Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

June 28, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Enforcement Action Targets Marketing of Auto Loans, Add-On Products to Servicemembers. On June 27, the CFPB announced enforcement actions against a national bank and its service provider related to alleged deceptive marketing of auto loans and add-on products to active-duty servicemembers. The CFPB claims that the companies failed to disclose or mischaracterized certain fees charged and ancillary products offered through a program developed to finance auto loans to servicemembers. According to CFPB Director Richard Cordray, the actions were precipitated by a complaint received from an individual servicemember's relative. The companies agreed to pay restitution to servicemembers and to implement other changes in their business practices, but the CFPB did not impose any civil monetary penalties, in part, the CFPB explained, because the companies cooperated in the investigation and proactively changed certain practices. The actions demonstrate the CFPB's continued focus on auto finance and the sale of add-on products, and its coordination with the Department of Defense and the individual branches of the military on servicemember protection issues. For more information about these actions and related issues, see our Special Alert.

CFPB Proposes Additional Changes to Mortgage Rules. On June 24, the CFPB issued another set of proposed amendments to its January 2013 mortgage rules. The proposal primarily addresses several important questions that have emerged during the implementation process regarding the Mortgage Servicing and Loan Originator Compensation rules. We provided detailed analysis of the proposed changes in a recent Special Alert. Comments on the proposed amendments are due by July 22, 2013.

CFPB Issues Guidance on Responsible Conduct. On June 25, the CFPB issued Bulletin 2013-06, which identifies four pillars of "responsible conduct" - self-policing, self-reporting, remediation, and cooperation - on the part of potential targets of enforcement action by the Bureau, as described in more detail in our Special Alert. The Bulletin expressly states that such conduct may be rewarded

with (i) resolution of an investigation with no public enforcement action; (ii) treatment of subject conduct as a less severe type of violation; (iii) reduction in the number of violations pursued; or (iv) reduction in sanctions or penalties. Despite the encouragement of self-policing, self-reporting, remediation, and cooperation, the Bulletin notes that there is no consistent formula that can be applied to the crediting of responsible conduct, and satisfaction of some or all of the factors will not bar the Bureau from bringing any enforcement action or pursuing any remedy. The Bulletin also states that there may be misconduct so egregious or harm so great that enforcement actions or penalties cannot be mitigated.

CFPB, Congress Exchange Letters on Fair Auto Lending Guidance. On June 20, 35 Republican Members of the U.S. House of Representatives sent a letter to CFPB Assistant Director of the Office of Fair Lending and Equal Opportunity, Patrice Ficklin, questioning the manner in which recent CFPB guidance regarding lending practices in the auto lending industry was rendered and requesting details concerning the process of analyzing potential fair lending violations. Also on June 20, CFPB Director Cordray responded to an earlier letter from 13 Democratic Members of the House Financial Services Committee. Mr. Cordray's response essentially reiterated both the CFPB's authority to supervise and investigate financial institutions engaged in auto finance and the CFPB's concerns that pricing discretion may create a significant risk of discrimination. Director Cordray indicated that the CFPB uses a proxy methodology to analyze disparate impact in the auto lending industry, though it is short on the specifics behind the methodology used. The CFPB response acknowledged that ECOA fair lending analysis is more complex than mortgage lending analysis given the absence of data similar to that collected in the mortgage context under HMDA. For more information about the exchange of letters and the CFPB's auto lending guidance, please see our recent blog post.

CFPB Finalizes Rule to Supervise Nonbanks That Pose Risks to Consumers. On June 26, the CFPB issued a final rule outlining new procedures for establishing supervisory authority over nonbanks that it has "reasonable cause" to believe pose "risks to consumers" with regard to consumer financial products or services. The rule outlines the procedures by which the CFPB will notify nonbanks that they are being considered for supervision and how they can respond to the CFPB's notice. The CFPB's determination regarding whether and when to issue a "Notice of Reasonable Cause" will be based on complaints collected by the Bureau or on information from other sources, including judicial opinions and administrative decisions. Once supervised, a nonbank is subject to the CFPB's authority to require reports and conduct examinations, but can petition to end the supervision after two years and annually thereafter. The final rule takes effect 30 days after its publication in the Federal Register.

