January 11, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Issues Ability to Repay/Qualified Mortgage Rule and High-Cost Mortgage Rules. On January 10, the CFPB issued a rule that will require creditors to verify a consumer's ability to repay prior to making almost any type of mortgage loan. The rule defines a "qualified mortgage," providing a safe harbor from liability for loans with an APR below Regulation Z's "higher-priced" threshold of 150 basis points above the Average Prime Offer Rate, and a "rebuttable presumption" for loans with an APR above that threshold. The rule will become effective on January 10, 2014. Concurrently, the CFPB released a proposal seeking comment on amendments to the final rule that would, among other things, provide exemptions for certain community-based lenders and small portfolio creditors and potentially change the treatment of indirect lender compensation for purposes of the qualified mortgage "points and fees" test. BuckleySandler has prepared a Special Alert that highlights a few key issues resolved and left open by the nearly 1,000-page releases on the rule and concurrent proposal. We will distribute a summary and additional analysis of key issues in the releases once we complete our review of them.

Also on January 10, the CFPB issued two final rules related to high-cost mortgages. The first rule amends Regulation Z to implement changes to TILA made by the Dodd-Frank Act that lengthen the time for which a mandatory escrow account established for a higher-priced mortgage loan must be maintained. This rule also exempts certain transactions from the statute's escrow requirement. The second rule, which also amends Regulation Z to incorporate Dodd-Frank Act statutory changes, expands the types of mortgage loans that are subject to the protections of the Home Ownership and Equity Protections Act of 1994 (HOEPA), revises and expands the tests for coverage under HOEPA, and imposes additional restrictions on mortgages that are covered by HOEPA, including a pre-loan counseling requirement. This rule also amends Regulation Z and Regulation X to require, among other things, that lenders provide borrowers information about homeownership counseling providers. BuckleySandler is reviewing these rules and will soon provide additional information.

Federal Regulators Agree to Monetary Settlement With 10 Servicers In Lieu of Independent Foreclosure Review. On January 7, the OCC and the Federal Reserve Board announced that 10 of the 14 mortgage servicers subject to consent orders issued in April 2011 regarding alleged improper servicing and foreclosure practices agreed in principle to resolve those allegations by paying borrowers $3.3 billion directly and providing $5.2 billion in borrower assistance through loan modifications and forgiveness of deficiency judgments. For the settling servicers, the agreement ends the costly and ineffective Independent Foreclosure Review program required by the consent orders, pursuant to which the banks were to compensate borrowers for any financial injury and/or improper foreclosure identified by third-party consultants through a case-by-case loan file audit process or in response to borrower requests for review. The OCC states that more than 3.8 million borrowers are expected to receive compensation ranging from hundreds of dollars up to $125,000, without having to take any action to become eligible. The exact payout will depend on the type of alleged servicing error, and the regulators expect that borrowers will be contacted by the end of March with payment details. The regulators continue to seek similar agreements with the remaining companies subject to the 2011 consent orders.

Fannie Mae Obtains Comprehensive Settlement of Repurchase Claims Against Major Lender. On January 7, Fannie Mae and a national bank announced a comprehensive settlement to resolve all outstanding and future repurchase requests on nearly all single-family loans originated by the bank (and other lenders it later acquired) over a nine-year period and subsequently delivered to Fannie Mae. The announcement states that the loans had an outstanding unpaid principal balance of $297 billion as of November 30, 2012. Fannie Mae alleges that the lenders breached representations and warranties on the loans. The bank agreed to pay $3.55 billion in cash to Fannie Mae and to repurchase roughly 30,000 loans with cumulative unpaid principal balances and interest of $6.75 billion. On the loans retained by Fannie Mae, the bank remains responsible for certain payment and other obligations with respect to mortgage insurance rescissions, cancellations and denials, as well as its servicing, third-party indemnification, and recourse obligations. Finally, Fannie Mae and FHFA approved the transfer of servicing rights for roughly one million loans from the bank to specialty servicers, which FHFA stated is designed to benefit borrowers and reduce future credit losses to Fannie Mae.

SEC Announces Departure of Enforcement Director, Names New General Counsel and Chief Accountant. On January 9, the SEC announced that its Enforcement Director, Robert Khuzami, is leaving the agency. Mr. Khuzami was appointed to the position in February 2009. The SEC press release credits him with, among other things, restructuring the division and aggressively pursuing financial crisis-related cases and insider trading enforcement, which, together with other enforcement activities, yielded the all-time record number of 735 SEC enforcement actions in FY 2011 and another 734 actions in FY 2012. Earlier in the week, the SEC announced that Geoffrey Aronow will serve as the agency's General Counsel. Mr. Aronow previously served as the Director of the Division of Enforcement at the CFTC for nearly four years, but most recently was in private practice. Last week, the SEC named Paul Beswick as Chief Accountant, head of the agency office responsible for establishing and enforcing accounting and auditing policy. Mr. Beswick joined the SEC in September 2007 and has filled the position in an acting role since July 2012.

