January 25, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

President Obama Re-nominates Richard Cordray for CFPB Director, Nominates Mary Jo White for SEC Chair. On January 24, President Obama announced his re-nomination of current CFPB Director Richard Cordray. Mr. Cordray has led the Bureau since January 2012 when President Obama used his recess appointment authority to install the CFPB director. Absent Senate confirmation, Mr. Cordray's recess appointment expires at the end of this year. Further, the constitutionality of that appointment may be called into question by a recent federal appellate court decision addressing other recess appointments, reported below. Also on January 24, President Obama nominated Mary Jo White for Senate confirmation to serve as Chairman of the SEC. Ms. White is a former U.S. Attorney for the Southern District of New York, during which time she led high-profile prosecutions of organized crime members and terrorists. Most recently she was in private practice.

Federal Regulators Propose Guidance for Social Media Use. On January 22, the FFIEC proposed guidance on the applicability of consumer protection and compliance laws, regulations, and policies to activities conducted via social media by federally supervised financial institutions, as well as nonbanks supervised by the CFPB. With regard to compliance and legal risks, the guidance addresses (i) the applicability of existing federal laws and regulations to the use of social media for marketing and originating new deposit and lending products and the use of social media to facilitate consumer use of payment systems; (ii) the need to apply BSA/AML internal controls to customers engaging in electronic banking through the use of social media, and e-banking products and services offered in the context of social media, as well as BSA/AML risks emerging through the growing use of social media; (iii) CRA monitoring of social media sites run by an institution; and (vi) customer privacy issues associated with social media. The guidance also reviews reputational risks related to social media, including risks related to (i) fraud and brand identity; (ii) social media vendor monitoring; (iii) privacy; (iv) consumer complaints; and (v) employee use of social media. Finally, the guidance addresses the vulnerability of social media to malware and the resultant operational risk. The FFIEC is accepting comments for 60 days after publication in the Federal Register. After the comment period, the agencies will issue supervisory guidance and will urge state regulators to follow.

CFPB Addresses Use of Electronic Periodic Statements for Residential Mortgage Loans. The CFPB's recent rule amending Regulation Z (TILA), issued on January 17, included, among other changes, the requirement that mortgage servicers provide consumers with periodic billing statements. As required by the Dodd-Frank Act, the rule explicitly allows electronic distribution of the statements. However, the Bureau restricted the use of electronic statements only to instances where "the consumer agrees." In describing the process through which this agreement must be obtained, the rule departs from the formal requirements of the federal ESIGN Act's consumer consent process, authorizing instead a "simpler process" which requires only the consumer's "affirmative consent." The CFPB staff, in the accompanying Official Interpretations, indicates that consent may be presumed for consumers who are currently receiving electronic account disclosures from their servicer for any type of account, mortgage or otherwise. In light of concerns about information security, the Official Interpretations also indicate that mortgage servicers may make electronic periodic statements available on a secure website and notify the consumer that the statement is available, rather than delivering the statement directly to the consumer. Recognizing that some consumers may not desire regular notification emails, the Official Interpretations also allow a consumer who has demonstrated the ability to access statements online to opt out of receiving such notifications. Neither the rule nor the Official Interpretations address how the rule relates to other laws that may affect when an electronic communication is delivered, such as the sending or receipt requirements of state UETA statutes.

CFPB Delays Remittance Rule Effective Date. On January 22, the CFPB announced that the effective date for its international remittance transfer rule, originally set for February 7, 2013, is delayed, and that a new effective date will be announced later this year. The CFPB recently proposed making the rule effective 90 days after proposed revisions to the rule are finalized.

Senator Urges Federal Regulators to Sync QRM Rule with CFPB's QM Standard. On January 22, Senator Bob Corker (R-TN) sent a letter to federal regulators responsible for finalizing the Dodd-Frank Act mandated "qualified residential mortgage" (QRM) standard, urging that the final QRM definition mirror the "qualified mortgage" (QM) definition recently promulgated by the CFPB. The QRM rule will define those loans exempt from the Act's risk retention requirements for mortgage securitizers, a requirement that also will be set by the rule though it cannot be less than the statutory floor of five percent of the credit risk for any asset that is not a QRM. The Act also prohibits the QRM standard from being broader than the QM definition. Senator Corker maintains that, because the QRM rule will exempt loans sold to federal government sponsored enterprises and government agencies, "if the QRM rule is written differently than the QM rule, most financial institutions will only originate loans intended for sale to" those entities and as a result the return of private capital to the secondary market will be limited.

SEC Names Office of Market Intelligence Chief. On January 22, the SEC announced that Vincente Martinez will serve as the head of the Office of Market Intelligence, a unit of the Enforcement Division that collects and evaluates tips, complaints and referrals. Mr. Martinez rejoins the SEC from the CFTC where he served as the first director of that agency's whistleblower office. He previously spent eight years in the SEC's Enforcement Division, most recently helping to develop Enforcement Division and SEC-wide policies and procedures for handling tips, complaints, and referrals. Lori Walsh, who is currently serving as the Acting Chief of the Office of Market Intelligence, will serve as Deputy Chief of the office.

