Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted as a measure to promote financial stability and protection for consumers through increased regulation of nearly every aspect of the consumer finance industry. In the two years since its enactment, the Dodd-Frank Act has led to significant industry reforms and the promulgation of numerous new laws and regulations. In an effort to stay apprised of these significant industry changes, Burr & Forman's Dodd-Frank Newsletter will serve as a periodic update of recent case law, news, and developments related to the Dodd-Frank Act.

- - RECENT CASES - -

Dodd-Frank Challenges Under the Administrative Procedure Act and Commodity Exchange Act

Investment Company Institute v. U.S. Commodity Futures Trading Commission, --- F. Supp. 2d ---, 2012 WL 6185735 (D.D.C. Dec. 12, 2012).

The U.S. District Court for the District of Columbia recently held that the Commodity Futures Trading Commision ("CFTC") followed the proper procedures in approving rules that regulate registered investment companies ("RICs") under the Dodd-Frank Act.

Plaintiffs Investment Company Institute and Chamber of Commerce of the United States of America filed suit against the Commodity Futures Trading Commission ("CFTC") under the Administrative Procedure Act ("APA") and Commodity Exchange Act ("CEA"). Specifically, Plaintiffs challenged amendments to 17 C.F.R. §§ 4.5 and 4.27, which extend the CFTC's regulation to RICs pursuant to the Dodd-Frank Act. Plaintiffs and the CFTC filed cross-motions for summary judgment.

Between 2003 and Dodd-Frank's enactment, RICs were excluded from the definition of Commodity Pool Operators ("CPOs") and were therefore not required to register with the CFTC. In February 2012, the CFTC issued a final rule amending the definition of CPO to require RICs to register with the CFTC "if the RIC engages in non-hedging commodity trading certain thresholds, or if it makes statements that the CFTC regards as marketing a product as a vehicle for trading in the commodity market." 2012 WL 6185735, at *12 (citing 77 Fed. Reg. at 11,283). The CFTC also added 17 C.F.R. § 4.27, which requires reporting by all registered CPOs. *See* 77 Fed. Reg. at 11,285-86.

First, the Court addressed Plaintiffs' argument that the CFTC failed to conduct a cost-benefit analysis of the final rule and failed to justify its revisions to the 2003 version of the rule. The Court determined that the CFTC expressly stated the benefits of registration in the Final Rule, which provides that registration ensures that participants in the derivatives market meet certain standards and gives the general public a means to address wrongful conduct by such participants. *See* 77 Fed. Reg. at 11,277. Further, the Court found that the CFTC stated the benefits of the reporting requirement, which include, among others things, creating transparency in operations of commodity pools and allowing the CFTC to obtain information to assist in tailoring its regulations. *See* 77 Fed. Reg. at 11,281. The Court also found that the CFTC listed eight justifications for the amendment in the final rule and rejected Plaintiffs' argument that the financial crisis and mandate in Dodd-Frank could not serve as justification for the final rule. Accordingly, the Court concluded that the CFTC provided adequate justification for its departure from the 2003 regulation and sufficiently explained the benefits of the final rule. Because the amendments were, in the Court's opinion, a "reasonable response to 'changed circumstances' reflected in legislation and potentially risky financial market activities," the Court also rejected Plaintiffs' argument that the CFTC arbitrarily reversed its 2003 position in violation of the APA. 2012 WL 6185735, at *28.

Turning to Plaintiffs' argument that the CFTC's cost analysis was insufficient, the Court first addressed the contention that the CFTC could not evaluate costs because the CFTC had yet to evaluate costs pending the harmonization of overlapping regulations of the CFTC and Securities and Exchange Commission. The Court noted that the CFTC does not require RICs to comply with reporting requirements in Section 4.5 until the harmonization rule is in effect. *See* 77 Fed. Reg. at 11,252. The Court also relied on *Judulang v. Holder*, 132 S. Ct. 476 (2011), and stated that "if . . . an agency policy is not arbitrary or capricious, but is, as here, sufficiently justified by the agency based upon its evaluation of the relevant statute and context, the mere fact that it carries costs and burdens does not render it violative of the APA." 2012 WL 6185735, at *38. Finding the CFTC's cost-benefit analysis sufficient, the Court held that the agency's actions were not arbitrary and capricious.