CFPB Announces Debt Collection Field Hearing. On June 26, the CFPB announced that its next field hearing will focus on debt collection and will be held in Portland, Maine on July 10, 2013. The event, which is open to members of the public who RSVP, will feature remarks from CFPB Director Richard Cordray, as well as testimony from consumer groups and industry representatives. In the past, the CFPB has made policy announcements in connection with field hearings, and this time may announce, among other things, that it will begin accepting debt collection complaints through its public complaint database.

FTC Obtains Settlement Regarding Marketing of Mortgage Refinancing Services to Servicemembers; Announces First Settlements in "Cardholder Services" Robocalls Sweep. On June 27, the FTC announced that a mortgage broker will pay a $7.5 million civil penalty to resolve alleged violations of the agency's Telemarketing Sales Rule (TSR) and Mortgage Acts and Practices - Advertising Rule (MAP Rule). The broker allegedly violated the TSR by calling more than 5.4 million telephone numbers listed on the National Do Not Call Registry to offer home loan refinancing services to current and former U.S. military consumers and by failing remove consumers

from its call list upon demand. The broker also allegedly violated the MAP Rule by misleading consumers about its affiliation with the Department of Veterans Affairs and leading consumers to believe that it was offering low interest, fixed rate mortgages with no costs, when in reality it was offering adjustable rate mortgages with closing costs. In the same announcement, the FTC stated that it had obtained the first settlements in cases related to a 2012 sweep of telemarketers alleged to have placed automated calls to consumers to make deceptive "no-risk" offers to substantially reduce the consumers' credit card interest rates in exchange for an upfront fee. According to the FTC, the telemarketers claimed to be calling from the consumers' credit card company, or otherwise used the generic "Cardholder Services" title to suggest a relationship with a bank or credit card company.

Bipartisan Group of Senators Propose Housing Finance Reform Bill. On June 25, Senators Mark Warner (D-VA) and Bob Corker (R-TN) announced the introduction of a new bill to reform the secondary mortgage market. The bill, known as the Housing Finance Reform and Taxpayer Protection Act, has bipartisan support from several other members of the Senate Banking Committee. The bill is designed to draw private capital back into the secondary mortgage market by providing a limited government guarantee to qualifying mortgage-backed securities (MBS). It would replace over a period of time Fannie Mae and Freddie Mac and in their stead establish the Federal Mortgage Insurance Corporation (FMIC), which would oversee a variety of secondary market utility functions, many of which are similar to those under development by the FHFA. Under the new system, the FMIC would insure MBS securitized by FMIC-approved issuers, provided that the MBS place in the first loss position a private investor with at least 10 cents in equity capital for every dollar of risk. FMIC-insured MBS also would be required to be collateralized by "eligible mortgages" - mortgages that, among other things, meet the CFPB's ability to pay requirements, have a down payment of at least five percent, and are below the conforming loan limit. The FMIC also would have responsibility for approving bond guarantors to provide credit enhancement, servicers eligible to service loans in MBS pools, and private mortgage insurance companies to insure mortgages with a loan-to-value ratio above 80 percent. The bill also would establish an affordable housing fund subsidized through fees on securitized loans and would grant the FMIC authority to back the entire MBS market for a limited period of time in emergencies.

DOD Seeks Input on Military Lending Act Regulations; State AGs Seek Expansion of Covered Loans. Last week, the Department of Defense (DOD) issued an advanced notice of proposed rulemaking to solicit input on potential changes to the definition of "consumer credit" in the regulations that implement the Military Lending Act (MLA). Currently, the MLA regulations cover certain payday, car title, and refund anticipation loans to servicemembers and their dependents. The DOD notice seeks (i) comment on whether the definition of "consumer credit" should be revised to cover other small dollar loans and (ii) examples of alternative programs designed to assist servicemembers who need small dollar loans. Responses to the DOD notice are due by August 1, 2013. On June 24, a bipartisan group of 13 state attorneys general submitted a comment letter urging the DOD to amend the MLA regulations to close loopholes in the definitions of covered loans and to cover any other type of consumer credit loan presenting similar dangers, such as overdraft loans.