House Financial Services Committee Membership, Subcommittees Finalized. On January 22, House Financial Services Committee Chairman Jeb Hensarling (R-TX) announced the subcommittee assignments for the committee's Republican members. Rep. Garrett (R-NJ) will again lead the subcommittee on Capital Markets and Government Sponsored Enterprises, while Rep. Capito (R-WV) remains as head of the subcommittee on Financial Institutions and Consumer Credit. Ranking Member Maxine Waters (D-CA) also recently announced as Ranking Members of those subcommittees Rep. Maloney (D-NY) and Rep. Meeks (D-NY), respectively, and released the full roster for each subcommittee. The subcommittee rosters reflect the new members joining the committee, including Reps. Barr (R-KY), Cotton (R-AR), Hultgren (R-IL), Mulvaney (R-SC), Pittenger (R-NC), Ross (Fla.), Stutzman (R-IN), and Wagner (R-MO) for the majority; and on the minority side Reps. Beatty (D-OH), Delaney (D-MD), Heck (D-WA), Foster (D-IL), Kildee (D-MI), Murphy (D-FL), Sewell (D-AL), and Sinema (D-AZ). Finally, earlier this month Chairman Hensarling announced majority staff positions, and followed with additional staff announcements on January 25, 2013.

FHFA Announces Deputy Director for Housing Mission and Goals. On January 15, the FHFA announced that beginning in March Sandra Thompson will serve as Deputy Director of the Division of Housing Mission and Goals with responsibility for overseeing the FHFA's housing and regulatory policy, financial analysis, and policy research and analysis of housing finance and financial markets. Ms. Thompson will leave her current position as Director of the Division of Risk Management Supervision at the FDIC where she led the agency's examination and enforcement program for risk management and consumer protection. The FHFA also promoted Nina Nichols to serve as Deputy Director of the Division of Supervision Policy and Support.

OCC Announces Chief Counsel. Last week, the OCC announced Amy Friend as the agency's Chief Counsel beginning in February, replacing Julie Williams who retired last fall. Ms. Friend is a former assistant chief counsel at the OCC and served as chief counsel to the Senate Banking Committee during the development of the Dodd-Frank Act.

NCUA Eases Regulatory Requirements for Certain Small Credit Unions. On January 18, the NCUA published a final rule to amend the definition of "small entities" from those with less than $10 million in assets to those with less than $50 million in assets. The change will allow more credit unions to be considered for relief from NCUA rules. The Regulatory Flexibility Act requires federal agencies to consider the impact of their rules on small entities and allows federal agencies to determine what constitutes a small entity. The NCUA proposed a $30 million threshold, which it adjusted upward following review of comments received on the proposal. The NCUA declined to adopt the $175 million threshold sought by some commenters and used by the Small Business Association and the CFPB. In addition to requiring the NCUA to assess the impact of future proposed and final rules on more small credit unions, the new threshold has the immediate effect of excluding more credit unions from certain requirements under NCUA's Prompt Corrective Action rule and the requirement to implement interest rate risk policies. The rule requires the NCUA to review the threshold in two years, and every three years thereafter. The new threshold takes effect on February 19, 2013.

NCUA Finalizes Rule Regarding Troubled State Credit Unions. On January 18, the NCUA published a final rule to allow the agency to determine whether a state-chartered credit union is in "troubled condition." Under current law, only a state supervisory authority is permitted to declare a federally insured, state-chartered credit union to be in troubled condition. The NCUA believes that the change will help protect the National Credit Union Share Insurance Fund by leveraging the federal regulator's resources to increase the likelihood that problems at covered credit unions are addressed. The rule goes into effect on February 19, 2013.

STATE ISSUES

Virginia Publishes Electronic Notarization Standard. On January 21, the Virginia Secretary of the Commonwealth released the Virginia Electronic Notarization Assurance Standard. Citing challenges faced by notaries to "preserve and strengthen the role of the notary in the rapidly emerging digital economy and to ensure reliability and cross-border recognition of notarized electronic documents in a global economy," the standards are intended to support transition of notaries in Virginia to performing electronic notarizations that have the same legal effect as traditional notarizations. They set forth registration and performance requirements, electronic signature and seal requirements, online notarization procedures, and notarized electronic document requirements. According to the Secretary, the Virginia standards (i) reflect the National Association of Secretaries of State Electronic Notarization Standard for Document Security; (ii) incorporate aspects of standards previously adopted by seven other states; and (iii) are consistent with the federal ESIGN Act, the UETA, and the Uniform Real Property Electronic Recording Act.

COURTS

D.C. Circuit Declares President Obama's NLRB Recess Appointments Unconstitutional. On January 25, the U.S. Court of Appeals for the D.C. Circuit held that appointments to the National Labor Relations Board (NLRB) made by President Obama in January 2012 during a purported Senate recess were unconstitutional, and vacated an order of the NLRB as constituted with those improperly appointed members. *Noel Canning v. NLRB*, No. 12-1115, slip. op (D.C. Cir. Jan. 25, 2013). The court, making a distinction between recesses generally and "the Recess" as used in the Constitution, held that the President can only make recess appointments during intersession recesses, and not during intrasession recesses. The court explained that the President's NLRB appointments were made during an intrasession recess, as the Senate was operating pursuant to a unanimous consent agreement that provided it would meet in *pro forma sessions*. Moreover, the court held that the President may only fill vacancies that arise or begin during such intersession recesses, as opposed to vacancies that happen to exist during such recesses. The court determined that the vacancies at issue here existed well before the recess. The court held that the appointments were constitutionally "invalid from their inception" and therefore the NLRB lacked a quorum to issue the NLRB order challenged on appeal. The court vacated the NLRB's order at issue. The President appointed CFPB Director Richard Cordray as a recess appointment on the same day the President appointed the NLRB members. Mr. Cordray's appointment is the subject of a lawsuit currently pending in the U.S. District Court for the District of Columbia.