Second, Plaintiffs argued that the CFTC failed to comply with the analysis required under Section 15(a) of the CEA, and urged the Court to apply a standard more stringent than the "arbitrary and capricious" standard. The Court found no basis for applying anything other than the "arbitrary and capricious" standard and concluded that the CFTC sufficiently evaluated the costs and benefits of the proposed rule using the five factors in Section 15(a) of the CEA.

Notably, the Court declined to follow a line of cases from the U.S. District Court for the District of Columbia, which have been interpreted to require a higher standard of review for an agency cost-benefit analysis. *See Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *Am. Equity Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010); *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005). The Court distinguished these cases finding that the SEC, unlike the CFTC here, did not consider properly the costs of the proposed rules. Therefore, the Court granted summary judgment in favor of the CFTC and upheld the final rule.

Preemption

Ellsworth v. U.S. Bank, N.A., --- F. Supp. 2d ---, 2012 WL 6176905 (N.D. Cal. Dec. 11, 2012).

Plaintiff Stephen Ellsworth filed a class action against U.S. Bank, N.A. and American Security Insurance Company alleging breach of contract, breach of the covenant of good faith and fair dealing, and other state law claims. Defendants moved to dismiss Ellsworth's complaint.

In support of their motion to dismiss, Defendants argued that Ellsworth's claims were preempted by the National Bank Act ("NBA") and the OCC regulations. Because Ellsworth obtained his mortgage loan on July 2, 2007, the Court applied the preemption standard that was in effect prior to the Dodd-Frank amendments, which operate prospectively and took effect on July 21, 2011. The Court first noted that "states are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's . . . exercise of its federal powers. But when the state prescriptions significantly impair the exercise of authority, . . . the state's regulations must give way." 2012 WL 6176905, at *7. The Court also looked to 12 C.F.R. § 34.4 and stated that the OCC limits the preemptive effect of banks' broad powers to conduct business by categorically excluding certain areas of law that are presumptively not preempted.

Turning to Ellsworth's claims, the Court found that *Martinez v. Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549 (9th Cir. 2010), required it to "consider the conduct on which the claims are based (and not just the categories of the claims)." *Id.* at *8. The Court found that Ellsworth's claim relating to kickbacks challenged the arrangement rather than the fees themselves and concluded that it was a breach of contract claim. Finding that breach of contract claims fall within an exception to NBA preemption, the Court held that Ellsworth's claim as it related to kickbacks was not preempted under the NBA.

Similarly, the Court rejected Defendants' argument that Ellsworth's kickback claims were preempted under the NBA's real estate lending powers. The Court found that the challenged conduct was merely related to real estate lending powers and the kickback claims do not obstruct, impair, or condition a national bank's ability to exercise its real estate lending powers. Accordingly, the Court held that Ellsworth's claims relating to kickbacks were not preempted.

The Court also rejected Defendants' argument that its procedures related to backdating insurance coverage wcpc authorized by 12 C.F.R. § 22.7. Finding that Ellsworth's claims related to kickbacks and backdating were not preempted by the NBA, the Court denied Defendants' motion to dismiss.

Sacco v. Bank of America, N.A., No. 5:12-cv-00006-RLV-DCK, 2012 WL 6566681 (W.D.N.C. Dec. 17, 2012).

Plaintiff Darlene Sue Sacco filed suit against Bank of America, N.A. alleging violations of the North Carolina Debt Collection Act ("NCDCA"), N.C. Gen. Stat. § 75-50 *et seq.*, and the Telephone Consumer Protection Act ("TCPA"). Bank of America moved to dismiss Sacco's claims.