Fannie Mae Clarifies Foreclosure Sherriff's Costs Reimbursement Process. On January 9, Fannie Mae issued a Servicing Notice regarding claims for reimbursement of foreclosure sheriff's costs. Noting that some states require that the sheriff's office perform some or all of the tasks associated with completing a foreclosure sale, the notice clarifies that when a servicer files a claim for reimbursement of the sheriff's costs associated with foreclosure activities, Fannie Mae may require that the servicer provide supporting documentation with its request. Fannie Mae prefers that such costs be documented in a cost sheet on the sheriff's office letterhead, but the notice includes an attachment listing other acceptable forms of documentation. The notice provides other reminders regarding the sheriff's costs claim reimbursement process and supporting documentation.

NCUA Files Another Major MBS Suit. On January 4, the NCUA announced another major mortgage-backed securities lawsuit. Similar to prior suits, the NCUA alleges on behalf of three insolvent corporate credit unions that a mortgage securitizer violated federal and state securities laws in the sale of $2.2 billion in mortgage-backed securities to the credit unions. In this case, the NCUA is suing a securities firm for alleged wrongdoing by companies the defendant later acquired. The NCUA complaint alleges the acquired firms made numerous misrepresentations and omissions of material facts in the offering of the securities sold to the failed corporate credit unions, and that underwriting guidelines in the offering documents were "systematically abandoned." The NCUA argues that these actions caused the credit unions to believe the risk of loss was low, when, in fact, the opposite was true. When the securities lost value, the NCUA claims, the credit unions were harmed and forced into insolvency.

OCC Extends Deadline for Application of Lending Limits Rule. On January 4, the OCC issued a final rule that extends until July 1, 2013 the temporary exception for the application of its lending limits rule to certain credit exposures. In June 2012, the OCC issued an interim final rule to implement Dodd-Frank Act revisions to the statutory definitions of loans and extensions of credit for lending limit purposes to include certain credit exposures arising from a derivative transaction, repurchase agreement, reverse repurchase agreement, securities lending transaction, or securities borrowing transaction. That interim rule gave institutions until January 1, 2013 to comply, and the OCC extended that date to April 2013 through a recent bulletin. The instant rule extends the date once more and explains that, without the extension, institutions that wish to use an internal model method to determine credit exposure for derivative transactions and securities financing transactions may not have sufficient time to develop, receive approval for, and implement such a model.

Senators Ask Regulators to Halt Bank Payday Lending. On January 2, a group of Democratic Senators sent a letter to the Federal Reserve Board, the FDIC, and the OCC seeking action to stop banks from making payday loans. The letter cites the agencies' "long history of appropriately prohibiting . . . banks from partnering with non-bank payday lenders," but claims that several banks are currently making payday loans directly to their customers. The products at issue are actually deposit advance loans, which the Senators claim are structured the same as traditional payday loans and put customers in a cycle of debt. The Senators call on the regulators to take "meaningful regulatory action" in response to the problem as they present it, but stop short of identifying specific banks or outlining potential federal legislation.

HUD Obtains First Settlement Under Rule Requiring Sexual Orientation and Gender Identity Equal Access. On January 2, HUD announced that a lender agreed to settle a claim that it refused to provide FHA financing to a lesbian couple. HUD noted that the agreement is the first enforcement action taken under a rule finalized in January 2012 that aims to provide equal access to housing, regardless of sexual orientation, gender identity, or marital status, including by prohibiting lenders from determining FHA-insured financing eligibility based on sexual orientation or gender identity. The lender denies the allegations, but HUD required the lender to pay $7,500 so the parties could avoid additional costs associated with the administrative proceedings. The agreement also requires the lender to update its fair lending training program to support compliance with the new rule.