FHFA Settles One of Many Pending MBS Suits. On January 23, the FHFA settled and voluntarily dismissed one of the lawsuits it initiated in 2011 as conservator for Fannie Mae and Freddie Mac, alleging against many parties that billions of dollars of MBS purchased by the GSEs were based on offering documents that contained materially false statements and omissions. *FHFA v. Gen. Elec. Co.*, No. 11-7048, Notice of Dismissal (Jan. 23, 2013). This is the first settlement to be announced in connection with this series of cases; the lead case currently is on appeal to the U.S. Court of Appeals for the Second Circuit. Although the FHFA did not release any details related to the settlement, in reports the FHFA's general counsel described the resolution as "consistent with FHFA's responsibilities as conservator."

California Appeals Court Holds No Actual Damages Necessary to Sustain Claims Against Dealer, Finance Company Under State Auto Finance Act. On January 15, the California Court of Appeal for the Second Appellate District held that an auto buyer need not plead actual damages to sustain a claim under the state's auto finance act, and that there is no statutory protection from contract rescission afforded a dealer or its assignee for substantial compliance with the act. *Rojas v.*

Platinum Auto Group, Inc. No. B235956, 2013 WL 156561 (Cal. App. Ct. Jan. 15, 2013). The plaintiff bought and financed a car with a dealer, agreeing to a deferred down payment schedule, which he claims the dealer failed to properly reflect on the retail installment sales contract. The dealer and the finance company to which it had assigned the loan, succeeded on demurrers in the trial court, obtaining dismissal of the buyer's claims that the dealer's mischaracterization of the down payment violated the state's Rees-Levering Act, which requires a detailed and truthful itemization of a buyer's down payment, and allegations that the mischaracterization violated the state Consumer Legal Remedies Act and constituted an unfair business practice. On appeal, the court held that "the purpose and history of Rees-Levering establish that [buyer] need not have suffered actual damage from [the dealer's] violation of the statute's disclosure requirements," and that a common law substantial compliance rule has been statutorily removed. As such, the buyer could state a claim for relief under the act even for apparently "trivial" misstatements. The court also held that while the buyer's allegations of injury are vague and do not support the assertions made regarding violations of the Consumer Legal Remedies Act and unfair business practices, the buyer should have the right to amend his claims. The court reversed the district court and remanded for further proceedings.

California Supreme Court Overturns Long-standing Rule Limiting Fraud Exception to Parol Evidence Rule. On January 14, the California Supreme Court overturned a long-standing state limitation on the fraud exception to the parol evidence rule. *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Assoc.*, No. S190581, 2013 WL 141731 (Cal. Jan. 14, 2013). Generally, the parol evidence rule limits the use of evidence outside a contract itself to contradict or add to the terms of the contract. The exception allows a party to present extrinsic evidence to support a claim of fraud. In California, the Supreme Court in 1935 established a rule in *Bank of Am. etc. Assn. v. Pendergrass*, 4 Cal. 2d 258 (1935) to limit the fraud exception to evidence that establishes an independent fact or representation, a fraud in the procurement of the instrument, or a breach of confidence concerning its use. That *Pendergrass* limitation excluded evidence of a promise at odds with the written contract. The instant case involved two borrowers who entered into a restructured debt agreement with a credit association after falling behind on their payments. After the credit association sought to foreclose on the borrowers for failing to perform under the agreement, the borrowers sued the association, claiming that its vice president had promised terms different from those reflected in the written contract. The Supreme Court affirmed the intermediate appellate court's holding in favor of the borrowers that evidence of an alleged oral misrepresentation of the written terms is not barred by the *Pendergrass* rule; concluding that *Pendergrass* was "an aberration," it overturned the rule. The court determined that the *Pendergrass* rule was out of step with established state law at the time it was adopted and was improperly supported in the court's 1935 decision, and reaffirmed that the parol evidence rule was never intended to be used as a shield to prevent proof of fraud. The court did not address whether, in this case, the borrowers had presented evidence of reasonable reliance on the promised terms, particularly given that the borrowers admit to having not reviewed the contract. That issue will need to be first addressed by the trial court on remand.

MISCELLANY

California County Drops Consideration of Eminent Domain Proposal. On January 24, a Joint Powers Authority established by San Bernardino County decided not to pursue a proposal under which the County would use eminent domain power to seize underwater mortgages from private trusts and provide principal reduction for the borrowers. In announcing the decision, the chairman of the Authority explained that the decision was based on warnings from experts about the destabilizing effect on the housing market such a policy would have, and noted that county residents did not favor the proposal. Instead, the Authority approved an agreement to work with banking, mortgage, real estate, and investment firms to connect homeowners with appropriate mortgage assistance programs. San Bernardino had been closely watched since it began pursuing the concept last year. Its decision could portend how other localities will proceed. At least one recent report indicates that several other localities that have been considering eminent domain proposals already were wary of the concept even before San Bernardino's decision.

Chicago Requires Debt Collector Licensing, Sets Zoning Requirements for Small Dollar Lenders. On January 17, the City of Chicago passed ordinances related to debt collection, small dollar lending, and license enforcement. With the adoption of an ordinance requiring that debt collectors collecting debts from Chicagoans obtain from the City a Regulated Business License, Chicago becomes only the third municipality to require local debt collector licensing. By requiring a license, the ordinance requires that debt collectors follow all state and federal debt collection rules, including for example, providing debt verification. For debt collectors that have their licenses revoked, the ordinance requires a four-year wait period before a new license can be issued. A second ordinance sets new zoning rules for payday and title-secured lending stores. Finally, the City passed an ordinance that, effective June 1, 2013, will allow the Department of Business Affairs and Consumer Protection to initiate license revocation proceedings and refuse to issue or reissue the license of specific business locations convicted within the last five years of violating the Illinois Wage Payment and Collection Act (IWPCA) and the federal FDCPA. The passing of the ordinances follows a recent announcement by the City and the CFPB to enter a first-of-its-kind partnership to share information on consumer financial protection issues.