Regarding Sacco's state law claims, Bank of America argued that they were preempted by the NBA. The Court first addressed whether the Dodd-Frank Act applied retroactively to Sacco's claims because Sacco obtained her loan before the effective date of July 21, 2011. The Court stated that the Dodd-Frank Act codified the Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner*, 517 U.S. 25 (1996), and, thus, did not change the law substantively so as to render an impermissible retroactive effect.

Additionally, Bank of America argued that the OCC's corresponding regulations preempted Sacco's claims under the NCDCA because 12 C.F.R. § 34.4(a) allows national banks to conduct certain loan servicing activities without regard to state law limitations. The Court noted, however, that 12 C.F.R. § 34.4(b) specifically provides that state laws on "rights to collect debts" are "not inconsistent with the real estate lending powers of national banks," and are not presumptively preempted. *See* 12 C.F.R. § 34.4(b).

Applying the *Barnett Bank* preemption standard, the Court first noted that the preemption analysis was the same, regardless of whether the Dodd-Frank Act applied to the case. The Court noted that state laws that do not "'significantly interfere' with a national bank's exercise of powers" are not preempted. 2012 WL 6566681, at *8 (citing *Barnett Bank of Marion County, N.A.*, 513 U.S. at 33). Finding that the NCDCA only prohibits debt collectors from engaging in abusive debt collection practices and, thus, does not significantly interfere with Bank of America's ability to collect debts, the Court held that the NCDCA was not preempted. Accordingly, the Court denied Bank of America's motion to dismiss.

Whistleblower Protection Under the Dodd-Frank Act

Mart v. Gozdecki, Del Giudice, Americus & Farkas LLP, No. 12 C 2496, 2012 WL 5830627 (N.D. Ill. Nov. 16, 2012).

Plaintiff Brad Mart brought a legal malpractice claim against Gozdecki, Del Giudice, Americus & Farkas LLP ("GDAF") for failing to file a retaliatory discharge claim under Section 806 of the Sarbanes-Oxley Act of 2002. GDAF moved to dismiss Mart's complaint for failure to state a claim.

Applying the legal malpractice standard under Illinois law, the Court stated that to prevail Mart must demonstrate that he would have been successful in the lawsuit underlying the failed litigation but for the attorney's negligence. The Court noted that Section 806 provides whistleblower protection for employees of publically traded companies. The Court further found that Section 929A of the Dodd-Frank Act amended Section 806 "by extending the whistleblower provisions to employees of privately held subsidiaries of publicly traded companies." 2012 WL 5830627, at *3 (citing Pub. L. No. 111-203 § 929A, 124 Stat. 1376 (2010)). The Court first determined that, before the Dodd-Frank amendment, Section 806 unambiguously stated that employees of publically traded companies are entitled to whistleblower protection. Because Mart's former employer was a private company, the Court found that he would not be afforded whistleblower protection under Section 806 as it existed prior to Dodd-Frank's enactment.

Next, the Court addressed whether the Dodd-Frank amendment to Section 806 applies retroactively. The Court stated that if the Dodd-Frank amendment substantively alters Section 806, then the amendment does not apply retroactively. If, however, the amendment merely clarifies the statute, then the Court would apply Section 806 as amended to Mart's claims. To determine whether an amendment clarifies a statute, the Court stated that it must examine "(1) whether the enacting body declared the amendment was clarifying a prior enactment; (2) whether a conflict or ambiguity existed prior to the amendment; and (3) whether an amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history." *Id.* at *3 (citing

Middleton v. City of Chicago, 578 F.3d 655, 664 (7th Cir. 2009)). The Court noted that several courts held that the Dodd-Frank amendment clarified Section 806 rather than substantively changed it, but declined to follow their line of reasoning because they failed to analyze the plain language of Section 806.

Analyzing the first *Middleton* factor, the Court determined that the Dodd-Frank amendment did not expressly state that it was clarifying Section 806. The Court then applied the second *Middleton* factor and found that the statute was unambiguous. Additionally, the Court noted that the vast majority of decisions hold that Section 806 does not protect employees of privately held companies, which suggests that there is not a significant conflict in interpretations of Section 806. Finally, the Court determined that the plain language of Dodd-Frank was inconsistent with Section 806 of Sarbanes-Oxley. Accordingly, the Court held that Dodd-Frank alters Section 806 of Sarbanes-Oxley and, thus, does not apply retroactively. The Court concluded that Mart was not a covered employee under Section 806 and, thus, found that his claims failed as a matter of law. Consequently, the Court granted GDAF's motion to dismiss.

