Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

**May 10, 2013**

## TOPICS COVERED THIS WEEK (CLICK TO VIEW)



## FEDERAL ISSUES

**Fannie Mae, Freddie Mac Directed to Purchase Only QM Loans.** On May 6, the FHFA announced that Fannie Mae and Freddie Mac must limit their future mortgage acquisitions to loans that meet the requirements for qualified mortgages under the CFPB's January 2013 ability-to-repay/qualified mortgage rule (ATR/QM rule), including special or temporary qualified mortgage requirements, and loans that are exempt from the "ability-to-repay" requirements. After the ATR/QM rule takes effect on January 10, 2014, Fannie Mae and Freddie Mac will no longer purchase a loan subject to the ability-to-repay requirements if the loan (i) is not fully amortizing, (ii) has a term of longer than 30 years, or (iii) includes points and fees in excess of 3% of the total loan amount, or such other limits for low balance loans as set forth in the rule. The announcement, together with announcements made by Fannie Mae and Freddie Mac, confirms that the enterprises will continue to purchase loans that meet the underwriting and delivery eligibility requirements stated in their respective selling guides, including those that are processed through their automated underwriting systems.

**CFPB Issues Report, Holds Field Hearing on Student Loan Relief Policy Options**. On May 8, the CFPB issued a report regarding student loan affordability and related policy issues. The report summarizes and analyzes public responses to the CFPB's request for information and discusses policy options for addressing these issues. In particular, the paper explores policy options for restructuring student loans, including, for example, allowing distressed private loan borrowers to convert their obligations into federal student loans, which would allow them to accesses certain income-based repayment and other benefits available to federal loan borrowers, and options for a public-private loan restructuring program. The paper also identifies multiple policy options for jumpstarting the refinance market, including creating a "centralized source on private student loans[, which] could create the conditions and data standards for the emergence of an auction-like

marketplace for refinance activity." The paper states that compliance with existing laws on origination, servicing, and collection of student loans is also critical. On the same day the report was issued, the CFPB held a field hearing at which CFPB Director Richard Cordray, other CFPB officials, and industry and consumer groups discussed many of the issues presented by the CFPB information request and report, including the effects of student debt burdens on individuals and the broader economy, and potential debt relief policy options.

**FTC Sharpens Focus on Data Brokers.** On May 7, the FTC released letters it sent to 10 data brokers warning that certain of the brokers' practices could violate FCRA privacy protections. The announcement states that data broker companies that collect, distribute or sell information about consumers' creditworthiness, eligibility for insurance, or suitability for employment are subject to FCRA, and as such, have an obligation to reasonably verify the identities of their customers and make sure that customers have a legitimate purpose for receiving consumer information. The letters were issued pursuant to an FTC "test-shopping" operation as part of an international privacy practice transparency sweep conducted by the Global Privacy Enforcement Network. The operation and subsequent warnings letters are the latest move by the FTC to address data broker compliance with FCRA. Last year, the FTC ordered certain data brokers to produce information about their collection and use of consumer data and announced at least one settlement with a data broker regarding FCRA compliance. However, the letters do not constitute an official notice that the companies are subject to FCRA or act as formal complaints, but rather "remind" the companies to review their practices to determine whether they are consumer reporting agencies subject to FCRA.

**CFPB Proposes to Delay Part of Mortgage Loan Originator Rule.** On May 7, the CFPB proposed to temporarily delay the effective date of one aspect of its loan originator compensation rule. Under the final rule, effective June 1, 2013, creditors would be prohibited from financing premiums or fees for certain credit insurance products offered in connection with certain mortgage loan transactions. The CFPB proposes to temporarily delay the relevant provision so that the Bureau can clarify its application to transactions other than those in which a lump-sum premium is added to the loan amount at closing. The CFPB plans to publish a new proposal to seek further notice and comment about whether, and under what circumstances, premiums for certain credit insurance products can be charged on a periodic basis in connection with a covered consumer credit transaction.