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.**

STAGE Network Webinar Marks Anniversary of RMBS Working Group

On January 24, the STAGE Network hosted a webinar entitled "The Residential Mortgage-Backed Securities Working Group - Where Do Things Stand, Today?" The webinar was highlighted by a discussion of current and anticipated actions by the Working Group, which was established in January of 2012. The session focused on the efforts of three key Group members - the U.S. Department of Justice, the Securities and Exchange Commission, and the New York State Attorney General. Discussion of their activities featured insights from Buckley Sandler LLP partners Andrew Schilling, former Chief of the Civil Division of the U.S. Attorney's Office for the Southern District of New York and Thomas Sporkin, former Chief of the Enforcement Division's Office of Market Intelligence at the SEC, and Nicole Gueron of Clarick Gueron Reisbaum LLP, former Deputy Chief Trial Counsel and member of the Executive Staff at the Office of the New York State Attorney

General. A recording of the webinar, which was moderated by Jeremiah Buckley of BuckleySandler LLP, is available for review.

Andrew Sandler will participate in a Women in Housing and Finance event on February 4, 2013 from 12:00 - 1:30 PM. Mr. Sandler will be joined by Donna Murphy, Principal Deputy Chief of the Housing and Civil Enforcement Section, Department of Justice, to discuss key fair lending issues for 2013. The event will be hosted at BuckleySandler's Washington, DC office.

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.

Jonice Gray Tucker, Amanda Raines, and Thomas Dowell will discuss recent CFPB enforcement actions relating to add-on products during a Women in Housing in Finance event on February 12, 2013, from 12:00 - 1:30 PM. The event will be hosted at BuckleySandler's Washington, DC office.

David Baris will speak at seminars sponsored by the Community Bankers Association of Georgia on February 12, 2013 in Atlanta, GA, and February 13, 2013 in Macon, GA on "What Bank Boards of Directors Need to Know about Capital Planning and How to Raise Capital in This Challenging Market".

David Baris will speak at the 2013 American Bankers Association National Conference for Community Bankers at the JW Marriott Orlando, Grande Lakes, Orlando, FL on February 18, 2013. His topic is entitled "Challenges and Opportunities for Bank Boards in 2013".

James Shreve will speak at the RSA Conference in San Francisco, California on February 28, 2013. The session, "Who Owns the Data in Mobile Payments and Why that Matters," will examine regulatory and contractual issues that may arise from data ownership in mobile payments systems.

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.

Thomas Sporkin and James Shreve will speak at the International Association of Privacy Professionals Global Privacy Summit in Washington, DC on March 7, 2013. The session, "Demystifying SEC Guidance on Cybersecurity Risk," will discuss guidance from the SEC's Division of Corporate Finance on how and when actual or possible cybersecurity incidents and their costs should be included in public filings.

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).

Please visit us at the following locations:

Washington: 1250 24th Street NW, Suite 700, Washington, DC 20037, (202) 349-8000
New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400
Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (310) 424-3900
Orange County: 3121 Michelson Drive, Suite 210, Irvine, CA 92612, (949)398-1360

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

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

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

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

MORTGAGES

President Obama Re-nominates Richard Cordray for CFPB Director, Nominates Mary Jo White for SEC Chair. On January 24, President Obama announced his re-nomination of current CFPB Director Richard Cordray. Mr. Cordray has led the Bureau since January 2012 when President Obama used his recess appointment authority to install the CFPB director. Absent Senate confirmation, Mr. Cordray's recess appointment expires at the end of this year. Further, the constitutionality of that appointment may be called into question by a recent federal appellate court decision addressing other recess appointments, reported below. Also on January 24, President Obama nominated Mary Jo White for Senate confirmation to serve as Chairman of the SEC. Ms. White is a former U.S. Attorney for the Southern District of New York, during which time she led high-profile prosecutions of organized crime members and terrorists. Most recently she was in private practice.

D.C. Circuit Declares President Obama's NLRB Recess Appointments Unconstitutional. On January 25, the U.S. Court of Appeals for the D.C. Circuit held that appointments to the National Labor Relations Board (NLRB) made by President Obama in January 2012 during a purported Senate recess were unconstitutional, and vacated an order of the NLRB as constituted with those improperly appointed members. *Noel Canning v. NLRB*, No. 12-1115, slip. op (D.C. Cir. Jan. 25, 2013). The court, making a distinction between recesses generally and "the Recess" as used in the Constitution, held that the President can only make recess appointments during intersession recesses, and not during intrasession recesses. The court explained that the President's NLRB appointments were made during an intrasession recess, as the Senate was operating pursuant to a unanimous consent agreement that provided it would meet in *pro forma sessions*. Moreover, the court held that the President may only fill vacancies that arise or begin during such intersession recesses, as opposed to vacancies that happen to exist during such recesses. The court determined that the vacancies at issue here existed well before the recess. The court held that the appointments were constitutionally "invalid from their inception" and therefore the NLRB lacked a quorum to issue the NLRB order challenged on appeal. The court vacated the NLRB's order at issue. The President appointed CFPB Director Richard Cordray as a recess appointment on the same day the President appointed the NLRB members. Mr. Cordray's appointment is the subject of a lawsuit currently pending in the U.S. District Court for the District of Columbia.