Arbitration Agreements Under the Dodd-Frank Act

Holmes v. Air Liquide USA, LLC, No. 12-20129, 2012 WL 5914863 (5th Cir. Nov. 26, 2012).

The U.S. Court of Appeals for the Fifth Circuit recently affirmed the district court's holding that the Dodd-Frank Act does not invalidate an arbitration agreement for claims arising under the Americans with Disabilities Act, the Texas Commission on Human Rights Act, Title VII of the Civil Rights Act of 1964, and the Family and Medical Leave Act.

Plaintiff Jamie Holmes brought suit against her former employer, Air Liquide USA, LLC ("Air Liquide"). Air Liquide moved to compel Holmes's claims, and the district court granted Air Liquide's motion. Holmes appealed.

On appeal, Holmes argued that the Dodd-Frank Act applies retroactively and that certain provisions of the Dodd-Frank Act render her arbitration agreement unenforceable. The Court first noted that while some district courts have held that the Dodd-Frank Act applies retroactively to render arbitration _epcckclrq slcldmpac_`jc, other district courts have reached the opposite conclusion. However, the Court found that the Dodd-Frank Act does not apply to Holmes's claims and, thus, did not reach a decision regarding the Dodd-Frank Act's retroactive effect.

Holmes contended that because her arbitration agreement encompassed "all disputes," the broad scope of the agreement would include disputes arising under the Dodd-Frank Act. The Commodity Exchange provision, 7 U.S.C. § 26(n)(2), and the Sarbanes-Oxley provision, 18 U.S.C. § 1514A(e)(2), invalidate agreements that require arbitration of claims arising under these Sections. On the other hand, the Bureau of Consumer Financial Protection provision, 12 U.S.C. § 5567(d)(2), contains limiting language that invalidates agreements "to the extent" that they require arbitration of claims under the statute. Relying on this language, Holmes argued that the Bureau of Consumer Financial Protection provision requires a claim to arise under the statute before the pre-dispute arbitration provision is triggered. Because the Sarbanes-Oxley and Commodity Exchange provisions do not contain limiting language, Holmes contended that her agreement references "all disputes" and since she *could* have brought claims under Sarbanes-Oxley or the Commodity Exchange Act, these provisions invalidate her arbitration agreement. Disagreeing with Holmes's line of reasoning and finding that Holmes did not bring any Dodd-Frank Act claims, the Court held that the Dodd-Frank Act did not invalidate Holmes's arbitration agreement.

Say on Pay Voting

Boxer v. Accuray Inc., --- F. Supp. 2d ---, 2012 WL 5975238 (N.D. Cal. Nov. 29, 2012).

Plaintiff Robert Boxer filed a class action against Accuray Inc. ("Accuray") and several board members alleging, among other things, breach of fiduciary duty when the directors and executive officers failed to alter an executive compensation plan following a negative say-on-pay vote. Defendants removed the case to the U.S. District Court for the Northern District of California on the ground that the claim was premised on requirements set forth in the Dodd-Frank Act. Boxer moved to remand.

In support of removal, Defendants noted that Section 951 of the Dodd-Frank Act, the "say on pay" provision, requires publicly-traded companies to allow shareholders to vote on executive compensation. *See* 15 U.S.C. § 78n-1. Defendants argued that the case was properly removable because the Court was required to apply federal law in reviewing the adequacy of disclosures on executive compensation.

