA Office of Inspector General (OIG) issued a report on its review of the FHFA's oversight of Fannie Mae's January 2013 representation and warranty settlement with a mortgage originator and the FHFA's related approval of the sale of certain of the originator's mortgage servicing rights (MSR) to specialty servicers. The OIG reviewed the process by which the FHFA assessed and approved the MSR transfer and concluded that the FHFA's review of the MSR transfer did not reflect the "depth of analysis that likely would have been accorded had FHFA followed a process comparable to that used in its newly established process for reviewing mortgage repurchase . . . settlements." As such, the OIG determined that the FHFA should establish a formal review process for "compensatory fee settlements and significant mortgage servicing rights transfers." In a letter attached to the report, the FHFA concurred with the OIG's recommendation, and committed to establish guidelines for compensatory fee settlements and significant MSR transfers by January 31, 2014.

FDIC to Consider QRM Proposal Next Week. This week, the FDIC released the agenda for an August 28, 2013 Board Meeting at which the Board will consider the re-proposal of a rule to implement the credit risk retention requirements of the Dodd-Frank Act, including provisions regarding "qualified residential mortgages" or QRMs. The FDIC and other federal banking and housing agencies originally proposed a rule in April 2011 that would have required sponsors of asset-backed securities (ABS) to retain at least five percent of the credit risk of the assets underlying the securities. Exemptions to the proposed rule included U.S. government-guaranteed ABS and mortgage-backed securities that are collateralized exclusively by residential mortgages that qualify as QRMs. The proposed rule would have established a definition of QRMs incorporating criteria designed to ensure that such QRMs were of very high credit quality, including a 20% down payment requirement or a requirement that the borrower's debt-to-income ratio not exceed 36%. It recently has been reported that, in response to overwhelming objections from industry participants, the re-proposed rule will loosen those standards and align the QRM definition with the CFPB's qualified mortgage or QM definition.

Senator Warren Presses DOJ on National Mortgage Servicing Settlement FHA-Related Releases. On August 21, Senator Elizabeth Warren (D-MA) sent a letter to Attorney General Eric Holder raising concerns about the provisions of the National Mortgage Settlement that relate to the government's release of potential FHA-related False Claims Act-based claims against the settling servicers. Senator Warren's letter questions the settlement amount that the government obtained for the release of such claims. The Senator calls for a "clearer and more public accounting of the

[alleged] damages FHA incurred" as a result of the settling servicers' conduct, and presses DOJ more broadly on its enforcement approach to large financial institutions. Senator Warren is seeking information and documents relating to the DOJ's assessment of any potential FHA claims and the process by which it agreed to settle those claims.

Fannie Mae, Freddie Mac Update Selling Policies Based on CFPB QM Rule. On August 20, Fannie Mae issued Announcement SEL-2013-06 and Freddie Mac published Bulletin 2013-16, both of which update numerous selling requirements in response to the CFPB's final Ability-to-Repay/Qualified Mortgage (ATR/QM) rule. As promised in their July 2013 notices to sellers, the issuances (i) detail new mortgage eligibility requirements (e.g., retirement of mortgages with original maturities in excess of 30 years and making mortgages with prepayment penalties ineligible for sale) (ii) revise thresholds for points and fees, (iii) revise higher-priced mortgage loans eligibility requirements, and (iv) remind sellers of other policies, including those related to the representation and warranty framework announced in September 2012. The changes take effect when the ATR/QM rule goes into effect on January 10, 2014.

Freddie Mac Updates SCRA Servicing Requirements. On August 15, Freddie Mac issued Bulletin 2013-05, which, among other things,revises requirements relating to the SCRA and similar state laws and explains servicer responsibilities to effectively implement military relief legal protections. Specifically, Freddie Mac eliminated the requirement that servicers collect and report official documentation of a servicemember's disability or death and available government benefits in the event a servicemember dies or becomes disabled while on active duty. In addition, Freddie Mac added a new guide section to include the additional foreclosure relief Freddie Mac provides to servicemembers and their dependents, and repurposed another guide section to remind servicers of their responsibilities to evaluate servicemembers and their dependents for the most appropriate relief or workout option from Freddie Mac's existing options when a servicemember or dependent: (i) does not qualify for mortgage relief under the provisions of the SCRA or similar state laws; or (ii) qualifies for mortgage relief under the provisions of the SCRA or similar state law, but chooses to explore other relief options.