STATE ISSUES

California AG Issues Mobile Application Privacy Recommendations. On January 10, California Attorney General Kamala Harris (AG) issued recommended privacy practices for mobile application developers, mobile application platform providers, mobile advertising networks, operating system developers, and mobile carriers. The AG recommends a "surprise minimization" approach, which could include measures to (i) avoid collecting personally identifiable data that are not needed for basic functionality, (ii) make an app's general privacy policy easy to understand and available before download, and (iii) supplement a legally required general privacy policy with enhanced measures to alert users and give them control over data practices that are not related to an application's basic functionality or that involve sensitive information. Supplemental policies could include "special notices" delivered in context and "just-in-time," or short privacy statements made readily available within an application and that highlight potentially unexpected practices and allow users to make privacy choices. The issuance of the recommendations is the latest action by the AG as part of a broader privacy initiative and follows the state's first mobile application privacy suit filed last month.

Massachusetts Division of Banks Proposes Foreclosure Regulation Amendments. On January 7, the Massachusetts Division of Banks announced a public hearing to review proposed amendments to the state's foreclosure and mortgage modification regulations. The proposed amendments would implement a recently passed law that makes it harder to foreclose in that state, including by creating a pre-foreclosure modification notice requirement for creditors. The amended regulation would (i) establish the processes for a borrower and creditor with regard to the borrower's right to request a loan modification, (ii) establish the actions that constitute a borrower's good faith response to a creditor's notice of the right to request a loan modification, (iii) define good faith efforts by creditors to avoid foreclosure, and (iv) establish safe harbors for creditors that comply with the loan modification process. The hearing is scheduled for February 6, 2013, and the Division of Banks is accepting public comments on the proposal through February 15, 2013.

Ohio Creates Temporary Loan Originator License. Last month, Ohio enacted a bill, S.B. 333, to allow the Division of Financial Institutions to offer a transitional loan originator license to assist an originator licensed by another state to transition to employment with an Ohio-regulated firm. The new license allows a transitioning out-of-state originator to originate loans on a temporary basis-120 days-while the originator completes the requirements of obtaining a state-issued annual license. A transitioning originator must have a sponsor that meets certain criteria and must pay a fee as set by the state regulator. In addition, the law directs the state regulator to adopt regulations allowing an originator from a federally regulated institution to obtain a temporary state license after federal law is changed to allow such transitional licenses. The CFPB has interpreted current federal law to prohibit such transitional licenses.

COURTS

Ninth Circuit Affirms Dismissal of Unfair Competition Claims over Teaser Rates. On January 9, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court's dismissal of a putative class action against a national bank over its adjustable rate mortgage disclosure and payment application. *O'Donnell v. Bank of Am., N.A.*, No. 11-16351, slip op. (9th Cir. Jan. 9, 2013). On appeal, the borrowers argued that the district court erred in holding that their California state-law claims for common law fraud and violations of the Unfair Competition Law based on the lender's alleged concealment of material facts about the loans' escalating principal balances and interest rates are preempted by the National Bank Act and OCC regulations. The borrowers also challenged the district court's dismissal of their state-law breach of contract claim based on allegations that the lender improperly applied payments solely toward satisfying part of the interest owed while adding the remaining interest to the principal balance. In affirming the dismissal, the appeals court held that the fraud and unfair competition claims are expressly preempted because they would force the lender to make additional disclosures not required by federal law. The appeals court also affirmed the district court's holding that the FTC Act does not provide a private right of action and therefore cannot be employed as a premise for the borrowers' unfair competition claim. With regard to the borrowers' breach of contract claim, the court held that the mortgage contract did not include any representation that the lender would apply payments to principal if the payment failed to cover the accrued interest, and, therefore, the borrowers failed to state a plausible claim.

D.C. Circuit Reinstates Challenge to HUD Reverse Mortgage Regulations. On January 4, the U.S. Court of Appeals for the District of Columbia held that two widowed spouses have standing to pursue allegations that a HUD regulation defining conditions under which it would insure a reverse mortgage agreement contradicted the governing statute, and in doing so made it easier for lenders to foreclose on homes occupied by surviving spouses. *Bennett v. Donovan*, No. 11-5288, 2013 WL 45879 (D.C. Cir. Jan. 4, 2012). The surviving spouses, neither of whom were legal borrowers under the reverse mortgages entered into by their spouses, sought declaratory relief that HUD's regulations requiring that the mortgage be due and payable in full if a borrower dies and the property is not the principal residence of at least one surviving borrower violated the Administrative Procedure Act because the rule is inconsistent with the governing statute. The statute protects "homeowners," as opposed to "borrowers," from displacement and defines "homeowner" to include "spouse of the homeowner." The district court held that the spouses lacked standing to sue HUD because relief for their injuries depended solely on the lenders' decision whether to foreclose. The appellate court held, however, that in situations like those at issue here, it is within HUD's power to provide complete relief to the lenders and borrowers, and therefore such relief is likely, as opposed to speculative, and as such is sufficient to establish standing. Though it limited its holding to the standing issue, the court added that it was "puzzled" by HUD's attempt to justify a rule that appears to contradict the governing statute. Further, the court outlined potential relief that HUD could provide, explaining that HUD could accept assignment of the mortgage, pay off the balance of the loans to the lenders, and then decline to foreclose against the spouses. The court reinstated the case and remanded for further proceedings.