Rejecting Defendants' argument, the Court stated that a breach of fiduciary duty may arise when a director fails to disclose material information in a proxy statement. The Court further stated that a disclosure is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." 2012 WL 5975238, at *2 (quoting *Seinfeld v. Bartz*, 322 F.3d 693, 696-97 (9th Cir. 2003)). The Court found that Defendants "made no showing that a violation of the Dodd-Frank Act with respect to disclosures in a proxy statement is a necessary prerequisite to [sic] finding of materiality. . . " *Id.* at *3. Further, the Court noted that part of Boxer's breach of fiduciary duty claim was based on the authorization of an increase in stock shares, which state law controls. Finding that Boxer's claim could be resolved without involving a substantial federal question, the Court granted Boxer's motion to remand.

Dodd-Frank Act Amendments to RESPA

Kunzelmann v. Wells Fargo Bank, N.A., No. 9-11-cv-81373-DMM, 2012 WL 139913 (S.D. Fla. Jan. 10, 2013).

Plaintiff Mark Kunzelmann filed a class action against Wells Fargo Bank, N.A. and others seeking reimbursement for broker commissions relating to force-placed hazard insurance and alleging unjust enrichment and breach of the implied covenant of good faith and fair dealing. Kunzelmann filed a motion to certify the class.

The Court first addressed the class action requirements of Federal Rule of Civil Procedure 23(a) and found that Kunzelmann failed to meet the four requirements of the rule. Turning to the requirements of Rule 23(b)(3) and the issue of predominance, the Court found that an unjust enrichment claim requires the court to analyze the circumstances of each individual case, precluding a finding of predominance. Additionally, the Court noted that the law of unjust enrichment varies from state to state. Thus, the Court concluded that Kunzelmann failed to satisfy the predominance requirement.

Addressing the superiority requirement, the Court noted that Section 1463 of the Dodd-Frank Act amended the Real Estate Settlement Procedures Act ("RESPA") regarding lender-placed insurance. Specifically, Section 6(m) of RESPA requires "that charges related to lender-placed insurance, other than charges subject to State insurance regulation, must be bona fide and reasonable." 2012 WL 139913, at *12. The Dodd-Frank Act also amended Section 6(f) of RESPA by increasing the amount of recovery in a private right of action. Pursuant to the Dodd-Frank amendment, an individual can recover actual damages and additional damages if he or she demonstrateq a pattern or practice of noncompliance. While those filing a class action can recover up to $2,000 as damages if he or she can demonstrate a pattern and practice in addition to actual damages, the total damages cannot exceed $1,000,000 or one percent of the mortgage servicer's net worth. Thus, the Court concluded that the class action was not superior to individual actions. Accordingly, the Court denied Kunzelmann's motion for class certification.

- - NEWS & DEVELOPMENTS - -

CFPB Issues Final Rules Affecting Mortgage Servicers

On January 17, 2013, the CFPB issued final rules to establish greater protection for delinquent borrowers against deficient loan servicing practices. According to the CFPB, distressed homeowners seeking foreclosure alternatives often face "costly surprises and runarounds" by their mortgage servicers.

The final rules protect borrowers from restrict the practice of "dual-tracking"--that is, working with a borrower on foreclosure alternatives while simultaneously pursuing foreclosure--and prohibit servicers from foreclosing until they have adequately considered all alternatives to foreclosure. Servicers who offer foreclosure alternatives must give borrowers adequate time to accept the offer before foreclosing.

The rules also impose a number of duties on mortgage servicers, including (1) notifying a borrower of foreclosure alternatives after they miss two consecutive payments,

(2) providing borrowers with direct, easy access to loan servicer personnel, (3) considering borrowers for all available foreclosure alternatives, not only those alternatives that are most financially beneficial to the servicer, and (4) providing regular statements that break down payments in a clear manner.

For more information, visit: http://files.consumerfinance.gov/f/201301_cfpb_servicing-rules_summary.pdf

CFPB Expands HOEPA Coverage

The CFPB issued a final rule under the Dodd-Frank Act, effective January 10, 2014, which expands coverage under the Home Ownership and Equity Protection Act ("HOEPA") to home-purchase loans and home equity lines of credit. The rule also modifies the rate and fee thresholds and includes prepayment penalties as a factor for determining coverage.