CFPB Addresses Use of Electronic Periodic Statements for Residential Mortgage Loans. The CFPB's recent rule amending Regulation Z (TILA), issued on January 17, included, among other changes, the requirement that mortgage servicers provide consumers with periodic billing statements. As required by the Dodd-Frank Act, the rule explicitly allows electronic distribution of the statements. However, the Bureau restricted the use of electronic statements only to instances where "the consumer agrees." In describing the process through which this agreement must be obtained, the rule departs from the formal requirements of the federal ESIGN Act's consumer consent process, authorizing instead a "simpler process" which requires only the consumer's "affirmative consent." The CFPB staff, in the accompanying Official Interpretations, indicates that consent may be presumed for consumers who are currently receiving electronic account disclosures from their servicer for any type of account, mortgage or otherwise. In light of concerns about information security, the Official Interpretations also indicate that mortgage servicers may make electronic periodic statements available on a secure website and notify the consumer that the statement is available, rather than delivering the statement directly to the consumer. Recognizing that some consumers may not desire regular notification emails, the Official Interpretations also allow a consumer who has demonstrated the ability to access statements online to opt out of receiving such notifications. Neither the rule nor the Official Interpretations address how the rule relates to other laws that may affect when an electronic communication is delivered, such as the sending or receipt requirements of state UETA statutes.

Senator Urges Federal Regulators to Sync QRM Rule with CFPB's QM Standard. On January 22, Senator Bob Corker (R-TN) sent a letter to federal regulators responsible for finalizing the Dodd-Frank Act mandated "qualified residential mortgage" (QRM) standard, urging that the final QRM definition mirror the "qualified mortgage" (QM) definition recently promulgated by the CFPB. The QRM rule will define those loans exempt from the Act's risk retention requirements for mortgage securitizers, a requirement that also will be set by the rule though it cannot be less than the statutory floor of five percent of the credit risk for any asset that is not a QRM. The Act also prohibits the QRM standard from being broader than the QM definition. Senator Corker maintains that, because the QRM rule will exempt loans sold to federal government sponsored enterprises and government agencies, "if the QRM rule is written differently than the QM rule, most financial institutions will only originate loans intended for sale to" those entities and as a result the return of private capital to the secondary market will be limited.

California County Drops Consideration of Eminent Domain Proposal. On January 24, a Joint Powers Authority established by San Bernardino County decided not to pursue a proposal under which the County would use eminent domain power to seize underwater mortgages from private trusts and provide principal reduction for the borrowers. In announcing the decision, the chairman of the Authority explained that the decision was based on warnings from experts about the destabilizing effect on the housing market such a policy would have, and noted that county residents did not favor the proposal. Instead, the Authority approved an agreement to work with banking, mortgage, real estate, and investment firms to connect homeowners with appropriate mortgage assistance programs. San Bernardino had been closely watched since it began pursuing the concept last year. Its decision could portend how other localities will proceed. At least one recent report indicates that several other localities that have been considering eminent domain proposals already were wary of the concept even before San Bernardino's decision.

FHFA Announces Deputy Director for Housing Mission and Goals. On January 15, the FHFA announced that beginning in March Sandra Thompson will serve as Deputy Director of the Division of Housing Mission and Goals with responsibility for overseeing the FHFA's housing and regulatory policy, financial analysis, and policy research and analysis of housing finance and financial markets. Ms. Thompson will leave her current position as Director of the Division of Risk Management Supervision at the FDIC where she led the agency's examination and enforcement program for risk management and consumer protection. The FHFA also promoted Nina Nichols to serve as Deputy Director of the Division of Supervision Policy and Support.

BANKING

Federal Regulators Propose Guidance for Social Media Use. On January 22, the FFIEC proposed guidance on the applicability of consumer protection and compliance laws, regulations, and policies to activities conducted via social media by federally supervised financial institutions, as well as nonbanks supervised by the CFPB. With regard to compliance and legal risks, the guidance addresses (i) the applicability of existing federal laws and regulations to the use of social media for marketing and originating new deposit and lending products and the use of social media to facilitate consumer use of payment systems; (ii) the need to apply BSA/AML internal controls to customers engaging in electronic banking through the use of social media, and e-banking products and services offered in the context of social media, as well as BSA/AML risks emerging through the growing use of social media; (iii) CRA monitoring of social media sites run by an institution; and (vi) customer privacy issues associated with social media. The guidance also reviews reputational risks related to social media, including risks related to (i) fraud and brand identity; (ii) social media vendor monitoring; (iii) privacy; (iv) consumer complaints; and (v) employee use of social media. Finally, the guidance addresses the vulnerability of social media to malware and the resultant operational risk. The FFIEC is accepting comments for 60 days after publication in the Federal Register. After the comment period, the agencies will issue supervisory guidance and will urge state regulators to follow.

CFPB Delays Remittance Rule Effective Date. On January 22, the CFPB announced that the effective date for its international remittance transfer rule, originally set for February 7, 2013, is delayed, and that a new effective date will be announced later this year. The CFPB recently proposed making the rule effective 90 days after proposed revisions to the rule are finalized.

House Financial Services Committee Membership, Subcommittees Finalized. On January 22, House Financial Services Committee Chairman Jeb Hensarling (R-TX) announced the subcommittee assignments for the committee's Republican members. Rep. Garrett (R-NJ) will again lead the subcommittee on Capital Markets and Government Sponsored Enterprises, while Rep. Capito (R-WV) remains as head of the subcommittee on Financial Institutions and Consumer Credit. Ranking Member Maxine Waters (D-CA) also recently announced as Ranking Members of those subcommittees Rep. Maloney (D-NY) and Rep. Meeks (D-NY), respectively, and released the full roster for each subcommittee. The subcommittee rosters reflect the new members joining the committee, including Reps. Barr (R-KY), Cotton (R-AR), Hultgren (R-IL), Mulvaney (R-SC), Pittenger (R-NC), Ross (Fla.), Stutzman (R-IN), and Wagner (R-MO) for the majority; and on the minority side Reps. Beatty (D-OH), Delaney (D-MD), Heck (D-WA), Foster (D-IL), Kildee (D-MI), Murphy (D-FL), Sewell (D-AL), and Sinema (D-AZ). Finally, earlier this month Chairman Hensarling announced majority staff positions, and followed with additional staff announcements on January 25, 2013.