Freddie Mac Changes Low Activity Fee to No Activity Fee. On June 25, Freddie Mac announced in Bulletin 2013-12 that, based on industry feedback, it is changing its recently-announced "low activity fee" to a "no activity fee." In May, Freddie Mac announced that, effective January 1, 2014, a seller/servicer would be charged a $7,500 fee if the seller/servicer did not either (i) sell mortgages to Freddie Mac with an aggregate unpaid principal balance greater than $5 million during the immediately preceding calendar year, or (ii) service, or act as a servicing agent for, mortgages for Freddie Mac with an aggregate unpaid principal balance of at least $25 million as of December 31 of the immediately preceding calendar year. Under the revised policy, seller/servicers

can avoid the fee if they (i) sell to Freddie Mac during the immediately preceding 36 months, or (ii) service, or act as a servicing agent for, a mortgage portfolio for Freddie Mac as of December 31 of the immediately preceding calendar year. In addition, new seller/servicers are exempt from the fee until they have been approved by Freddie Mac for three years.

Freddie Mac Makes Loan Quality Advisor Available to Sellers. On June 24, Freddie Mac issued Bulletin 2013-11, which announced that a new web-based risk and eligibility assessment tool, Loan Quality Advisor (LQA), is now available to sellers. It is designed to help sellers identify loan eligibility issues both pre- and post-closing. The Bulletin provides information regarding a new agreement that provides the terms and conditions for sellers using the LQA. In addition, effective immediately, sellers are permitted to resubmit construction conversion and renovation mortgages to Loan Prospector after the note date or the effective date of permanent financing.

SEC Approves FINRA Rule Change to Publicly Release Additional Disciplinary Action Information. On June 21, the SEC approved a change to FINRA's rules that will allow the self-regulatory organization to publish greater information about FINRA's disciplinary actions. Under existing rules, FINRA only releases disciplinary actions upon request, unless the action meets specified criteria established for use in determining whether an action is worthy of publication. Once the new rules take effect - likely several months from now - those publication criteria will be removed, and most FINRA disciplinary actions will be released as a matter of course. FINRA will retain authority to redact information to protect privacy of individuals. The new rules also update and codify FINRA's practices related to the publication of other FINRA actions, including temporary cease and desist orders, statutory disqualification decisions, expedited proceeding decisions, summary actions, and others.

FinCEN Announces Functional Reorganization. On June 24, FinCEN announced its new organizational structure, effective immediately. The new structure organizes employees based on their job function, whereas previously employees were organized based on the stakeholder that they served. FinCEN believes the change will maximize its ability to efficiently further its anti-money laundering and counterterrorist financing efforts.

FTC Updates Guidance for Search Engines on Advertising. On June 25, the FTC announced updated guidance for the search engine industry on distinguishing paid search results from natural search results. The updated guidance was in the form of letters sent to seven general purpose search engines and 17 high traffic specialized search engines. The FTC noted that the principles of its original 2002 guidance still apply, but that changes in the search industry and requests from industry and consumer groups led the agency to issue the revised guidance. The guidance states that the failure to clearly and prominently distinguish advertising from natural search results, such as through visual cues, labels, or other techniques, could constitute a deceptive practice. The FTC also noted that the principles of the guidance should be applied to new means used by consumers to search for information, such as social media, mobile applications and voice assistants on mobile devices.

NIST Issues Mobile Device Security Guidelines. On June 25, the National Institute of Standards and Technology (NIST) released a mobile device management guide to help federal agencies centrally manage the security of mobile devices. While the NIST document was developed for use by federal agencies, the device management principles may be applicable to other organizations facing similar security concerns. The guide focuses on smart phones and tablets and provides recommendations for selecting, implementing, and using centralized management technologies. It also explains the security concerns inherent in mobile device use and provides recommendations for securing mobile devices throughout their life cycles. The recommendations aim to address security issues related to both organization-provided and personally-owned ("bring your own

device") mobile devices.