HUD Issues Three Mortgagee Letters. On August 15, HUD issued three mortgagee letters to announce various changes related to the origination of FHA-insured mortgage loans. Effective for case numbers assigned on or after October 15, 2013, Mortgagee Letter 2013-24 (i) sets forth documentation requirements for conducting credit analysis of collections and judgments, (ii) requires a specified capacity analysis of collection accounts with an aggregate balance equal to or greater than $2,000, (iii) details the required treatment of judgments, and (iv) revises the FHA's policy on manual downgrades for applications with disputed accounts to reflect the risk associated with derogatory and non-derogatory disputed accounts for factors such as age and size of outstanding balance. In Mortgagee Letter 2013-25, HUD updates FHA's TOTAL Mortgage Scorecard User Guide to reflect the changes announced in Mortgagee Letter 2013-24. Finally, Mortgagee Letter 2013-26 loosens eligibility requirements for certain borrowers adversely impacted by the recession. Specifically, the letter allows for the consideration of borrowers who have experienced a loss of employment or income, or a combination of both, and can document that: (i) certain credit impairments were the result of a loss of employment or a significant loss of household income beyond the borrower's control, (ii) the borrower has demonstrated full recovery from the event, and (iii) the borrower has completed housing counseling.

Eighth Circuit Extends Recent TILA Rescission Holding. On August 19, the U.S. Court of Appeals for the Eighth Circuit held that borrowers facing foreclosure were required to file suit prior to the foreclosure sale to complete the exercise of their right to rescind under TILA. *Hartman v. Smith*, No. 12-1947, 2013 WL 4407058 (8th Cir. Aug. 19, 2013). In this case, the bank moved to foreclose after the borrowers failed to make payments to a real estate financing firm with which the borrowers

had placed mortgages on the property. After the property was sold at a sheriff's sale, the borrowers sued the bank and the financing firm, seeking, among other things, to rescind the loans under TILA on the basis that they provided written notice of rescission prior to the foreclosure sale. Applying its recent holding in *Keiran v. Home Capital, Inc.*, 720 F.3d 721 (8th Cir. Jul. 12, 2013) that a borrower seeking rescission under TILA must file suit within three years to preserve the borrower's right of rescission, the court again held that providing notice under TILA is a necessary but not sufficient predicate to exercising the right to rescind. Here, where the foreclosure sale occurred within the three-year rescission period, the court held that the borrowers were required to file a rescission action in a court prior to the foreclosure sale. Because they failed to do so, the court held that their rescission claim was barred.

Southern District of New York Endorses Use of FIRREA in Mortgage Fraud Cases. On August 16, the U.S. District Court for the Southern District of New York issued a written opinion in support of its May 8, 2013 dismissal of claims for damages and civil penalties under the False Claims Act (FCA) brought by the federal government against a mortgage lender alleged to have sold defective loans to Freddie Mac and Fannie Mae while representing that the loans complied with the enterprises' requirements. *U.S. v. Countrywide Fin. Corp.*, No. 12-1422, 2013 WL 4437232 (S.D.N.Y. Aug. 16, 2013). Although it dismissed the FCA claims, the court did not dismiss the government's claims under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) that the lender's conduct "affected" a federally insured financial institution - the lender itself. In its opinion, the court rejected the lender's arguments that FIRREA's legislative history and policy considerations contradict the government's position, and instead applied a plain meaning analysis and held that the lender allegedly has paid billions of dollars to settle repurchase claims by Fannie Mae and Freddie Mac as a result of the alleged fraud, which "affected" the lender itself and as such is sufficient to sustain the FIRREA counts. The court also rejected the lender's argument that the government failed to adequately allege the FIRREA predicate offenses of mail fraud and wire fraud because the alleged misrepresentations were "mere breaches of contract that cannot separately support an action for fraud," holding that the argument is premised on the "fundamental error" that "mail fraud and wire fraud are subject to the same arcane limitations as common law fraud." Notably, the court dismissed the government's FCA claims "with prejudice" because the government failed to plead fraud with particularity with respect to loans sold after the enactment of the Fraud Enforcement and Recovery Act of 2009, which extended the FCA to cover indirect recipients of federal funds.

BANKING

Federal Reserve Board Paper Reviews Large Bank Capital Planning. On August 19, the Federal Reserve Board released a paper that details its expectations for internal capital planning at large bank holding companies and describes the range of practices the Board has observed during the stress test exercises conducted to date. The Federal Reserve conducts the stress tests annually to assess companies' capital planning processes and ensure that the processes account for unique risks and result in sufficient capital to enable the institutions to continue lending to households and businesses during times of economic and financial stress. The Board stated that the paper is intended to promote better capital planning at bank holding companies generally, and to provide greater clarity on the standards against which those practices are evaluated as part of the stress test exercise. The Board found that firms needed to improve a number of aspects of their capital planning processes, including their accounting for risks most relevant to the specific business activities, their methods of projecting the effect of certain stresses on their capital needs, and their governance of the capital planning processes, and emphasized that bank holding companies, when considering their capital needs, should focus on the specific risks they could face under potentially stressful conditions.