OCC Announces Chief Counsel. Last week, the OCC announced Amy Friend as the agency's Chief Counsel beginning in February, replacing Julie Williams who retired last fall. Ms. Friend is a former assistant chief counsel at the OCC and served as chief counsel to the Senate Banking Committee during the development of the Dodd-Frank Act.

NCUA Eases Regulatory Requirements for Certain Small Credit Unions. On January 18, the NCUA published a final rule to amend the definition of "small entities" from those with less than $10 million in assets to those with less than $50 million in assets. The change will allow more credit unions to be considered for relief from NCUA rules. The Regulatory Flexibility Act requires federal agencies to consider the impact of their rules on small entities and allows federal agencies to determine what constitutes a small entity. The NCUA proposed a $30 million threshold, which it adjusted upward following review of comments received on the proposal. The NCUA declined to adopt the $175 million threshold sought by some commenters and used by the Small Business Association and the CFPB. In addition to requiring the NCUA to assess the impact of future proposed and final rules on more small credit unions, the new threshold has the immediate effect of excluding more credit unions from certain requirements under NCUA's Prompt Corrective Action rule and the requirement to implement interest rate risk policies. The rule requires the NCUA to review the threshold in two years, and every three years thereafter. The new threshold takes effect on February 19, 2013.

NCUA Finalizes Rule Regarding Troubled State Credit Unions. On January 18, the NCUA published a final rule to allow the agency to determine whether a state-chartered credit union is in "troubled condition." Under current law, only a state supervisory authority is permitted to declare a federally insured, state-chartered credit union to be in troubled condition. The NCUA believes that the change will help protect the National Credit Union Share Insurance Fund by leveraging the federal regulator's resources to increase the likelihood that problems at covered credit unions are addressed. The rule goes into effect on February 19, 2013.

CONSUMER FINANCE

President Obama Re-nominates Richard Cordray for CFPB Director, Nominates Mary Jo White for SEC Chair. On January 24, President Obama announced his re-nomination of current CFPB Director Richard Cordray. Mr. Cordray has led the Bureau since January 2012 when President Obama used his recess appointment authority to install the CFPB director. Absent Senate confirmation, Mr. Cordray's recess appointment expires at the end of this year. Further, the constitutionality of that appointment may be called into question by a recent federal appellate court decision addressing other recess appointments, reported below. Also on January 24, President Obama nominated Mary Jo White for Senate confirmation to serve as Chairman of the SEC. Ms. White is a former U.S. Attorney for the Southern District of New York, during which time she led high-profile prosecutions of organized crime members and terrorists. Most recently she was in private practice.

D.C. Circuit Declares President Obama's NLRB Recess Appointments Unconstitutional. On January 25, the U.S. Court of Appeals for the D.C. Circuit held that appointments to the National Labor Relations Board (NLRB) made by President Obama in January 2012 during a purported Senate recess were unconstitutional, and vacated an order of the NLRB as constituted with those improperly appointed members. *Noel Canning v. NLRB*, No. 12-1115, slip. op (D.C. Cir. Jan. 25, 2013). The court, making a distinction between recesses generally and "the Recess" as used in the Constitution, held that the President can only make recess appointments during intersession recesses, and not during intrasession recesses. The court explained that the President's NLRB appointments were made during an intrasession recess, as the Senate was operating pursuant to a unanimous consent agreement that provided it would meet in *pro forma sessions*. Moreover, the court held that the President may only fill vacancies that arise or begin during such intersession recesses, as opposed to vacancies that happen to exist during such recesses. The court determined that the vacancies at issue here existed well before the recess. The court held that the appointments were constitutionally "invalid from their inception" and therefore the NLRB lacked a quorum to issue the NLRB order challenged on appeal. The court vacated the NLRB's order at issue. The President appointed CFPB Director Richard Cordray as a recess appointment on the same day the President appointed the NLRB members. Mr. Cordray's appointment is the subject of a lawsuit currently pending in the U.S. District Court for the District of Columbia.

Federal Regulators Propose Guidance for Social Media Use. On January 22, the FFIEC proposed guidance on the applicability of consumer protection and compliance laws, regulations, and policies to activities conducted via social media by federally supervised financial institutions, as well as nonbanks supervised by the CFPB. With regard to compliance and legal risks, the guidance addresses (i) the applicability of existing federal laws and regulations to the use of social media for marketing and originating new deposit and lending products and the use of social media to facilitate consumer use of payment systems; (ii) the need to apply BSA/AML internal controls to customers engaging in electronic banking through the use of social media, and e-banking products and services offered in the context of social media, as well as BSA/AML risks emerging through the growing use of social media; (iii) CRA monitoring of social media sites run by an institution; and (vi) customer privacy issues associated with social media. The guidance also reviews reputational risks related to social media, including risks related to (i) fraud and brand identity; (ii) social media vendor monitoring; (iii) privacy; (iv) consumer complaints; and (v) employee use of social media. Finally, the guidance addresses the vulnerability of social media to malware and the resultant operational risk. The FFIEC is accepting comments for 60 days after publication in the Federal Register. After the comment period, the agencies will issue supervisory guidance and will urge state regulators to follow.