STATE ISSUES

Illinois Extends Foreclosure Protections Sunset Provision. On June 20, Illinois enacted HB 99, which extends for three years the protections afforded borrowers in the Illinois Homeowner Protection Act. The Act requires mortgagees to notify homeowners who are at least 30 days late on their payments that they have 30 days to seek housing counseling. A homeowner who seeks counsel gets an additional 30 days to work out a payment plan or refinance their loan, meaning that such homeowners have a "grace period" of up to 90 days. Those protections were set to expire on July 1, 2013, but now will remain in effect until July 1, 2016. The bill took effect immediately.

Nevada Alters Foreclosure Mediation Program. Recently, Nevada enacted AB 273, which altered the state's foreclosure mediation program to require a trustee under a deed of trust to send certain information concerning the foreclosure mediation program to a borrower concurrently with, but separately from, the copy of the notice of default and election to sell that also must be sent to the borrower. The bill also requires that a borrower facing foreclosure be automatically enrolled in the foreclosure mediation program unless the borrower elects to waive mediation or fails to pay his or her share of the program fee. The bill also adds, among other things, certain procedural requirements for mediators and trustees. These changes become effective on October 1, 2013.

Texas Adds Flexibility to Increase Fees and Charges on Consumer Loans, Cash Advances. On June 14, Texas enacted SB 1251, which grants the state Finance Commission authority to set maximum amounts for (i) administrative fees charged on consumer loans and (ii) acquisition charges on cash advances. Those maximum amounts have not been updated in the state in more than 10 years and 20 years, respectively. The bill makes certain other changes related to the computation of interest charges on cash advances and the application of an alternate interest charge computation methodology to a borrower's account. The bill takes effect on September 1, 2013.

COURTS

U.S. Supreme Court To Hear Recess Appointment Case. On June 24, the U.S. Supreme Court agreed to hear the federal government's challenge to a January 2013 decision by the U.S. Court of Appeals for the D.C. Circuit holding that "recess appointments" to the National Labor Relations Board (NLRB) made by President Obama were unconstitutional. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. Jan. 25, 2013), *cert. granted*, 2013 WL 1774240 (U.S. June 24, 2013) (No. 12-1281). Last month, the Third Circuit also invalidated a different NLRB recess appointment made by President Obama. CFPB Director Richard Cordray was appointed in the same manner and on the same day as the NLRB member appointments at issue in *Noel Canning*, and his appointment is the subject of a lawsuit currently pending in the U.S. District Court for the District of Columbia. The Supreme Court will address two questions presented by the government, as well as a third that the Court added. The government's petition asked the court to determine (i) whether the President's recess appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions and (ii) whether the President's recess appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess. The Court also signaled its intent to address the issue of Senate pro forma sessions with a question it added - whether the President's recess appointment power may be exercised when the Senate is convening every three days in pro forma sessions. The Court is likely to hear the case in the fall and issue its opinion next

year.

Insurance Trades Challenge HUD Disparate Impact Rule. On June 26, two insurance associations filed a lawsuit challenging a rule promulgated earlier this year by HUD that authorizes so-called "disparate impact" or "effects test" claims under the Fair Housing Act. The rule provides support to private or governmental plaintiffs challenging housing or mortgage lending practices that have a "disparate impact" on protected classes of individuals, even if the practice is facially neutral and non-discriminatory and there is no evidence that the practice was motivated by a discriminatory intent. The rule also permits practices to be challenged based on claims that the practice improperly creates, increases, reinforces, or perpetuates segregated housing patterns. The insurance associations allege that the rule violates the Administrative Procedures Act because it contradicts the plain language of the relevant portion of the Fair Housing Act, which prohibits only intentional discrimination. The complaint also alleges that the rule, if applied to homeowners' insurance, would require insurers "to consider characteristics such as race and ethnicity and to disregard legitimate risk-related factors," thereby forcing insurers "to provide and price insurance in a manner that is wholly inconsistent with well-established principles of actuarial practice and applicable state insurance law."