The rule generally prohibits balloon payments and prepayment penalties for "high cost" mortgages, which the rule defines as loans with an APR that exceeds the average prime offer rate for (1) first mortgages by more than 6.5 percentage points and (2) second or junior mortgages by more than 8.5 percentage points.

The rule also places a number of other restrictions on mortgages, including: (1) a cap on late fees at 4%; (2) a ban on loan modification fees; (3) a ban on rolling closing costs into the loan amount; and (4) a restriction on fees in connection with payoff statement requests.

To read the final rule, visit: http://files.consumerfinance.gov/f/201301_cfpb_final-rule_high-cost-mortgages.pdf

CFPB Expands Escrow Account Duration for High-Cost Mortgages

The CFPB issued a final rule under the Dodd-Frank Act, effective June 1, 2012, which extends the required minimum duration for high-cost mortgage escrow accounts to five years. The previous requirement for the duration of such escrow accounts was one year.

Creditors who meet certain criteria, including operating in predominantly rural or underserved areas, are exempt from the rule.

To read the final rule, visit: http://files.consumerfinance.gov/f/201301_cfpb_final-rule_escrow-requirements.pdf

CFPB Releases Final Ability-to-Repay Rule and "Qualified Mortgage" Standard

With the aim of bolstering trust in the mortgage lending market, the CFPB released its final ability-to-repay rule, effective January 2014, which requires lenders to take certain steps to determine whether a consumer will be able to repay a mortgage loan.

The rule is the product of extensive research and analysis, which began in May 2012 when the CFPB sought public comment on the topic.

The rule requires lenders to consider specific underwriting criteria, including income, assets, and employment status. A lender must determine a consumer's ability to repay over the entire life of the loan, not merely at inception, as rates are often lower in a loan's introductory period.

However, creditors refinancing risky mortgages, such as adjustable-rate mortgages, to standard loans are exempt from the full underwriting process mandated by the final rule.

Lenders who issue "qualified mortgages" ("QMs") are presumed to have complied with the final rule. To constitute a "qualified mortgage," a mortgage must meet certain requirements, including restrictions on points and fees and a debt-to-income ratio less than or equal to 43%. Certain balloon payments qualify as QMs if they are originated by small banks in predominantly rural or underserved areas.

To read the final rule fact sheet, visit: http://files.consumerfinance.gov/f/201301_cfpb_ability-to-repay-factsheet.pdf

Fannie Mae and Freddie Mac Delinquencies Drop

The Federal Housing Finance Agency released its Third Quarter 2012 Foreclosure Prevention Report, which revealed that the number of seriously delinquent loans backed by Fannie Mae or Freddie Mac dropped below 1 million for the first time since Summer 2009.

According to the report, over 1 million homeowners have been offered a HAMP trial modification since the program's inception in April 2009. Of these homeowners, over half have been granted permanent modifications.

The report also showed that the use of foreclosure alternatives, such as short sales and deeds-in-lieu, increased by 4% since the second quarter of 2012.

To read the report, visit: http://www.fhfa.gov/webfiles/24858/3q12FPR_final.pdf

Regulators Reach Settlement With Mortgage Providers

The OCC and the Federal Reserve Board reached an $8.5 billion settlement with ten mortgage servicing companies that are subject to enforcement actions for deficient loan servicing and foreclosure practices. The agreement includes Aurora, Bank of America, Citibank, JPMorgan Chase, MetLife Bank, PNC, Sovereign, SunTrust, U.S. Bank, and Wells Fargo.

$3.3 billion of the settlement will be paid directly to eligible borrowers whose homes were in foreclosure in 2009 and 2010. Each borrower's compensation will depend on the nature of the servicer's error, ranging from several hundred dollars up to $125,000. The remaining $5.2 billion will fund other assistance, including loan modifications and deficiency waivers.

Under the agreement, participating servicers will replace Independent Foreclosure Review with a broader framework that will allow eligible borrowers to receive compensation more quickly. Borrowers will not have to execute a waiver to utilize the new framework. A payment agent, who will be appointed to administer payments, is expected to contact eligible borrowers by March 2013 with details.