House Financial Services Committee Membership, Subcommittees Finalized. On January 22, House Financial Services Committee Chairman Jeb Hensarling (R-TX) announced the subcommittee assignments for the committee's Republican members. Rep. Garrett (R-NJ) will again lead the subcommittee on Capital Markets and Government Sponsored Enterprises, while Rep. Capito (R-WV) remains as head of the subcommittee on Financial Institutions and Consumer Credit. Ranking Member Maxine Waters (D-CA) also recently announced as Ranking Members of those subcommittees Rep. Maloney (D-NY) and Rep. Meeks (D-NY), respectively, and released the full roster for each subcommittee. The subcommittee rosters reflect the new members joining the committee, including Reps. Barr (R-KY), Cotton (R-AR), Hultgren (R-IL), Mulvaney (R-SC), Pittenger (R-NC), Ross (Fla.), Stutzman (R-IN), and Wagner (R-MO) for the majority; and on the minority side Reps. Beatty (D-OH), Delaney (D-MD), Heck (D-WA), Foster (D-IL), Kildee (D-MI), Murphy (D-FL), Sewell (D-AL), and Sinema (D-AZ). Finally, earlier this month Chairman Hensarling announced majority staff positions, and followed with additional staff announcements on January 25, 2013.

Chicago Requires Debt Collector Licensing, Sets Zoning Requirements for Small Dollar Lenders. On January 17, the City of Chicago passed ordinances related to debt collection, small dollar lending, and license enforcement. With the adoption of an ordinance requiring that debt collectors collecting debts from Chicagoans obtain from the City a Regulated Business License, Chicago becomes only the third municipality to require local debt collector licensing. By requiring a license, the ordinance requires that debt collectors follow all state and federal debt collection rules, including for example, providing debt verification. For debt collectors that have their licenses revoked, the ordinance requires a four-year wait period before a new license can be issued. A second ordinance sets new zoning rules for payday and title-secured lending stores. Finally, the City passed an ordinance that, effective June 1, 2013, will allow the Department of Business Affairs and Consumer Protection to initiate license revocation proceedings and refuse to issue or reissue the license of specific business locations convicted within the last five years of violating the Illinois Wage Payment and Collection Act (IWPCA) and the federal FDCPA. The passing of the ordinances follows a recent announcement by the City and the CFPB to enter a first-of-its-kind partnership to share information on consumer financial protection issues.

California Appeals Court Holds No Actual Damages Necessary to Sustain Claims Against Dealer, Finance Company Under State Auto Finance Act. On January 15, the California Court of Appeal for the Second Appellate District held that an auto buyer need not plead actual damages to sustain a claim under the state's auto finance act, and that there is no statutory protection from contract rescission afforded a dealer or its assignee for substantial compliance with the act. *Rojas v. Platinum Auto Group, Inc.* No. B235956, 2013 WL 156561 (Cal. App. Ct. Jan. 15, 2013). The plaintiff bought and financed a car with a dealer, agreeing to a deferred down payment schedule, which he claims the dealer failed to properly reflect on the retail installment sales contract. The dealer and the finance company to which it had assigned the loan, succeeded on demurrers in the trial court, obtaining dismissal of the buyer's claims that the dealer's mischaracterization of the down payment violated the state's Rees-Levering Act, which requires a detailed and truthful itemization of a buyer's down payment, and allegations that the mischaracterization violated the state Consumer Legal Remedies Act and constituted an unfair business practice. On appeal, the court held that "the purpose and history of Rees-Levering establish that [buyer] need not have suffered actual damage from [the dealer's] violation of the statute's disclosure requirements," and that a common law substantial compliance rule has been statutorily removed. As such, the buyer could state a claim for relief under the act even for apparently "trivial" misstatements. The court also held that while the buyer's allegations of injury are vague and do not support the assertions made regarding violations of the Consumer Legal Remedies Act and unfair business practices, the buyer should have the right to amend his claims. The court reversed the district court and remanded for further proceedings.

California Supreme Court Overturns Long-standing Rule Limiting Fraud Exception to Parol Evidence Rule. On January 14, the California Supreme Court overturned a long-standing state limitation on the fraud exception to the parol evidence rule. *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Assoc.*, No. S190581, 2013 WL 141731 (Cal. Jan. 14, 2013). Generally, the parol evidence rule limits the use of evidence outside a contract itself to contradict or add to the terms of the contract. The exception allows a party to present extrinsic evidence to support a claim of fraud. In California, the Supreme Court in 1935 established a rule in *Bank of Am. etc. Assn. v. Pendergrass*, 4 Cal. 2d 258 (1935) to limit the fraud exception to evidence that establishes an independent fact or representation, a fraud in the procurement of the instrument, or a breach of confidence concerning its use. That *Pendergrass* limitation excluded evidence of a promise at odds with the written contract. The instant case involved two borrowers who entered into a restructured debt agreement with a credit association after falling behind on their payments. After the credit association sought to foreclose on the borrowers for failing to perform under the agreement, the borrowers sued the association, claiming that its vice president had promised terms different from those reflected in the written contract. The Supreme Court affirmed the intermediate appellate court's holding in favor of the borrowers that evidence of an alleged oral misrepresentation of the written terms is not barred by the *Pendergrass* rule; concluding that *Pendergrass* was "an aberration," it overturned the rule. The court determined that the *Pendergrass* rule was out of step with established state law at the time it was adopted and was improperly supported in the court's 1935 decision, and reaffirmed that the parol evidence rule was never intended to be used as a shield to prevent proof of fraud. The court did not address whether, in this case, the borrowers had presented evidence of reasonable reliance on the promised terms, particularly given that the borrowers admit to having not reviewed the contract. That issue will need to be first addressed by the trial court on remand.