Virginia Federal District Court Dismisses Shareholder Derivative Action Related to Credit Card Issuer's Settlements with OCC, CFPB. On June 21, the U.S. District Court for the Eastern District of Virginia dismissed a shareholder derivative action against a national bank's officers and directors that was based on the bank's settlements with the CFPB and OCC over allegedly deceptive marketing of ancillary products. *In re Capital One Derivative S'holder Litig.*, No. 1:12-cv-1100 (E.D. Va. June 21, 2013). The shareholders, relying on Delaware law, alleged that the officers and directors breached their fiduciary duty of loyalty, committed corporate waste, and were unjustly enriched by failing to prevent the allegedly deceptive sales practices at the bank's third-party call centers which led to the consent orders. The court held that the shareholders did not adequately allege corporate waste because the bank's settlement payments were not "transfers of assets with no corporate purpose" but instead achieved final resolution of the investigations. The unjust enrichment claim failed because the shareholders did not allege any facts indicating a relationship between the officers and directors' compensation and the settlements with the agencies. With respect to the duty of loyalty claim, the shareholders alleged two theories: (i) that the officers and directors failed to implement controls that would have prevented the alleged misconduct, and (ii) that defendants ignored numerous "red flags" that should have alerted them to the alleged misconduct. First, the controls theory failed because the shareholders could not satisfy the demanding *Caremark* standard, which requires an utter failure to implement any controls. Second, most of the alleged red flags were either not actually red flags at all or there were no allegations that the individual officers and directors were aware of them. However, as to a small number of the alleged red flags, the court found the claims sufficiently plausible to allow the shareholders an opportunity to amend their complaint to add additional facts.

Texas Supreme Court Holding Requires Lender-Retained Fees To Be Factored into Home Equity Loan Fee Cap. On June 21, the Texas Supreme Court invalidated state regulations that defined "interest" with regard to home equity loans to exclude lender-retained fees and allowed home equity loan closings through an agent. *Finance Commission of Texas v. Norwood*, No. 10-0121, 2013 WL 3119481 (Tex. Jun. 21, 2013). The state constitution caps home equity loan fees at three percent of principal, but excludes "interest" from the definition of "fees." The Texas Supreme Court held that a state regulation that defined "interest" for the purpose of home equity lending by referencing a state code definition that excludes lender-retained fees effectively rendered the constitutional fee cap meaningless by giving the state legislature authority to modify the cap. The legislature's broader definition of interest was designed to prohibit usury, a function inversely related to the constitutional cap for home equity loans, the court explained. The court held that the

constitutional definition of interest means the amount determined by multiplying the loan principal by the interest rate, and therefore does not include lender-retained fees. The court also invalidated a regulation that allowed borrowers to mail consent to a lender to have a lien placed on the homestead and to attend the equity loan closing through an agent, reasoning that a constitutional provision designed to prohibit the coercive closing of a home equity loan at the owner's home requires that execution of consent or a power of attorney must occur at one of the locations specified in the provision - the office of the lender, an attorney, or a title company. Finally, the court upheld a regulation that created a rebuttable presumption that a specific home equity loan consumer disclosure required by the state constitution is received three days after it is mailed.

FIRM NEWS

David Whitaker recently spoke about the legality and importance of e-signatures for DocuSign's National ESIGN Day. Click here to view David's presentation.

Margo Tank will participate on a panel on "E-Delivery" at The American Council for Life Insurers' Compliance and Legal Sections Annual Meeting being held in Orlando, Florida from July 17-19, 2013. The panel will discuss the legal and regulatory issues insurance carriers face as they move to implement insurance policy related customer communication via e-delivery.

Andrew Sandler will participate in the Stafford webinar, Bank Enforcement Actions: New Issues, Higher Penalties, Joint Enforcement Actionsbeing held on Thursday, July 18, 2013, from 1:00 pm to 2:30 PM EDT.

Jonice Gray Tucker will speak at the Thomson Reuters workshop, Preparing for a CFPB Examination in Washington, DC on August 1, 2013.

Jonice Gray Tucker will moderate a Regulatory "Super Session" at the California Mortgage Bankers Association's Western States Loan Servicing Conference on August 4, 2013, in Las Vegas, Nevada. The panel will focus the changing regulatory landscape for mortgage servicers and practical tips for compliance.