For more information, visit: http://occ.gov/news-issuances/news-releases/2013/nr-ia-2013-3.html

GHOS Endorses Basel Committee's LCR Amendments

On January 6, 2013, the Group of Governors and Heads of Supervision ("GHOS") unanimously endorsed the Basel Committee's amendments to the Liquidity Coverage Ratio ("LCR"), demonstrating its commitment to ensuring that banks hold sufficient liquid assets.

The Basel Committee's changes to the definition of LCR include an expansion in eligible assets and refinements to assumed inflow and outflow rates.

The LCR will be introduced on January 1, 2015, with the minimum requirement beginning at 60% and rising by 10 percentage points annually until it reaches 100% on January 1, 2019. This graduated approach will minimize disruption to the banking system and the economy at large.

For more information, visit: http://www.bis.org/press/p130106.htm

OCC Extends Lending-Limits Exception

The OCC issued a final rule extending the temporary lending limits rule exception from January 1, 2013 to July 1, 2013. Intended to allow time for institutions to comply with the new standard, the exception applies to certain credit exposures arising from derivatives and securities financing transactions.

Issued in June 2012, the interim final rule implemented Section 610 of the Dodd-Frank Act, which revised the definition of loans and extensions of credit to include credit exposures arising from certain types of transactions, including derivatives and securities transactions.

The OCC extended the January 1 deadline due to comments received on the interim final rule. Comments suggested that the deadline did not allow institutions sufficient time to implement policies and procedures to comply with the rule.

For more information, visit: http://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-1.html

OCC Grants Banks More Time to Comply With DFA Swaps Provision

The OCC issued guidance stating that it would consider banks' requests for additional time to comply with Section 716 of the Dodd-Frank Act, the "swaps pushout" provision. Section 716 prohibits "swap entities" from utilizing deposit insurance or other forms of federal assistance to fund certain swap activities.

Specifically, the OCC guidance stated that "each request must be written and specify the transition period appropriate to the institution, up to a two-year transition period commencing from July 16." Transition requests must outline how a bank intends to comply with Section 716 and why a transition period "would mitigate adverse effects on mortgage lending, small business lending, job creation and capital formation."

For more information, visit: http://regreformtracker.aba.com/2013/01/occ-to-grant-more-time-to-comply-with.html?utm_source=regreformtracker&utm_medium=ABA+Dodd-Frank+Tracker

FTC Issues Dodd-Frank Report

The FTC submitted a report to Congress detailing the agency's efforts to effectuate the new debit card transaction rules that the Federal Reserve Board introduced last year. Pursuant to the Dodd-Frank Act, which amended the Electronic Fund Transfer Act, the rules prohibit exclusive networks for debit transactions and restrict interchange fees.

The report outlines the activities the FTC has undertaken to implement the rules, including law enforcement, merchant outreach, consumer education, research, and policy development. The FTC states that it will continue these activities in 2013 and undertake additional efforts to implement recent Regulation II amendments.

To read the report, visit: http://www.ftc.gov/opa/2012/12/DoddFrankReport.pdf

CFTC Delays Provisions on Cross-Border Swaps

The CFTC approved an exemptive order delaying certain cross-border applications of Dodd-Frank's swaps provisions and related regulations. The order permits non-U.S. swap dealers and major swap participants, as well as foreign branches of U.S. swap dealers and major swap participants, to delay compliance with certain requirements of the Dodd-Frank regulatory scheme. The order also defines "U.S. person."

The exemptive order will give cross-border market participants greater certainty as to their obligations under the swaps rules and facilitate an orderly transition into the new swaps regulatory scheme.

To learn more, visit: http://www.cftc.gov/PressRoom/PressReleases/pr6478-12

CFPB Proposes Changes to Rules on Remittance Transfers

On December 21, 2012, the CFPB issued proposed amendments to the remittance transfer rules, which provide consumers who transfer money internationally with certain protections. The goal of revising the rules is to preserve consumer protections while facilitating the compliance of service providers.