SECURITIES

President Obama Re-nominates Richard Cordray for CFPB Director, Nominates Mary Jo White for SEC Chair. On January 24, President Obama announced his re-nomination of current CFPB Director Richard Cordray. Mr. Cordray has led the Bureau since January 2012 when President Obama used his recess appointment authority to install the CFPB director. Absent Senate confirmation, Mr. Cordray's recess appointment expires at the end of this year. Further, the constitutionality of that appointment may be called into question by a recent federal appellate court decision addressing other recess appointments, reported below. Also on January 24, President Obama nominated Mary Jo White for Senate confirmation to serve as Chairman of the SEC. Ms. White is a former U.S. Attorney for the Southern District of New York, during which time she led high-profile prosecutions of organized crime members and terrorists. Most recently she was in private practice.

FHFA Settles One of Many Pending MBS Suits. On January 23, the FHFA settled and voluntarily dismissed one of the lawsuits it initiated in 2011 as conservator for Fannie Mae and Freddie Mac, alleging against many parties that billions of dollars of MBS purchased by the GSEs were based on offering documents that contained materially false statements and omissions. *FHFA v. Gen. Elec. Co.*, No. 11-7048, Notice of Dismissal (Jan. 23, 2013). This is the first settlement to be announced in connection with this series of cases; the lead case currently is on appeal to the U.S. Court of Appeals for the Second Circuit. Although the FHFA did not release any details related to the settlement, in reports the FHFA's general counsel described the resolution as "consistent with FHFA's responsibilities as conservator."

SEC Names Office of Market Intelligence Chief. On January 22, the SEC announced that Vincente Martinez will serve as the head of the Office of Market Intelligence, a unit of the Enforcement Division that collects and evaluates tips, complaints and referrals. Mr. Martinez rejoins the SEC from the CFTC where he served as the first director of that agency's whistleblower office. He previously spent eight years in the SEC's Enforcement Division, most recently helping to develop

Enforcement Division and SEC-wide policies and procedures for handling tips, complaints, and referrals. Lori Walsh, who is currently serving as the Acting Chief of the Office of Market Intelligence, will serve as Deputy Chief of the office.

E-COMMERCE

Federal Regulators Propose Guidance for Social Media Use. On January 22, the FFIEC proposed guidance on the applicability of consumer protection and compliance laws, regulations, and policies to activities conducted via social media by federally supervised financial institutions, as well as nonbanks supervised by the CFPB. With regard to compliance and legal risks, the guidance addresses (i) the applicability of existing federal laws and regulations to the use of social media for marketing and originating new deposit and lending products and the use of social media to facilitate consumer use of payment systems; (ii) the need to apply BSA/AML internal controls to customers engaging in electronic banking through the use of social media, and e-banking products and services offered in the context of social media, as well as BSA/AML risks emerging through the growing use of social media; (iii) CRA monitoring of social media sites run by an institution; and (vi) customer privacy issues associated with social media. The guidance also reviews reputational risks related to social media, including risks related to (i) fraud and brand identity; (ii) social media vendor monitoring; (iii) privacy; (iv) consumer complaints; and (v) employee use of social media. Finally, the guidance addresses the vulnerability of social media to malware and the resultant operational risk. The FFIEC is accepting comments for 60 days after publication in the Federal Register. After the comment period, the agencies will issue supervisory guidance and will urge state regulators to follow.

CFPB Addresses Use of Electronic Periodic Statements for Residential Mortgage Loans. The CFPB's recent rule amending Regulation Z (TILA), issued on January 17, included, among other changes, the requirement that mortgage servicers provide consumers with periodic billing statements. As required by the Dodd-Frank Act, the rule explicitly allows electronic distribution of the statements. However, the Bureau restricted the use of electronic statements only to instances where "the consumer agrees." In describing the process through which this agreement must be obtained, the rule departs from the formal requirements of the federal ESIGN Act's consumer consent process, authorizing instead a "simpler process" which requires only the consumer's "affirmative consent." The CFPB staff, in the accompanying Official Interpretations, indicates that consent may be presumed for consumers who are currently receiving electronic account disclosures from their servicer for any type of account, mortgage or otherwise. In light of concerns about information security, the Official Interpretations also indicate that mortgage servicers may make electronic periodic statements available on a secure website and notify the consumer that the statement is available, rather than delivering the statement directly to the consumer. Recognizing that some consumers may not desire regular notification emails, the Official Interpretations also allow a consumer who has demonstrated the ability to access statements online to opt out of receiving such notifications. Neither the rule nor the Official Interpretations address how the rule relates to other laws that may affect when an electronic communication is delivered, such as the sending or receipt requirements of state UETA statutes.

Virginia Publishes Electronic Notarization Standard. On January 21, the Virginia Secretary of the Commonwealth released the Virginia Electronic Notarization Assurance Standard. Citing challenges faced by notaries to "preserve and strengthen the role of the notary in the rapidly emerging digital economy and to ensure reliability and cross-border recognition of notarized electronic documents in a global economy," the standards are intended to support transition of notaries in Virginia to performing electronic notarizations that have the same legal effect as traditional notarizations. They set forth registration and performance requirements, electronic signature and seal requirements, online notarization procedures, and notarized electronic document requirements. According to the Secretary, the Virginia standards (i) reflect the National Association of Secretaries of State Electronic Notarization Standard for Document Security; (ii) incorporate aspects of standards previously adopted by seven other states; and (iii) are consistent with the federal ESIGN Act, the UETA, and the Uniform Real Property Electronic Recording Act.