Jonice Gray Tucker will moderate a panel at the American Bar Association Annual Meeting entitled: Knowing is Half the Battle: The CFPB's Mortgage Rules, HUD's Disparate Impact Rule, and More. Speakers will include BuckleySandler partner Joseph Reilly, David Berenbaum (NCRC), Ken Markison (MBA), and David Stein (Promontory). The panel will be held on August 10, 2013, in San Francisco, CA.

BuckleySandler is a proud sponsor of The Five Star Institute's Compliance Caucus taking place September 9-10, 2013 in Dallas, TX. The firm will have two speakers at this year's event: On Tuesday, September 10, Andrea Mitchell will speak on the panel, "Understanding UDAAP and Emerging Regulations in Compliance," and Ben Olson will speak on the panel, "Get to Know CFPB and What's on the Agenda."

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."

Thomas Sporkin will participate on a panel on whistleblowers at the American Bar Association's Securities Fraud 2013 Conference in New Orleans, LA, October 24-25, 2013.

Margo Tank and David Whitaker will speak at The Electronic Signature and Record Association's E-Signatures 2013 Annual Conference, on November 14, 2013 in New York. Their panel is titled, "E-Sign 101 - Questions, Answers, and Best Practices."

FIRM PUBLICATIONS

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.

Benjamin Klubes, Michelle Rogers, and Katherine Halliday published "HAMP Risk on the Rise: A Complicated Regulatory Scheme Under the Spotlight," on June 5, 2013 in Bloomberg Law.

Margo Tank and David Whitaker authored "Planning for Accessibility When Developing Financial Services Websites and Mobile Apps," which appeared in ABA's Consumer Financial Services Newsletter on June 20, 2013.

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.

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MORTGAGES

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Texas Supreme Court Holding Requires Lender-Retained Fees To Be Factored into Home Equity Loan Fee Cap. On June 21, the Texas Supreme Court invalidated state regulations that defined "interest" with regard to home equity loans to exclude lender-retained fees and allowed home equity loan closings through an agent. *Finance Commission of Texas v. Norwood*, No. 10-0121, 2013 WL 3119481 (Tex. Jun. 21, 2013). The state constitution caps home equity loan fees at three percent of principal, but excludes "interest" from the definition of "fees." The Texas Supreme Court held that a state regulation that defined "interest" for the purpose of home equity lending by referencing a state code definition that excludes lender-retained fees effectively rendered the constitutional fee cap meaningless by giving the state legislature authority to modify the cap. The legislature's broader definition of interest was designed to prohibit usury, a function inversely related to the constitutional cap for home equity loans, the court explained. The court held that the constitutional definition of interest means the amount determined by multiplying the loan principal by the interest rate, and therefore does not include lender-retained fees. The court also invalidated a regulation that allowed borrowers to mail consent to a lender to have a lien placed on the homestead and to attend the equity loan closing through an agent, reasoning that a constitutional provision designed to prohibit the coercive closing of a home equity loan at the owner's home requires that execution of consent or a power of attorney must occur at one of the locations specified in the provision - the office of the lender, an attorney, or a title company. Finally, the court upheld a regulation that created a rebuttable presumption that a specific home equity loan consumer disclosure required by the state constitution is received three days after it is mailed.

CONSUMER FINANCE

CFPB Enforcement Action Targets Marketing of Auto Loans, Add-On Products to Servicemembers. On June 27, the CFPB announced enforcement actions against a national bank and its service provider related to alleged deceptive marketing of auto loans and add-on products to active-duty servicemembers. The CFPB claims that the companies failed to disclose or mischaracterized certain fees charged and ancillary products offered through a program developed to finance auto loans to servicemembers. According to CFPB Director Richard Cordray, the actions were precipitated by a complaint received from an individual servicemember's relative. The companies agreed to pay restitution to servicemembers and to implement other changes in their business practices, but the CFPB did not impose any civil monetary penalties, in part, the CFPB explained, because the companies cooperated in the investigation and proactively changed certain practices. The actions demonstrate the CFPB's continued focus on auto finance and the sale of add-on products, and its coordination with the Department of Defense and the individual branches of the military on servicemember protection issues. For more information about these actions and related issues, see our Special Alert.