Fourth Circuit Holds State Auto Debt Cancellation Requirements Not Preempted for Certain Assigned Loans. On December 26, the U.S. Court of Appeals for the Fourth Circuit held that federal law does not preempt Maryland's debt cancellation requirements for an auto retail installment sales contract (RISC) when a national bank is the assignee, and not the originator, of the loan. *Decohen v. Capital One, N.A.*, No. 11-2161, 2012 WL 6685767 (4th Cir. Dec. 26, 2012). In this case, a dealer sold and financed a used vehicle and subsequently assigned the loan to a national bank. The financing included a charge for a debt cancellation agreement in the RISC, which under the Maryland Credit Grantor Closed End Credit Provisions (CLEC) requires a lender to cancel any remaining loan balance when a car is totaled and insurance does not cover the full loss. After the buyer totaled his car and was left with a loan balance, he sought to enforce the debt cancellation agreement. In dismissing the case, the district court held, in relevant part, that the agreement at issue was a "debt cancellation contract" covered by the National Bank Act, and that because such contracts are governed by federal law and regulations, including regulations regarding debt cancellation agreements, state regulation of such contracts is preempted. The district court also found that the purchaser failed to state a claim for breach of contract because the bank did not agree to cancel the remaining debt. The appeals court disagreed and held that because the OCC regulations regarding debt cancellation agreements apply only to agreements entered into by national banks, "the CLEC provisions regarding debt cancellation agreements are not expressly preempted by federal law when the agreements are part of credit contracts originated by a local lender and assigned to a national bank." The court also held that the purchaser stated a claim for breach of contract because the parties voluntarily elected to be governed by the CLEC in the RISC, which cannot be undone by assignment of the loan. The court vacated the district court's judgment and remanded the case for further proceedings.

Eleventh Circuit Holds Management Company Collecting HOA Fees Exempt from FDCPA. Recently, the U.S. Court of Appeals for the Eleventh Circuit held that a management company collecting debts for a homeowners association was exempt from the FDCPA because collecting the unpaid assessments was incidental to the company's bona fide fiduciary obligations. *Harris v. Liberty Cmty. Mgmt., Inc.*, No. 11-14362, 2012 WL 6604518 (11th Cir. Dec. 19, 2012). In *Harris*, a homeowners association contracted with a management company to perform various tasks, including collecting past due assessments from homeowners. After warning the plaintiffs that their water service would be disconnected if they did not pay their outstanding association dues, the management company had their water service suspended. The plaintiffs asserted that the company was a debt collector under the FDCPA and violated the Act by terminating their water service. Under Section 1692a(6)(F)(i) of the FDCPA, an individual or entity is exempt from the Act when "collecting or attempting to collect any debt owed...another to the extent such activity is incidental to a bona fide fiduciary obligation." The Eleventh Circuit held that the management company fell within this exemption. Because the company was the homeowners association's agent, it owed a fiduciary duty to the association. The court also found that collecting the debts was "incidental" to the company's fiduciary obligation, noting that the company did many other tasks for the association other than collect assessments, such as obtaining utilities, purchasing insurance, and assisting the association with its tax filings. In addition, the Eleventh Circuit affirmed the district court's dismissal of the plaintiffs' claims under the Georgia Fair Business Practices Act. The court explained that the management company's decision to stop the water service after providing the plaintiff notice was not unfair or deceptive.

MISCELLANY

Basel Committee Relaxes Liquidity Standards. On January 7, theBasel Committee released its revised Liquidity Coverage Ratio (LCR), a component of the comprehensive Basel III accords that also address capital standards. The committee's LCR is intended to promote short-term resilience of a bank's liquidity risk and reduce the risk of the banking sector harming the broader economy by failing to absorb shocks arising from financial and economic stress. The LCR requires that a bank have an adequate stock of unencumbered high-quality liquid assets that can be converted into cash easily and immediately in private markets to meet a 30-day liquidity stress scenario. The revised LCR updates standards originally adopted by the Committee in 2010. Given slower than expected strengthening of the banking system and the broader economy, and in response to industry requests, the Committee decided to expand the range of eligible assets to include corporate debt, unencumbered equities, and highly-rated residential mortgage-backed securities. The Committee also clarified its intention to allow banks use their high-quality liquid assets in times of stress. Finally, the Committee revised the timetable for phase-in of the standard. The standard will take effect as planned on January 1, 2015, but the minimum requirement will begin at 60%, rising 10 percentage points each year until full implementation on January 1, 2019.