**International Bribery Charges against Broker-Dealer Employees Result from SEC Exam.** On May 7, the DOJ charged two employees of a U.S. broker-dealer and a senior official in Venezuela's state economic development bank for their alleged roles in what the DOJ describes as a "massive international bribery scheme." According to an unsealed criminal complaint, the DOJ accuses the broker-dealer employees and the foreign official of violating the FCPA by conspiring to pay $5 million in bribes to the foreign official in exchange for her directing the economic development bank's trading business to the broker-dealer, which yielded millions of dollars more in mark-ups and mark-downs for the broker-dealer. The government alleges that commissions paid on the directed trades were split with the foreign official through monthly kickbacks and that some of the trades executed for the bank had no discernible business purpose. The government also claims that the kickbacks often were paid using intermediary corporations and offshore accounts, which will be pursued through a separate civil forfeiture action. On the same day, the SEC announced a parallel civil action against the two broker-dealer employees and two other individuals who allegedly participated in and profited from the scheme. The investigations stemmed from a routine periodic SEC examination of the broker-dealer. The DOJ warned others in the financial services industry, particularly brokers, about engaging in similar activities, and the SEC's handling of this case suggests its examiners are focused on conduct that potentially violates the FCPA.

**FTC Approves Order Settling Data Breach Charges.** On May 3, the FTC approved a final order

settling charges against a California-based cord blood bank firm alleged to have violated the FTC Act by failing to use reasonable and appropriate procedures for handling customers' personal information, despite its privacy policy claims to the contrary. Further, the FTC alleged that the firm created unnecessary risks to personal information by transporting portable data storage devices containing personal information in a manner that made the information vulnerable to theft, and failed to prevent, detect and investigate unauthorized access to computer networks. According to the FTC, these practices resulted in a data breach in which certain portable devices were stolen from an employee's personal vehicle and the personal information of nearly 300,000 customers was compromised. The settlement requires the company to establish a comprehensive information security program and submit to security audits by independent auditors every other year for 20 years, and prohibits the company from misrepresenting the privacy and security of information collected from consumers.

**FinCEN Publishes SAR Activity Review and Annual SAR Data Report.** This week, FinCEN published its semiannual SAR Activity Review, which provides information about the preparation, use, and value of Suspicious Activity Reports (SARs) filed by financial institutions. The report identifies SAR trends, reviews law enforcement cases that demonstrate the importance and value of Bank Secrecy Act (BSA) data to the law enforcement community, and highlights issues related to financial exploitation of older Americans. FinCEN also published an annual companion report, "By the Numbers," which compiles numerical data gathered from SARs filed by financial institutions.

## STATE ISSUES

**New York AG Plans Suit Over Alleged Violations of National Servicer Settlement.** On May 6, New York Attorney General Eric Schneiderman announced his intent to sue two of the five mortgage servicers that entered the National Mortgage Settlement with 49 state attorneys general, the U.S. Department of Justice, and certain federal agencies, alleging numerous violations of the servicing standards established by that agreement. Based on complaints received from borrowers, Mr. Schneiderman alleged that the two companies violated agreed-to loan modification timeline requirements established in the National Mortgage Settlement, including failure to provide acknowledgment of receipt of documentation from a borrower, failure to notify the borrower of missing documentation, and failure to provide a decision on the modification request within 30 days of receiving a complete application. Procedurally, under the National Mortgage Settlement, an individual party such as the New York Attorney General must provide notice of intent to bring an enforcement action for noncompliance to the Monitoring Committee, which has 21 days to determine whether to pursue action on behalf of all the parties to the National Mortgage Settlement. At the conclusion of the 21-day waiting period, if the Monitoring Committee decides not to move forward, the New York Attorney General, and other individual attorneys general, may separately pursue the action.

**State Attorneys General Look Into Recent Data Breach Incident.** On May 1, the Connecticut Attorney General, George Jepsen, and the Maryland Attorney General and NAAG President, Douglas Gansler, sent a letter to representatives of a "daily deals" website that recently disclosed a data security incident, seeking additional information about the event. The company publicly reported the incident and stated that no financial information was obtained by the hackers. Nevertheless, the AGs presented numerous information requests, including requests for (i) a detailed timeline of the incident, (ii) the number of individuals affected in each state, (iii) the categories and types of compromised information, (iv) a description of how the company determined that no financial information was compromised, and (v) information about how the company stores, connects, protects, and monitors the various customer data in its possession. Although those experiencing a security breach are often required under state laws to provide this type of

information to a state AG, the public release of an AG information request and the joint issuance of a request by multiple state AGs has been less common.