CFPB Issues Guidance on Responsible Conduct. On June 25, the CFPB issued Bulletin 2013-06, which identifies four pillars of "responsible conduct" - self-policing, self-reporting, remediation, and cooperation - on the part of potential targets of enforcement action by the Bureau, as described in more detail in our Special Alert. The Bulletin expressly states that such conduct may be rewarded with (i) resolution of an investigation with no public enforcement action; (ii) treatment of subject conduct as a less severe type of violation; (iii) reduction in the number of violations pursued; or (iv) reduction in sanctions or penalties. Despite the encouragement of self-policing, self-reporting, remediation, and cooperation, the Bulletin notes that there is no consistent formula that can be applied to the crediting of responsible conduct, and satisfaction of some or all of the factors will not bar the Bureau from bringing any enforcement action or pursuing any remedy. The Bulletin also states that there may be misconduct so egregious or harm so great that enforcement actions or penalties cannot be mitigated.

CFPB, Congress Exchange Letters on Fair Auto Lending Guidance. On June 20, 35 Republican Members of the U.S. House of Representatives sent a letter to CFPB Assistant Director of the Office of Fair Lending and Equal Opportunity, Patrice Ficklin, questioning the manner in which recent CFPB guidance regarding lending practices in the auto lending industry was rendered and requesting details concerning the process of analyzing potential fair lending violations. Also on June 20, CFPB Director Cordray responded to an earlier letter from 13 Democratic Members of the House Financial Services Committee. Mr. Cordray's response essentially reiterated both the CFPB's authority to supervise and investigate financial institutions engaged in auto finance and the CFPB's concerns that pricing discretion may create a significant risk of discrimination. Director Cordray indicated that the CFPB uses a proxy methodology to analyze disparate impact in the auto lending industry, though it is short on the specifics behind the methodology used. The CFPB response acknowledged that ECOA fair lending analysis is more complex than mortgage lending analysis given the absence of data similar to that collected in the mortgage context under HMDA. For more information about the exchange of letters and the CFPB's auto lending guidance, please see our recent blog post.

CFPB Finalizes Rule to Supervise Nonbanks That Pose Risks to Consumers. On June 26, the CFPB issued a final rule outlining new procedures for establishing supervisory authority over nonbanks that it has "reasonable cause" to believe pose "risks to consumers" with regard to consumer financial products or services. The rule outlines the procedures by which the CFPB will notify nonbanks that they are being considered for supervision and how they can respond to the CFPB's notice. The CFPB's determination regarding whether and when to issue a "Notice of Reasonable Cause" will be based on complaints collected by the Bureau or on information from other sources, including judicial opinions and administrative decisions. Once supervised, a nonbank is subject to the CFPB's authority to require reports and conduct examinations, but can petition to end the supervision after two years and annually thereafter. The final rule takes effect 30 days after its publication in the Federal Register.

CFPB Announces Debt Collection Field Hearing. On June 26, the CFPB announced that its next field hearing will focus on debt collection and will be held in Portland, Maine on July 10, 2013. The event, which is open to members of the public who RSVP, will feature remarks from CFPB Director Richard Cordray, as well as testimony from consumer groups and industry representatives. In the past, the CFPB has made policy announcements in connection with field hearings, and this time may announce, among other things, that it will begin accepting debt collection complaints through its public complaint database.

DOD Seeks Input on Military Lending Act Regulations; State AGs Seek Expansion of Covered Loans. Last week, the Department of Defense (DOD) issued an advanced notice of proposed rulemaking to solicit input on potential changes to the definition of "consumer credit" in the regulations that implement the Military Lending Act (MLA). Currently, the MLA regulations cover certain payday, car title, and refund anticipation loans to servicemembers and their dependents. The DOD notice seeks (i) comment on whether the definition of "consumer credit" should be revised to cover other small dollar loans and (ii) examples of alternative programs designed to assist servicemembers who need small dollar loans. Responses to the DOD notice are due by August 1, 2013. On June 24, a bipartisan group of 13 state attorneys general submitted a comment letter urging the DOD to amend the MLA regulations to close loopholes in the definitions of covered loans and to cover any other type of consumer credit loan presenting similar dangers, such as overdraft loans.