FIRM NEWS

Complimentary Webinar - The California Homeowners Bill of Rights: What does it mean for your business?

BuckleySandler LLP will host a webinar on Thursday, January 31, 2013, from 12:00-1:00 PM ET, regarding the California Homeowners Bill of Rights, which went into effect on January 1, 2013 as one of many measures taken by the California legislature to regulate actions of banks against homeowners who are in default or are attempting to refinance and/or modify their loan. BuckleySandler attorneys Clinton Rockwell, Donna Wilson, and John McGuinness will discuss, among other things (i) the broadening of the scope of the coverage of foreclosure protections, (ii) restrictions on dual track foreclosures, (iii) verification of documents, (iv) restrictions on charging loan modification fees, and (v) the expected increase in litigation and litigation risk.

This webinar will be of particular interest to in-house legal, compliance, and risk management personnel at banks and other financial services providers offering mortgage services. **Click here to register.**

Clinton Rockwell will co-chair and speak at the ACI's 10th National Forum on Residential Mortgage Litigation & Regulatory Enforcement in San Francisco, CA, on January 17, 2013. Mr. Rockwell's panel, which will include the CFPB's Chief Counsel for Enforcement Strategy, Chris Peterson, will explore the CFPB's Regulatory and Enforcement Agenda for 2013.

David Whitaker will speak at the Silanis Technology E-Signature Summit for Bank Executives on January 17, 2013 in New York City. Mr. Whitaker will discuss key regulatory developments and judicial decisions of the past two years affecting the use of electronic records and signatures in electronic financial services. BuckleySandler is also sponsoring the cocktail reception at the close of the Summit.

David Krakoff will speak at ACI's Inaugural Summit on White Collar Litigation being held January 22-23, 2013 in New York, NY. Mr. Krakoff will participate in the January 22 session entitled "The FCPA Year In Review: Assessing the Biggest Cases of the Year and What Litigators Need to Take Away to Best Protect Their Clients."

Donna Wilson will participate in a Strafford CLE entitled "Privacy Class Actions: Latest Developments in Intentional Privacy and Negligent Data Breach Litigation" on January 24, 2013. Panelists will discuss theories of liability in privacy litigation, related questions of statutory damages, defenses for defendants, lessons from recent data breach settlements, and potential insurance coverage to minimize litigation and liability costs.

James Parkinson will speak at a symposium entitled "Bribes Without Borders: The Challenge of Fighting Corruption in the Global Context," produced by the Washington College of Law on February 12, 2013 in Washington, D.C.

James Parkinson will speak on corruption risks associated with doing business in India at a panel produced by the Association of the Bar of the City of New York City on March 1, 2013.

Andrew Sandler will participate in the "Fair Lending Forum" at CBA Live 2013, the Consumer Bankers Association's annual conference for retail banking leaders, to be held March 11-13, 2013 in Phoenix, AZ.

Andrew Schilling will be a panelist for "False Claims Act: Enforcement and Compliance Issues Explored," a Knowledge Congress CLE webcast, on March 13, 2013. This event will present an overview of the False Claims Act and address regulatory updates and enforcement developments, key takeaways from related cases, identifying risks for potential FCA violations, and developing a robust compliance program.

Jonice Gray Tucker will speak at the American Bar Association's Business Law Section Spring Meeting on April 4, 2013 in Washington, D.C. The panel on which she is participating will focus on CFPB enforcement actions.

Jonice Gray Tucker and Valerie Hletko will moderate a panel entitled "Extreme Makeover: Consumer Protection Edition" at the American Bar Association's Business Law Section Spring Meeting on April 4, 2013 in Washington, D.C. The panel will focus on the CFPB's new regulations and related compliance expectations.

Andrew Sandler will speak at the 39th Annual Bankers Legal Conference which will be held April 4-5, 2013 at The Westin Austin at the Domain.

FIRM PUBLICATIONS

Thomas Sporkin published "Will Rakoff Opinion Impact Decision on Steven Cohen" in Law360 on December 5, 2012.