**Indiana Eliminates Provisions Binding Interested Parties Not Named in Foreclosure Actions.** On May 7, Indiana enacted SB 279 to (i) eliminate a provision in current law that binds certain omitted parties (i.e., parties who have an interest in the property subject to a mortgage foreclosure action, but are not named in the foreclosure action) by the court's judgment in a foreclosure action as if they had been parties to the foreclosure action, and (ii) limit the post-sale redemption rights of certain omitted parties. The changes become effective July 1, 2013.

**Maryland Removes Potential Barrier to Refinance Transactions.** On May 2, Maryland enacted SB 199, which authorizes a mortgagor to refinance the full balance of a loan secured by a first mortgage or deed of trust without the permission of the holder of a junior lien if (i) the principal amount secured by the junior lien does not exceed $150,000, and (ii) the principal amount secured by the refinance mortgage does not exceed the unpaid outstanding principal balance of the first mortgage or deed of trust plus closing costs up to $5,000. In short, under these conditions, the bill grants, on recordation, the same lien priority to the refinance mortgage as the replaced first mortgage or deed of trust. Under current law, when a first mortgage is refinanced, the holder of an existing junior mortgage is asked to agree to subordinate so that the first loan holder preserves priority, and the second lienholder can block the homeowner's ability to refinance the first mortgage. Even where the junior mortgage holder agrees, the process can take can take more than a month and may require the borrower to pay subordination and rate-lock fees. The bill takes effect on October 1, 2013 and applies to refinance transactions after that date.

## COURTS

**DOJ Files First Criminal Action on CFPB Referral, CFPB Files Parallel Civil Suit.** On May 7, the U.S. Attorney for the Southern District of New York announced mail and wire fraud charges against a debt settlement firm, its owner, and three of its employees. The government alleges the defendants lied to prospective customers about (i) fees associated with the company's debt relief products, (ii) the company's purported affiliation with the federal government and leading credit bureaus, and (iii) the results achieved for its customers. On the same day, the CFPB filed a civil complaint against the same debt relief provider and one other company in which the CFPB alleges the firms violated the FTC's Telemarketing Sales Rule and the Dodd-Frank Act by charging consumers illegal advance fees for debt-settlement services. The CFPB is seeking to halt the operations, collect civil penalties, and obtain customer redress.

**Second Circuit Agrees to Hear Interlocutory Appeal of Key MBS Litigation Questions.** On May 7, the U.S. Court of Appeals for the Second Circuit granted two petitions seeking interlocutory appeal of key questions related to pending mortgage backed securities (MBS) cases. *Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago v. The Bank of New York Mellon*, Nos. 13-00661, 00664 (2nd Cir. May 7, 2013). Taking the two appeals in tandem, the court will address (i) a group of pension funds' question of whether a named plaintiff purchasing a certificate issued by one MBS trust has standing to represent a class which includes purchasers of certificates issued by trusts from which that plaintiff did not purchase, where the action is against a common trustee and involves repurchase rights for purportedly defective loans issued by a common originator, and (ii) an MBS trustee's question as to whether certificates evidencing beneficial ownership interests in trusts holding multiple mortgage loans are subject to the Trust Indenture Act.

**Southern District of New York Judge Dismisses False Claims Counts, Allows FIRREA Claims to Proceed in Major Mortgage Fraud Case.** On May 8, the U.S. District Court for the Southern

District of New York dismissed 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, Order (S.D.N.Y. May 8, 2013). The government also claims that (i) the lender's senior management ignored warnings about the supposedly high levels of fraud and defects, (ii) the lender attempted to conceal internal quality control reports indicating that the loans had high material defect rates, and misleadingly informed Fannie Mae and Freddie Mac that it had tightened its underwriting guidelines, and (iii) the lender resisted buying many of the loans back after the loans defaulted. Notably, the court did not dismiss the government's claims under FIRREA, which has a longer statute of limitations and lower burden of proof than the FCA. The court expects to release a written opinion in the near future.