The proposed changes focus on three primary issues: (1) disclosure of foreign taxes and institution fees, (2) disclosure of subnational taxes in a foreign country, and (3) errors from incorrect account information. While the rule was to take effect February 7, 2013, the CFPB has proposed a temporary delay.

Whereas comments on the temporary delay will close 15 days after the proposed rule is published, comments on the remainder of the proposal will close 30 days after publication.

To read the notice of proposed rulemaking, visit: http://files.consumerfinance.gov/f/201212_cfpb_remittances-proposal.pdf

SEC Issues Credit-Rating Agencies Report

In late December, the SEC released a report on credit-rating agencies as mandated by the Dodd-Frank Act. The report discussed registration and oversight, the credit rating process, metrics for determining the accuracy of credit ratings, and alternative means for compensating credit-rating agencies.

The report also discussed the feasibility of establishing an assignment system for credit ratings. Under a credit rating assignment system, a government clearinghouse could assign finance products to credit-rating agencies at random for rating.

To read the report, visit: http://www.sec.gov/news/studies/2012/assigned-credit-ratings-study.pdf

CFPB Seeks Public Comment on CARD Act

The CFPB seeks public comment on the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act") and key features the consumer credit card market. Comments are due 60 days after publication in the Federal Register.

Specifically, the CFPB requests comment on credit card terms, issuer practices, existing protections against unfair and deceptive practices, the effectiveness of credit card disclosures, and whether the CARD Act has affected the cost of credit.

For more information, visit: http://files.consumerfinance.gov/f/201212_cfpb_2012-0048.pdf

Federal Reserve Issues Proposed Foreign Banking Rule

The Federal Reserve has issued a proposed rule under the Dodd-Frank Act focused on the organization of foreign banks' U.S. operations. Under the rule, foreign banks would be required to organize U.S. operations under a single intermediate holding company ("IHC").

According to the Federal Reserve, foreign bank IHCs would enable consistent supervision and regulation of foreign banks' U.S. operations and foster a smoother resolution of failing foreign bank U.S. operations.

Under the rule, foreign bank IHCs with consolidated assets equaling or exceeding $50 billion would be subject to the Federal Reserve's capital plan rule. Moreover, domestic operations of foreign banks with combined U.S. assets equaling or exceeding $50 billion would be subject to enhanced liquidity risk-management standards and would be required to conduct liquidity stress tests.

The proposed rule will be open for public comment until March 31, 2013.

To read the proposed rule, visit: http://regreformtracker.aba.com/2012/12/fed-issues-proposal-on-foreign-banks-us.html?utm_source=regreformtracker&utm_medium=ABA+Dodd-Frank+Tracker

CFPB Shares Data on Consumer Complaints With State Agencies

On December 11, 2012, the CFPB announced its plans to share data from consumer complaints with state regulatory agencies. The purpose of the CFPB's data sharing plan is to eliminate the need for consumers to file duplicative complaints in order to have their complaints reviewed by multiple government agencies.

Moreover, data sharing will give state agencies a better picture of the consumer financial services market, enabling these agencies to better serve consumers.

Initially, the data sharing will be one-way, with the CFPB sending its data to state agencies via secured channels. However, the CFPB envisions that the data sharing will be two-way in the future, with state agencies sharing their data with the CFPB.

For more information, visit: http://www.consumerfinance.gov/blog/starting-today-sharing-consumer-complaint-data-with-state-agencies/

CFPB Releases Paper on Credit Reporting System

In December 2012, the CFPB released a paper entitled *Key Dimensions and Processes in the U.S. Credit Reporting System: A Review of How the Nation's Largest Credit Bureaus Manage Consumer Data*.

In its paper, the CFPB discusses the infrastructure of the credit reporting system at the U.S.'s three largest credit reporting agencies--Equifax, TransUnion, and Experian--and provides basic information and statistics on the processes by which consumer data is reported, matched, and reviewed after it has been disputed.

To read the paper, visit: http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf

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