Jeremiah Buckley authored "How CFPB Can Turn Restrictive Mortgage Rule into a Win for All" for American Banker on December 10, 2012.

Andrew Schilling, Matthew Previn, and Ross Morrison published "New York Becoming the Leading Venue for Financial Fraud Whistleblower Suits," in the December 18, 2012 issue of Bloomberg BNA's Banking Report.

Andrew Schilling published "U.S. Using Subpoenas Under 1989 Act as New Tool to Probe Financial Firms," on January 3, 2013 on Reuters' Financial Regulatory Forum.

About BuckleySandler LLP (www.buckleysandler.com)

With over 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.

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

MORTGAGES

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Ohio Creates Temporary Loan Originator License. Last month, Ohio enacted a bill, S.B. 333, to allow the Division of Financial Institutions to offer a transitional loan originator license to assist an originator licensed by another state to transition to employment with an Ohio-regulated firm. The new license allows a transitioning out-of-state originator to originate loans on a temporary basis-120 days-while the originator completes the requirements of obtaining a state-issued annual license. A transitioning originator must have a sponsor that meets certain criteria and must pay a fee as set by the state regulator. In addition, the law directs the state regulator to adopt regulations allowing an originator from a federally regulated institution to obtain a temporary state license after federal law is changed to allow such transitional licenses. The CFPB has interpreted current federal law to prohibit such transitional licenses.

Ninth Circuit Affirms Dismissal of Unfair Competition Claims over Teaser Rates. On January 9, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court's dismissal of a putative class action against a national bank over its adjustable rate mortgage disclosure and payment application. *O'Donnell v. Bank of Am., N.A.*, No. 11-16351, slip op. (9th Cir. Jan. 9, 2013). On appeal, the borrowers argued that the district court erred in holding that their California state-law claims for common law fraud and violations of the Unfair Competition Law based on the lender's alleged concealment of material facts about the loans' escalating principal balances and interest rates are preempted by the National Bank Act and OCC regulations. The borrowers also challenged the district court's dismissal of their state-law breach of contract claim based on allegations that the lender improperly applied payments solely toward satisfying part of the interest owed while adding the remaining interest to the principal balance. In affirming the dismissal, the appeals court held that the fraud and unfair competition claims are expressly preempted because they would force the lender to make additional disclosures not required by federal law. The appeals court also affirmed the district court's holding that the FTC Act does not provide a private right of action and therefore cannot be employed as a premise for the borrowers' unfair competition claim. With regard to the borrowers' breach of contract claim, the court held that the mortgage contract did not include any representation that the lender would apply payments to principal if the payment failed to cover the accrued interest, and, therefore, the borrowers failed to state a plausible claim.

D.C. Circuit Reinstates Challenge to HUD Reverse Mortgage Regulations. On January 4, the U.S. Court of Appeals for the District of Columbia held that two widowed spouses have standing to pursue allegations that a HUD regulation defining conditions under which it would insure a reverse mortgage agreement contradicted the governing statute, and in doing so made it easier for lenders to foreclose on homes occupied by surviving spouses. *Bennett v. Donovan*, No. 11-5288, 2013 WL 45879 (D.C. Cir. Jan. 4, 2012). The surviving spouses, neither of whom were legal borrowers under the reverse mortgages entered into by their spouses, sought declaratory relief that HUD's regulations requiring that the mortgage be due and payable in full if a borrower dies and the property is not the principal residence of at least one surviving borrower violated the Administrative Procedure Act because the rule is inconsistent with the governing statute. The statute protects "homeowners," as opposed to "borrowers," from displacement and defines "homeowner" to include "spouse of the homeowner." The district court held that the spouses lacked standing to sue HUD because relief for their injuries depended solely on the lenders' decision whether to foreclose. The appellate court held, however, that in situations like those at issue here, it is within HUD's power to provide complete relief to the lenders and borrowers, and therefore such relief is likely, as opposed to speculative, and as such is sufficient to establish standing. Though it limited its holding to the standing issue, the court added that it was "puzzled" by HUD's attempt to justify a rule that appears to contradict the governing statute. Further, the court outlined potential relief that HUD could provide, explaining that HUD could accept assignment of the mortgage, pay off the balance of the loans to the lenders, and then decline to foreclose against the spouses. The court reinstated the case and remanded for further proceedings.