**Second Circuit Sides with CFPB in ILSFDA Case While Applying *Auer* Deference.** On May 6, the U.S. Court of Appeals for the Second Circuit agreed with the CFPB in holding that a single-story unit in a multi-story condominium is a "lot," as that term is used in the Interstate Land Sales Full Disclosure Act. *Berlin v. Renaissance Rental Partners*, No. 12-2213, slip op. (2d Cir. May 6, 2013). The CFPB and HUD, the predecessor regulator under the ILSFDA, had previously issued regulations stating that a property could only qualify as a "lot" if it involved the "exclusive use of ... land." The Second Circuit determined that the definition of the term "land" was ambiguous and deferred to the agencies' interpretation, which equated "land" with "realty." The case is notable primarily because the dissenting opinion reflects an increasingly unfriendly attitude in the courts towards so-called *Auer* deference. That deference generally requires courts to defer to any plausible interpretation from an agency of its own regulations. In a 15-page dissent in *Berlin*, Chief Judge Dennis Jacobs questioned the utility of that deference doctrine in this case, arguing that the agency's reading was "unnatural" and should not be given effect. Chief Judge Jacobs also disagreed with the majority's emphasis on the fact that the HUD/CFPB position was consistent. Indeed, Chief Judge Jacobs felt that the CFPB's "gravity-defying" "misunderstanding" was "not improved by consistency," particularly given that the agencies' interpretations rested on guidelines that were "semi-literate." Interestingly, Chief Judge Jacobs twice cited to Justice Scalia's recent dissent in *Decker v. Northwest Environmental Defense Center*, which questions the continuing basis for *Auer*. (A previous InfoByte discussed the opinions in Decker.) Because *Auer* may prove relevant in many administrative law cases-including those involving banking and financial regulators-this unfriendly attitude may prove significant for participants throughout the financial industry.

**New York Appeals Court Overturns Sanction Requiring Bank To Accept Terms of Trial Loan Modification.** On May 1, the Supreme Court of the State of New York, Appellate Division, overturned a lower court's order requiring a lender to modify a borrower's loan agreement under the terms employed in the trial period as the penalty for failing to negotiate with the borrower in good faith during the required settlement conference. *Wells Fargo Bank, N.A. v. Meyers*, No. 34632/09, 2013 WL 1811781 (N.Y. Sup. Ct. App. Div. May 1, 2013). On appeal, the appellate court held that the HAMP trial agreement is not a proper agreement regarding the real property and cannot be enforced as an agreement. Moreover, the appellate court held that a court may not rewrite a contract that the parties freely entered into upon a finding that one of those parties failed to satisfy its obligation to negotiate in good faith during the settlement conference. Further, the court held that because the lender was not given notice that the trial court was considering such a remedy, the sanction violated the lender's due process rights. The appellate court overturned the trial court's order and remanded the case for further proceedings.

## MISCELLANY

**FINRA Fines Three Broker-Dealers Over AML Compliance Failures, Suspends Executives.** On

May 8, FINRA announced that it fined three firms a combined $900,000 and suspended four executives for allegedly failing to establish and implement adequate anti-money laundering programs. Specifically, FINRA claims that investigations into the three firms revealed that (i) one firm failed to identify suspicious account activity or did not adequately investigate numerous AML "red flags" and that certain of the firm's customers' accounts engaged in a pattern of activity consisting of moving millions of dollars through the accounts while conducting minimal-to-no securities transactions, (ii) a second firm that specialized in online trading and catered to the Chinese community failed to implement an AML program adequate to detect and report suspicious transactions, including potential manipulative trading, and (iii) a third firm failed to create and enforce a supervisory system and written procedures to monitor for unlawful transactions in unregistered penny stocks and failed to establish a program reasonably designed to monitor for and report suspicious activity. The suspended executives included two chief compliance officers who failed to fulfill obligations to monitor in accordance with AML requirements, and two owners. The suspensions range from three to nine months. The firms and the executives did not admit to the allegations, but agreed to pay the fines to resolve the investigation.

**Report Indicates FDIC Suing Bank Directors and Officers at Record Pace.** On May 8, an economic and financial analysis and consulting firm issued a report that indicates the FDIC is on pace to file more suits against bank directors and officers in 2013 than it has in any year since the start of the financial crisis. The report states that as of April 22, 2013, the FDIC has seized eight institutions and filed at least 12 lawsuits against officers and directors, and that trends suggest that substantially more FDIC cases may be filed in the coming months. Other key findings from the report include: (i) of the 476 financial institutions that have failed since 2007, 55, or 12%, have been the subject of FDIC D&O lawsuits, (ii) CEOs continue to be the most commonly named defendants, though outside directors have been named in 75 percent of all filed complaints, (iii) the 12 suits filed in 2013 included allegations of gross negligence and breach of fiduciary duty, and (iv) of the 44 settlement agreements involving directors and officers (regardless of whether a lawsuit was filed), as many as 17 agreements, or 39 percent, required out-of-pocket payments by the directors and officers.

