

May 24, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)[FEDERAL ISSUES](#)[STATE ISSUES](#)[COURTS](#)[MISCELLANY](#)[FIRM NEWS](#)[MORTGAGES](#)[BANKING](#)[CONSUMER FINANCE](#)[SECURITIES](#)[PRIVACY/DATA SECURITY](#)[PAYMENTS](#)**[FEDERAL ISSUES](#)**

CFPB, State Regulators Announce Supervision Framework. On May 21, the [CFPB](#) and the [CSBS](#) released an agreement to coordinate supervision of entities subject to concurrent jurisdiction of the CFPB and one or more state regulators. The [Supervisory Coordination Framework](#) is a nonbinding guide that builds off of the parties' [2011 Memorandum of Understanding](#), which has since been signed by 59 state regulators. The Framework establishes processes for information sharing, consulting on corrective actions, and coordinating exam schedules and supervisory plans. The Framework also includes a general process for resolving disputes between the CFPB and state regulators, and directs the parties to develop additional processes and procedures to ensure standardization and consistency in implementing the Framework.

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National Mortgage Settlement Monitor Updates Consumer Relief Status. On May 21, the National Mortgage Settlement Monitor, Joseph Smith, [released](#) updated consumer relief activities data submitted by the mortgage servicers subject to the Settlement. The update reflects relief activities during the period March 1, 2012 through March 31, 2013, and includes a breakout of data for the first quarter of 2013. A [fact sheet](#) highlights numerous aspects of the data, including that 621,712 borrowers have benefited from some type of consumer relief totaling \$50.63 billion, which, on average, represents about \$81,437 per borrower. The Monitor did not issue a full report on the data because he is focused on testing the 2012 year-end consumer relief claims of four banks. The

Monitor expects to release the results of the testing in the coming weeks. In June, he also plans to submit the first required report regarding the banks' compliance with the Settlement's servicing standards.

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be addressed in order to meet the goals of the executive order. The paper also includes a series of questions that will serve as the basis for additional discussion and study at an upcoming workshop to be hosted at Carnegie Mellon University in Pittsburgh, Pennsylvania on May 29-31, 2013.

State Department Finalizes Burma Investment Reporting Requirements. On May 23, the State Department [announced](#) that the Office of Management and Budget approved the final [Burma Responsible Investment Reporting Requirements](#). Effective immediately, pursuant to [General License No. 17](#), all U.S. persons with aggregate investment in Burma over \$500,000 are subject to the reporting requirements, which generally cover a range of policies and procedures with respect to investments in Burma, including human rights, labor rights, land rights, community consultations and stakeholder engagement, environmental stewardship, anti-corruption, arrangements with security service providers, risk and impact assessment and mitigation, payments to the government, any investments with the Myanmar Oil and Gas Enterprise (MOGE), and contact with the military or non-state armed groups. The State Department will use the information collected to conduct to encourage U.S. businesses to develop robust policies and procedures to address a range of impacts resulting from their investments and operations in Burma.

STATE ISSUES

Maryland Creates State Law Violation of Federal Mortgage Assistance Relief Provisions. On May 16, Maryland enacted [HB 291](#), which makes it a violation of state law for a mortgage assistance relief service provider to violate federal mortgage relief regulations administered by the CFPB under Regulation O. The bill grants enforcement authority to the Commissioner of Financial Regulation and the Attorney General, and creates a private right of action for damages. The bill states that a violation of its provisions is an unfair or deceptive trade practice under the Maryland Consumer Protection Act and is subject to that Act's civil and criminal penalty provisions. The bill takes effect on July 1, 2013.

Texas Adds Reverse Mortgage Constitutional Amendment to November Ballots. On May 22, the Texas legislature adopted a joint resolution, [SJR 18](#), to propose an amendment to the Texas Constitution to allow a reverse mortgage for the purchase of a homestead property. Under the amendment, a borrower would need to (i) occupy the homestead property as a principal residence within a specified time after the reverse mortgage closing and (ii) complete financial counseling before the reverse mortgage closing. The amendment would require a lender to provide to a prospective borrower a detailed disclosure of conduct that could lead to foreclosure, including among other things, the failure to pay property taxes. The proposed amendment will be decided by the voters on November 5, 2013.

COURTS

Ninth Circuit Affirms Preemption of State Law Claims Asserting National Bank Mislead Consumers by Failing to Make Material Disclosures. On May 22, the U.S. Court of Appeals for the Ninth Circuit [affirmed](#) a district court's holding that the National Bank Act (NBA) preempts state disclosure requirements on a bank's deposit-related activities. *Robinson v. Bank of Am., N.A.*, No. 11-57194, 2013 WL 2234073 (9th Cir. May 22, 2013). In this case, the bank charged a customer a fee for using a cash-access account, which could be avoided by withdrawing all funds from the account each month before the fee was assessed. The customer alleged that the failure to disclose the ability to avoid the fee violated, among other things, California's Consumer Legal Remedies Act and Unfair Competition Law. The district court [dismissed](#) the case, [holding](#) that the NBA preempts state laws that attempt to regulate disclosures of national banks on deposit accounts. The district

court also rejected the customer's argument that state laws that require all businesses generally (as opposed to banks in particular) to refrain from misrepresentations and from fraudulent, unfair, or illegal behavior cannot be preempted by the NBA. The Ninth Circuit affirmed the dismissal on the same grounds.