BANKING

OCC Extends Deadline for Application of Lending Limits Rule. On January 4, the OCC issued a final rule that extends until July 1, 2013 the temporary exception for the application of its lending limits rule to certain credit exposures. In June 2012, the OCC issued an interim final rule to implement Dodd-Frank Act revisions to the statutory definitions of loans and extensions of credit for lending limit purposes to include certain credit exposures arising from a derivative transaction, repurchase agreement, reverse repurchase agreement, securities lending transaction, or securities borrowing transaction. That interim rule gave institutions until January 1, 2013 to comply, and the OCC extended that date to April 2013 through a recent bulletin. The instant rule extends the date once more and explains that, without the extension, institutions that wish to use an internal model method to determine credit exposure for derivative transactions and securities financing transactions may not have sufficient time to develop, receive approval for, and implement such a model.

Senators Ask Regulators to Halt Bank Payday Lending. On January 2, a group of Democratic Senators sent a letter to the Federal Reserve Board, the FDIC, and the OCC seeking action to stop banks from making payday loans. The letter cites the agencies' "long history of appropriately prohibiting . . . banks from partnering with non-bank payday lenders," but claims that several banks are currently making payday loans directly to their customers. The products at issue are actually deposit advance loans, which the Senators claim are structured the same as traditional payday loans and put customers in a cycle of debt. The Senators call on the regulators to take "meaningful regulatory action" in response to the problem as they present it, but stop short of identifying specific banks or outlining potential federal legislation.

Basel Committee Relaxes Liquidity Standards. On January 7, theBasel Committee released its revised Liquidity Coverage Ratio (LCR), a component of the comprehensive Basel III accords that also address capital standards. The committee's LCR is intended to promote short-term resilience of a bank's liquidity risk and reduce the risk of the banking sector harming the broader economy by failing to absorb shocks arising from financial and economic stress. The LCR requires that a bank have an adequate stock of unencumbered high-quality liquid assets that can be converted into cash easily and immediately in private markets to meet a 30-day liquidity stress scenario. The revised LCR updates standards originally adopted by the Committee in 2010. Given slower than expected strengthening of the banking system and the broader economy, and in response to industry requests, the Committee decided to expand the range of eligible assets to include corporate debt, unencumbered equities, and highly-rated residential mortgage-backed securities. The Committee also clarified its intention to allow banks use their high-quality liquid assets in times of stress. Finally, the Committee revised the timetable for phase-in of the standard. The standard will take effect as planned on January 1, 2015, but the minimum requirement will begin at 60%, rising 10 percentage points each year until full implementation on January 1, 2019.

CONSUMER FINANCE

Senators Ask Regulators to Halt Bank Payday Lending. On January 2, a group of Democratic Senators sent a letter to the Federal Reserve Board, the FDIC, and the OCC seeking action to stop banks from making payday loans. The letter cites the agencies' "long history of appropriately prohibiting . . . banks from partnering with non-bank payday lenders," but claims that several banks are currently making payday loans directly to their customers. The products at issue are actually deposit advance loans, which the Senators claim are structured the same as traditional payday loans and put customers in a cycle of debt. The Senators call on the regulators to take "meaningful regulatory action" in response to the problem as they present it, but stop short of identifying specific banks or outlining potential federal legislation.

Fourth Circuit Holds State Auto Debt Cancellation Requirements Not Preempted for Certain Assigned Loans. On December 26, the U.S. Court of Appeals for the Fourth Circuit held that federal law does not preempt Maryland's debt cancellation requirements for an auto retail installment sales contract (RISC) when a national bank is the assignee, and not the originator, of the loan. *Decohen v. Capital One, N.A.*, No. 11-2161, 2012 WL 6685767 (4th Cir. Dec. 26, 2012). In this case, a dealer sold and financed a used vehicle and subsequently assigned the loan to a national bank. The financing included a charge for a debt cancellation agreement in the RISC, which under the Maryland Credit Grantor Closed End Credit Provisions (CLEC) requires a lender to cancel any remaining loan balance when a car is totaled and insurance does not cover the full loss. After the buyer totaled his car and was left with a loan balance, he sought to enforce the debt cancellation agreement. In dismissing the case, the district court held, in relevant part, that the agreement at issue was a "debt cancellation contract" covered by the National Bank Act, and that because such contracts are governed by federal law and regulations, including regulations regarding debt cancellation agreements, state regulation of such contracts is preempted. The district court also found that the purchaser failed to state a claim for breach of contract because the bank did not agree to cancel the remaining debt. The appeals court disagreed and held that because the OCC regulations regarding debt cancellation agreements apply only to agreements entered into by national banks, "the CLEC provisions regarding debt cancellation agreements are not expressly preempted by federal law when the agreements are part of credit contracts originated by a local lender and assigned to a national bank." The court also held that the purchaser stated a claim for breach of contract because the parties voluntarily elected to be governed by the CLEC in the RISC, which cannot be undone by assignment of the loan. The court vacated the district court's judgment and remanded the case for further proceedings.