## FIRM NEWS

James Parkinson will speak at ACI's Conference for FCPA and Anti-Corruption in the Life Sciences Industry on May 15, 2013, on a panel titled, "Managing Corruption Risks in a Transactional Setting: How to Prevent FCPA Pitfalls in Life Science Joint Ventures, Mergers & Acquisitions and Collaborations."

Andrew Sandler will speak at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference, May 20, 2013 in Boca Raton, FL. Mr. Sandler's panel is: "Major Litigation and Enforcement Trends".

James Parkinson will participate in a Strafford CLE webinar, "FCPA Risks for U.S. and Non-U.S. Execs," on June 4, 2013, 1:00 - 2:30 PM.

Andrea Mitchell will speak at an American Bankers Association Fair Lending Workshop on June 8, 2013 in Chicago, IL, offered in connection with the ABA Regulatory Compliance Conference. The Fair Lending Workshop will review current fair lending hot topics and how institutions can manage or mitigate fair lending obstacles and demonstrate compliance with fair lending laws and regulations.

Andrew Sandler will speak at the American Bankers Association's Regulatory Compliance

Conference, June 11, 2013 in Chicago, IL. Mr. Sandler's topic is: "Fair and Responsible Banking: Beyond Mortgages".

Jonathan Cannon will speak at the National Settlement Services Summit in Cleveland, Ohio on June 12, 2013. Mr. Cannon's session is entitled "RESPA defined in 2013: What's new, what's the same and where do compliance issues lurk?"

John Redding will participate on a panel at the 15th AFSA State Government Affairs and Legal Issues Forum on June 13, 2013 in San Antonio, TX. Mr. Redding's panel, which will cover auto finance lending products and CFPB concerns on fair lending and dealer participation, also will include Rebecca Gelfond, Deputy Fair Lending Director, CFPB, Will Lund, Superintendent, Maine Bureau of Consumer Credit Protection, and Deborah Robertson, Managing Counsel, Toyota Financial Services.

## FIRM PUBLICATIONS

Margo Tank, David Whitaker, and Ian Spear published, "Federal Regulators Issue Guidance on Social Media and Mobile Privacy," in Internet Law & Strategy on April 4, 2013.

Andrew Schilling, Ross Morrison, and Michelle Rogers published "Little-known Statute May Breathe New Life into False Claims Act Cases Against Financial Institutions," in Thomson Reuters Accelus on April 18, 2013.

Matthew Previn and Michelle Rogers published "A Financial Institution's Fraud on Itself Triggers FIRREA," in Law360, on April 26, 2013.

Margo Tank, Kate Aishton, and Andrew Grant published "NACHA's Guidelines for Bill Payments Via QR Codes," in the April 2013 issue of E-Finance and Payments Law and Policy.

Benjamin Saul, Valerie Hletko, Liana Prieto, and Shara Chang contributed the Fair Lending Litigation chapter in *Litigation Services Handbook: The Role of the Financial Expert*, 2013 Cumulative Supplement (5th Edition).

## About BuckleySandler LLP (www.buckleysandler.com)

*With nearly 150 lawyers in Washington, New York, Los Angeles, and Orange County, BuckleySandler provides best-in-class legal counsel to meet the challenges of its financial services industry and other corporate and individual clients across the full range of government enforcement actions, complex and class action litigation, and transactional, regulatory, and public policy issues. The Firm represents many of the nation's leading financial services institutions. "The best at what they do in the country." (Chambers USA).*

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*Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (310) 424-3900*
*Orange County: 3121 Michelson Drive, Suite 210, Irvine, CA 92612, (949)398-1360*

*We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes. Email infobytes@buckleysandler.com.*

*In addition, please feel free to email our attorneys. A list of attorneys can be found here.*