Federal Reserve Board Issues Final Large Bank Assessment Rule. On August 16, the Federal Reserve Board issued a final rule establishing the process by which it will assess annual fees for its supervision and regulation of large financial companies. The Dodd-Frank Act directed the Board to collect assessment fees equal to the expenses it estimates are necessary or appropriate to supervise and regulate bank holding companies and savings and loan holding companies with $50 billion or more in total consolidated assets and nonbank financial companies designated by the Financial Stability Oversight Council. The final rule outlines how the Board will (i) determine which companies are assessed, (ii) estimate the total anticipated expenses, (iii) determine the assessment for each of the covered companies, and (iv) bill for and collect the assessment from the companies. For the 2012 assessment period, the first year for which assessment fees will be collected, the Board will notify each company of the amount of its assessment when the rule becomes effective in late October. Payments for the 2012 assessment period will be due no later than December 15, 2013. The Board estimates it will collect about $440 million for the 2012 assessment period. Beginning with the 2013 assessment period, the Federal Reserve will notify each company of the amount of its assessment fee no later than June 30 of the year following the assessment period. Payments will be due by September 15.

Prudential Regulators Propose Leverage Ratio Rule. On August 20, the Federal Reserve Board, the OCC, and the FDIC proposed a rule to strengthen the leverage ratio standards for the largest U.S. banking organizations. The proposed rule is the same as that approved last month by the FDIC and the OCC. The rule would require bank holding companies with more than $700 billion in consolidated total assets or $10 trillion in assets under custody to maintain a tier 1 capital leverage buffer of at least 2% above the minimum supplementary leverage ratio requirement of 3%, for a total of 5%. Failure to exceed the 5% ratio would subject covered companies to restrictions on discretionary bonus payments and capital distributions. The proposed rule also would require insured depository institutions of covered holding companies to meet a 6% supplementary leverage ratio to be considered "well capitalized" for prompt corrective action purposes. The proposal suggests a phase-in period for the rule with an effective date of January 1, 2018. Comments on the proposal are due by October 21, 2013.

OCC Updates Handbook to Reflect Current CRE Lending Guidance. On August 20, the OCC issued bulletin OCC 2013-19, which attaches the Commercial Real Estate Lending booklet of the Comptroller's Handbook to replace the OCC's Commercial Real Estate and Construction Lending booklet. The new booklet reflects guidance issued since the prior booklet was released in 1995. That updated guidance relates to prudent loan workouts, management of concentrations, stress testing, updated interagency appraisal guidelines, and statutory and regulatory developments in environmental risk management. The booklet also incorporates discussions of statutes and regulations governing federal savings associations.

OCC Issues Bulletin on Lending Limits Rule. On August 15, the OCC issued a bulletin, OCC 2013-17, regarding its final lending limits rule. In June 2012, the OCC promulgated an interim final rule to apply its existing lending limits rule to certain credit exposures arising from derivative transactions and securities financing transactions, as required by the Dodd-Frank Act. With the interim final rule and subsequent actions, the OCC extended the compliance date while it accepted comments and prepared a final rule. As explained in the bulletin, the final rule outlines permissible methods available to banks to measure credit exposures arising from derivative transactions and securities financing transactions. For derivative transactions, banks can generally choose to measure credit exposure through (i) the Conversion Factor Matrix Method, which uses a lookup table that locks in the attributable exposure at the execution of the transaction, (ii) the Current Exposure Method, which replaces the Remaining Maturity Method included in the interim final rule and provides a more precise calculation of credit exposure, or (iii) an OCC-approved internal model.

For securities financing transactions, the final rule specifically exempts securities financing transactions relating to Type I securities and for other securities financing transactions allows banks to (i) lock in the attributable exposure based on the type of transaction, (ii) use an OCC-approved internal model, or (iii) use the Basel Collateral Haircut Method, which applies standard supervisory haircuts for measuring counterparty credit risk for such transactions under the capital rules' Basel II Advanced Internal Ratings-Based Approach or the Basel III Advanced Approaches. The final rule also extends the compliance period through October 1, 2013.