Sixth Circuit Holds Fannie Mae, Freddie Mac Exempt from Local Taxes. On May 20, the U.S. Court of Appeals for the Sixth Circuit overturned a district court decision and [held](#) that Fannie Mae and Freddie Mac are exempt from state and local real estate transfer taxes. *Oakland v. Fed. Hous. Fin. Agency*, No. 12-2135/2136, 2013 WL 2149964 (6th Cir. May 20, 2013). In this case, as in other similar cases pending around the country, Michigan counties and the state of Michigan sued to recover state and local real estate transfer taxes from Fannie Mae, Freddie Mac, and the FHFA for property transfers made by those entities. The appeals court held that Congress expressly exempted Fannie Mae and Freddie Mac from "all taxation," including all state and local taxation, when it chartered those institutions and that it applied the same exemption to the FHFA as conservator in the 2008 Housing and Economic Recovery Act. The court rejected the state and local entities' argument that the phrase "all taxation" applies only to direct taxes and not excise taxes. The court added that Congress specifically carved out real property taxes from the "all taxation" exemption, but did not carve out the types of transfer taxes at issue in this case. The court vacated the district court's order and remanded with direction that the district court enter summary judgment for the FHFA, Fannie Mae, and Freddie Mac. In a [statement](#) issued after the decision, one Michigan county stated that it plans to seek Supreme Court review.

Supreme Court Applies *Chevron* Deference to Agency's Interpretation of Statutory Jurisdiction. On May 20, the U.S. Supreme Court [held](#) that *Chevron* deference applies to an agency's interpretation of its own statutory jurisdiction. *City of Arlington v. FCC*, 569 U.S. ____ (2013). In this case, two Texas localities challenged the FCC's ability to administer part of the Communications Act of 1934, arguing that an agency's interpretation of a statutory ambiguity that concerns the scope of its statutory authority is a jurisdictional issue and that *Chevron* should not apply. The Court disagreed and stated that there is no basis for carving out an arbitrary subset of "jurisdictional" questions from the *Chevron* framework. To hold otherwise, the Court reasoned, would be to accept a false dichotomy between "jurisdictional" and "nonjurisdictional" agency interpretations, and transfer certain interpretive decisions from the agencies that administer the statutes to the federal courts. Although decided in the context of an action taken by the FCC, this is a broad administrative law decision that will affect regulated entities' ability to challenge certain regulatory actions taken by other federal agencies.

MISCELLANY

FINRA Expands Role Overseeing Equities Markets. On May 22, FINRA [announced](#) that it was selected by Direct Edge, the third largest U.S. stock exchange operator, to provide market surveillance services on behalf of Direct Edge's two licensed stock exchanges. The agreement extends FINRA's surveillance oversight to more than 90% of U.S. equities trading volume. With this agreement, all of Direct Edge's third-party regulatory services will be consolidated with FINRA.

Digital Advertising Group Revises Code of Conduct for Interest-Based Advertising. On May 16, the Network Advertising Initiative (NAI), a self-regulatory body governing over 90 third-party digital advertising companies, [released](#) a revised [Code of Conduct](#) designed to (i) ensure that NAI member companies continue to implement, honor, and maintain strong standards with respect to the collection and use of data for online advertising, (ii) adapt the code to accommodate all companies in the advertising technology field, and (iii) incorporate changes in the regulatory and self-regulatory landscape, including principles of the FTC's Self Regulatory Principles for Online

Behavioral Advertising, the FTC's final privacy report, and the White House privacy report.

FIRM NEWS

[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.

[Donna Wilson](#) will speak at ACI's [12th National Forum on Residential Mortgage Litigation and Regulatory Enforcement](#), on September 26, 2013 in Dallas, TX. Ms. Wilson's panel is titled, "Responding to Stepped Up Litigation and Enforcement Being Brought at the State Level, With an Emphasis on California, Florida, New York, Illinois, Texas, and Nevada."

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](#) published the Fair Lending Litigation chapter in [Litigation Services Handbook: The Role of the Financial Expert](#), 2013 Cumulative

Supplement (5th Edition).

[Jeremiah Buckley](#) authored "[Help the Fed Get Out of the Mortgage Business](#)" for American Banker on May 7, 2013.

[Benjamin Saul](#) published "[Private Student Lenders and Servicers Face CFPB Scrutiny](#)," on May 20, 2013, in the Westlaw Journal of Bank & Lender Liability.

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

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

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