*For archived InfoBytes, please visit our blog: http://www.infobytesblog.com.*

*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

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**Report Indicates FDIC Suing Bank Directors and Officers at Record Pace.** On May 8, an economic and financial analysis and consulting firm issued a report that indicates the FDIC is on pace to file more suits against bank directors and officers in 2013 than it has in any year since the start of the financial crisis. The report states that as of April 22, 2013, the FDIC has seized eight institutions and filed at least 12 lawsuits against officers and directors, and that trends suggest that substantially more FDIC cases may be filed in the coming months. Other key findings from the report include: (i) of the 476 financial institutions that have failed since 2007, 55, or 12%, have been the subject of FDIC D&O lawsuits, (ii) CEOs continue to be the most commonly named defendants, though outside directors have been named in 75 percent of all filed complaints, (iii) the 12 suits filed in 2013 included allegations of gross negligence and breach of fiduciary duty, and (iv) of the 44 settlement agreements involving directors and officers (regardless of whether a lawsuit was filed), as many as 17 agreements, or 39 percent, required out-of-pocket payments by the directors and

officers.

**Second Circuit Sides with CFPB in ILSFDA Case While Applying *Auer* Deference.** On May 6, the U.S. Court of Appeals for the Second Circuit agreed with the CFPB in holding that a single-story unit in a multi-story condominium is a "lot," as that term is used in the Interstate Land Sales Full Disclosure Act. *Berlin v. Renaissance Rental Partners*, No. 12-2213, slip op. (2d Cir. May 6, 2013). The CFPB and HUD, the predecessor regulator under the ILSFDA, had previously issued regulations stating that a property could only qualify as a "lot" if it involved the "exclusive use of ... land." The Second Circuit determined that the definition of the term "land" was ambiguous and deferred to the agencies' interpretation, which equated "land" with "realty." The case is notable primarily because the dissenting opinion reflects an increasingly unfriendly attitude in the courts towards so-called *Auer* deference. That deference generally requires courts to defer to any plausible interpretation from an agency of its own regulations. In a 15-page dissent in *Berlin*, Chief Judge Dennis Jacobs questioned the utility of that deference doctrine in this case, arguing that the agency's reading was "unnatural" and should not be given effect. Chief Judge Jacobs also disagreed with the majority's emphasis on the fact that the HUD/CFPB position was consistent. Indeed, Chief Judge Jacobs felt that the CFPB's "gravity-defying" "misunderstanding" was "not improved by consistency," particularly given that the agencies' interpretations rested on guidelines that were "semi-literate." Interestingly, Chief Judge Jacobs twice cited to Justice Scalia's recent dissent in *Decker v. Northwest Environmental Defense Center*, which questions the continuing basis for *Auer*. (A previous InfoByte discussed the opinions in Decker.) Because *Auer* may prove relevant in many administrative law cases-including those involving banking and financial regulators-this unfriendly attitude may prove significant for participants throughout the financial industry.

## CONSUMER FINANCE

**CFPB Issues Report, Holds Field Hearing on Student Loan Relief Policy Options**. On May 8, the CFPB issued a report regarding student loan affordability and related policy issues. The report summarizes and analyzes public responses to the CFPB's request for information and discusses policy options for addressing these issues. In particular, the paper explores policy options for restructuring student loans, including, for example, allowing distressed private loan borrowers to convert their obligations into federal student loans, which would allow them to accesses certain income-based repayment and other benefits available to federal loan borrowers, and options for a public-private loan restructuring program. The paper also identifies multiple policy options for jumpstarting the refinance market, including creating a "centralized source on private student loans[, which] could create the conditions and data standards for the emergence of an auction-like marketplace for refinance activity." The paper states that compliance with existing laws on origination, servicing, and collection of student loans is also critical. On the same day the report was issued, the CFPB held a field hearing at which CFPB Director Richard Cordray, other CFPB officials, and industry and consumer groups discussed many of the issues presented by the CFPB information request and report, including the effects of student debt burdens on individuals and the broader economy, and potential debt relief policy options.

**DOJ Files First Criminal Action on CFPB Referral, CFPB Files Parallel Civil Suit.** On May 7, the U.S. Attorney for the Southern District of New York announced mail and wire fraud charges against a debt settlement firm, its owner, and three of its employees. The government alleges the defendants lied to prospective customers about (i) fees associated with the company's debt relief products, (ii) the company's purported affiliation with the federal government and leading credit bureaus, and (iii) the results achieved for its customers. On the same day, the CFPB filed a civil complaint against the same debt relief provider and one other company in which the CFPB alleges the firms violated the FTC's Telemarketing Sales Rule and the Dodd-Frank Act by charging

consumers illegal advance fees for debt-settlement services. The CFPB is seeking to halt the operations, collect civil penalties, and obtain customer redress.