Eleventh Circuit Holds Management Company Collecting HOA Fees Exempt from FDCPA. Recently, the U.S. Court of Appeals for the Eleventh Circuit held that a management company collecting debts for a homeowners association was exempt from the FDCPA because collecting the unpaid assessments was incidental to the company's bona fide fiduciary obligations. *Harris v. Liberty Cmty. Mgmt., Inc.*, No. 11-14362, 2012 WL 6604518 (11th Cir. Dec. 19, 2012). In *Harris*, a homeowners association contracted with a management company to perform various tasks, including collecting past due assessments from homeowners. After warning the plaintiffs that their water service would be disconnected if they did not pay their outstanding association dues, the management company had their water service suspended. The plaintiffs asserted that the company was a debt collector under the FDCPA and violated the Act by terminating their water service. Under Section 1692a(6)(F)(i) of the FDCPA, an individual or entity is exempt from the Act when "collecting or attempting to collect any debt owed...another to the extent such activity is incidental to a bona fide fiduciary obligation." The Eleventh Circuit held that the management company fell within this exemption. Because the company was the homeowners association's agent, it owed a fiduciary duty to the association. The court also found that collecting the debts was "incidental" to the company's fiduciary obligation, noting that the company did many other tasks for the association other than collect assessments, such as obtaining utilities, purchasing insurance, and assisting the association with its tax filings. In addition, the Eleventh Circuit affirmed the district court's dismissal of the plaintiffs' claims under the Georgia Fair Business Practices Act. The court explained that the management company's decision to stop the water service after providing the plaintiff notice was not unfair or deceptive.

SECURITIES

SEC Announces Departure of Enforcement Director, Names New General Counsel and Chief Accountant. On January 9, the SEC announced that its Enforcement Director, Robert Khuzami, is leaving the agency. Mr. Khuzami was appointed to the position in February 2009. The SEC press release credits him with, among other things, restructuring the division and aggressively pursuing financial crisis-related cases and insider trading enforcement, which, together with other enforcement activities, yielded the all-time record number of 735 SEC enforcement actions in FY 2011 and another 734 actions in FY 2012. Earlier in the week, the SEC announced that Geoffrey Aronow will serve as the agency's General Counsel. Mr. Aronow previously served as the Director of the Division of Enforcement at the CFTC for nearly four years, but most recently was in private practice. Last week, the SEC named Paul Beswick as Chief Accountant, head of the agency office responsible for establishing and enforcing accounting and auditing policy. Mr. Beswick joined the SEC in September 2007 and has filled the position in an acting role since July 2012.

NCUA Files Another Major MBS Suit. On January 4, the NCUA announced another major mortgage-backed securities lawsuit. Similar to prior suits, the NCUA alleges on behalf of three insolvent corporate credit unions that a mortgage securitizer violated federal and state securities laws in the sale of $2.2 billion in mortgage-backed securities to the credit unions. In this case, the NCUA is suing a securities firm for alleged wrongdoing by companies the defendant later acquired. The NCUA complaint alleges the acquired firms made numerous misrepresentations and omissions of material facts in the offering of the securities sold to the failed corporate credit unions, and that underwriting guidelines in the offering documents were "systematically abandoned." The NCUA argues that these actions caused the credit unions to believe the risk of loss was low, when, in fact, the opposite was true. When the securities lost value, the NCUA claims, the credit unions were harmed and forced into insolvency.

PRIVACY/DATA SECURITY

California AG Issues Mobile Application Privacy Recommendations. On January 10, California Attorney General Kamala Harris (AG) issued recommended privacy practices for mobile application developers, mobile application platform providers, mobile advertising networks, operating system developers, and mobile carriers. The AG recommends a "surprise minimization" approach, which could include measures to (i) avoid collecting personally identifiable data that are not needed for basic functionality, (ii) make an app's general privacy policy easy to understand and available before download, and (iii) supplement a legally required general privacy policy with enhanced measures to alert users and give them control over data practices that are not related to an application's basic functionality or that involve sensitive information. Supplemental policies could include "special notices" delivered in context and "just-in-time," or short privacy statements made readily available within an application and that highlight potentially unexpected practices and allow users to make privacy choices. The issuance of the recommendations is the latest action by the AG as part of a broader privacy initiative and follows the state's first mobile application privacy suit filed last month.

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