CONSUMER FINANCE

CFPB Deputy Enforcement Director Discusses Enforcement Priorities. On August 22, C. Hunter Wiggins, the CFPB's Deputy Enforcement Director for Policy and Strategy, spoke to the D.C. Bar Antitrust and Consumer Law Section at a session titled "The Consumer Financial Protection Bureau's Enforcement Priorities." Mr. Wiggins explained that his team, which reports to the CFPB's Director of Enforcement, Kent Markus, is responsible for evaluating and setting strategic priorities that will allow the Bureau to be a proactive organization. In addition, the Enforcement Office has several "Issue Teams," which include members of the Policy and Strategy team and other Enforcement staff. Each of the "Issue Teams" is focused on one particular market, such as mortgage servicing or credit cards, and is responsible for identifying problems in those markets that should be prioritized for enforcement action. The criteria used include: (i) the number of consumers potentially impacted by a practice; (ii) the period of time that practice has been in place (including whether the practice is ongoing); (iii) the amount of harm to consumers; (iv) whether the practice targets a vulnerable population; (v) whether consumers have the ability to avoid the practice through shopping; (vi) whether the practice results in market distortions (such as a "race to the bottom" or competitive harm to legitimate businesses that do not engage in the practice); and (vii) barriers to other solutions (such the lack of a private right of action). See our full report on this event, including a review of how the Bureau allocates its enforcement resources.

CFPB Issues Report on Examination Findings, Other Supervisory Activities. On August 21, the CFPB released its summer 2013 Supervisory Highlights report, which covers supervisory activity from November 2012 through June 2013. This is the second such report the CFPB has released; the first report was released in October 2012 and covered activity from July 2011 through September 2012. The report provides a brief review of the CFPB's public enforcement actions and non-public supervisory actions and developments in the supervision program, including the issuance of bulletins, the issuance of new fair lending examination procedures, and the reorganization of supervision staff. The report also reviews the CFPB's risk-based approach to examinations, including the "Institution Product Lines" approach, and outlines the factors that influence examination priorities. The report does not identify any planned supervisory activities. The bulk of the report, however, summarizes the CFPB's examination findings. Read more...

CFPB Announces Suit Against Debt Settlement Firm. On August 20, the CFPB announced an enforcement action against a debt settlement company for violations of the Telemarketing Sales Rule and the Dodd-Frank Act. The complaint alleges that the company disguised illegal upfront fees charged for debt-relief services as bankruptcy-related charges and deceived consumers into believing they would become debt free when only "a tiny fraction" of its customers actually do. The enforcement action follows a lawsuit filed against the CFPB on July 22, in which the same debt settlement company and an attorney jointly accused the CFPB of "grossly overreaching its authority" in the investigation on which the enforcement action is based.

Tribes Seek to Halt New York Internet Lending Investigation; Meet with DOJ on Parallel Investigation. On August 21, two Native American tribes and related entities announced a lawsuit

against the New York Department of Financial Services (DFS) in response to its recent effort to halt the offering of online payday loans to New York borrowers. On August 6, the DFS, among other related actions, sent letters to 35 online lenders, including lenders affiliated with Native American tribes, demanding that they cease and desist offering allegedly illegal payday loans to New York borrowers. The tribes argue that the DFS actions are "intimidation tactics" that will deny the tribes' rights as sovereign entities and will result in irreparable injury to the tribes absent injunctive relief. The tribes claim that the investigation already has led to "significant harm" to tribes' business relationships, which impacts the funding of tribal government operations. The suing tribes also met with the DOJ on August 21 regarding its Internet lending enforcement activities. The tribes sent a follow up letter quoting DOJ officials who reportedly stated they are concerned only with financial fraud, and that the DOJ's actions are not aimed at tribal short-term lending businesses. The letter also indicates that tribal governments will join the Financial Fraud Enforcement Task Force's Consumer Protection Working Group.

E-COMMERCE

Tenth Circuit Asks Oklahoma Supreme Court to Decide Application of Internet Based Terms to Written Contract. On August 15, the U.S. Court of Appeals for the Tenth Circuit asked the Oklahoma Supreme Court to decide whether a written consumer contract for the sale of goods incorporates by reference a separate document entitled "Terms of Sale" available on the seller's website, when the contract states that it is "subject to" the seller's "Terms of Sale" but does not specifically reference the website. *Walker v. BuildDirect.com Techs., Inc.*, No. 12-6261, slip op. (10th Cir. Aug. 15, 2013). In this case, the plaintiffs filed a putative class action over allegedly defective home building products they ordered from the seller by telephone and subsequently agreed to purchase by written contract. The seller moved to compel arbitration, arguing that the written contract for the sale of goods incorporated by reference the Terms of Sale provided on the seller's website, which included an arbitration clause. The district court denied the motion to compel, holding that the contract was ambiguous and that it could not determine as a matter of law that the contract incorporated the Internet-based terms. On appeal, the court noted that, although Oklahoma courts have held that a written contract can incorporate an extrinsic document by reference, the state's highest court has not set standards for incorporation by reference that would resolve this case, nor has it addressed a case similar to this one. Finding no precedent in Oklahoma state law, and that the question can be resolved on the undisputed facts presented, the appeals court certified the question to the Oklahoma Supreme Court.