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## SECURITIES

**International Bribery Charges against Broker-Dealer Employees Result from SEC Exam.** On May 7, the DOJ charged two employees of a U.S. broker-dealer and a senior official in Venezuela's state economic development bank for their alleged roles in what the DOJ describes as a "massive international bribery scheme." According to an unsealed criminal complaint, the DOJ accuses the broker-dealer employees and the foreign official of violating the FCPA by conspiring to pay $5 million in bribes to the foreign official in exchange for her directing the economic development bank's trading business to the broker-dealer, which yielded millions of dollars more in mark-ups and mark-downs for the broker-dealer. The government alleges that commissions paid on the directed trades were split with the foreign official through monthly kickbacks and that some of the trades executed for the bank had no discernible business purpose. The government also claims that the kickbacks often were paid using intermediary corporations and offshore accounts, which will be pursued through a separate civil forfeiture action. On the same day, the SEC announced a parallel civil action against the two broker-dealer employees and two other individuals who allegedly participated in and profited from the scheme. The investigations stemmed from a routine periodic SEC examination of the broker-dealer. The DOJ warned others in the financial services industry, particularly brokers, about engaging in similar activities, and the SEC's handling of this case suggests its examiners are focused on conduct that potentially violates the FCPA.

## PRIVACY/DATA SECURITY

**FTC Sharpens Focus on Data Brokers.** On May 7, the FTC released letters it sent to 10 data brokers warning that certain of the brokers' practices could violate FCRA privacy protections. The announcement states that data broker companies that collect, distribute or sell information about

consumers' creditworthiness, eligibility for insurance, or suitability for employment are subject to FCRA, and as such, have an obligation to reasonably verify the identities of their customers and make sure that customers have a legitimate purpose for receiving consumer information. The letters were issued pursuant to an FTC "test-shopping" operation as part of an international privacy practice transparency sweep conducted by the Global Privacy Enforcement Network. The operation and subsequent warnings letters are the latest move by the FTC to address data broker compliance with FCRA. Last year, the FTC ordered certain data brokers to produce information about their collection and use of consumer data and announced at least one settlement with a data broker regarding FCRA compliance. However, the letters do not constitute an official notice that the companies are subject to FCRA or act as formal complaints, but rather "remind" the companies to review their practices to determine whether they are consumer reporting agencies subject to FCRA.

**FTC Approves Order Settling Data Breach Charges.** On May 3, the FTC approved a final order settling charges against a California-based cord blood bank firm alleged to have violated the FTC Act by failing to use reasonable and appropriate procedures for handling customers' personal information, despite its privacy policy claims to the contrary. Further, the FTC alleged that the firm created unnecessary risks to personal information by transporting portable data storage devices containing personal information in a manner that made the information vulnerable to theft, and failed to prevent, detect and investigate unauthorized access to computer networks. According to the FTC, these practices resulted in a data breach in which certain portable devices were stolen from an employee's personal vehicle and the personal information of nearly 300,000 customers was compromised. The settlement requires the company to establish a comprehensive information security program and submit to security audits by independent auditors every other year for 20 years, and prohibits the company from misrepresenting the privacy and security of information collected from consumers.

**State Attorneys General Look Into Recent Data Breach Incident.** On May 1, the Connecticut Attorney General, George Jepsen, and the Maryland Attorney General and NAAG President, Douglas Gansler, sent a letter to representatives of a "daily deals" website that recently disclosed a data security incident, seeking additional information about the event. The company publicly reported the incident and stated that no financial information was obtained by the hackers. Nevertheless, the AGs presented numerous information requests, including requests for (i) a detailed timeline of the incident, (ii) the number of individuals affected in each state, (iii) the categories and types of compromised information, (iv) a description of how the company determined that no financial information was compromised, and (v) information about how the company stores, connects, protects, and monitors the various customer data in its possession. Although those experiencing a security breach are often required under state laws to provide this type of information to a state AG, the public release of an AG information request and the joint issuance of a request by multiple state AGs has been less common.

## CRIMINAL ENFORCEMENT

Stay current on U.S. FCPA enforcement actions and international anti-corruption news by visiting our FCPA Score Card Blog.

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