U.S. Supreme Court To Hear Recess Appointment Case. On June 24, the U.S. Supreme Court agreed to hear the federal government's challenge to a January 2013 decision by the U.S. Court of Appeals for the D.C. Circuit holding that "recess appointments" to the National Labor Relations

Board (NLRB) made by President Obama were unconstitutional. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. Jan. 25, 2013), *cert. granted*, 2013 WL 1774240 (U.S. June 24, 2013) (No. 12-1281). Last month, the Third Circuit also invalidated a different NLRB recess appointment made by President Obama. CFPB Director Richard Cordray was appointed in the same manner and on the same day as the NLRB member appointments at issue in *Noel Canning*, and his appointment is the subject of a lawsuit currently pending in the U.S. District Court for the District of Columbia. The Supreme Court will address two questions presented by the government, as well as a third that the Court added. The government's petition asked the court to determine (i) whether the President's recess appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions and (ii) whether the President's recess appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess. The Court also signaled its intent to address the issue of Senate pro forma sessions with a question it added - whether the President's recess appointment power may be exercised when the Senate is convening every three days in pro forma sessions. The Court is likely to hear the case in the fall and issue its opinion next year.

Texas Adds Flexibility to Increase Fees and Charges on Consumer Loans, Cash Advances. On June 14, Texas enacted SB 1251, which grants the state Finance Commission authority to set maximum amounts for (i) administrative fees charged on consumer loans and (ii) acquisition charges on cash advances. Those maximum amounts have not been updated in the state in more than 10 years and 20 years, respectively. The bill makes certain other changes related to the computation of interest charges on cash advances and the application of an alternate interest charge computation methodology to a borrower's account. The bill takes effect on September 1, 2013.

SECURITIES

SEC Approves FINRA Rule Change to Publicly Release Additional Disciplinary Action Information. On June 21, the SEC approved a change to FINRA's rules that will allow the self-regulatory organization to publish greater information about FINRA's disciplinary actions. Under existing rules, FINRA only releases disciplinary actions upon request, unless the action meets specified criteria established for use in determining whether an action is worthy of publication. Once the new rules take effect - likely several months from now - those publication criteria will be removed, and most FINRA disciplinary actions will be released as a matter of course. FINRA will retain authority to redact information to protect privacy of individuals. The new rules also update and codify FINRA's practices related to the publication of other FINRA actions, including temporary cease and desist orders, statutory disqualification decisions, expedited proceeding decisions, summary actions, and others.

CREDIT CARDS

FTC Obtains Settlement Regarding Marketing of Mortgage Refinancing Services to Servicemembers; Announces First Settlements in "Cardholder Services" Robocalls Sweep. On June 27, the FTC announced that a mortgage broker will pay a $7.5 million civil penalty to resolve alleged violations of the agency's Telemarketing Sales Rule (TSR) and Mortgage Acts and Practices - Advertising Rule (MAP Rule). The broker allegedly violated the TSR by calling more than 5.4 million telephone numbers listed on the National Do Not Call Registry to offer home loan refinancing services to current and former U.S. military consumers and by failing remove consumers from its call list upon demand. The broker also allegedly violated the MAP Rule by misleading

consumers about its affiliation with the Department of Veterans Affairs and leading consumers to believe that it was offering low interest, fixed rate mortgages with no costs, when in reality it was offering adjustable rate mortgages with closing costs. In the same announcement, the FTC stated that it had obtained the first settlements in cases related to a 2012 sweep of telemarketers alleged to have placed automated calls to consumers to make deceptive "no-risk" offers to substantially reduce the consumers' credit card interest rates in exchange for an upfront fee. According to the FTC, the telemarketers claimed to be calling from the consumers' credit card company, or otherwise used the generic "Cardholder Services" title to suggest a relationship with a bank or credit card company.

Virginia Federal District Court Dismisses Shareholder Derivative Action Related to Credit Card Issuer's Settlements with OCC, CFPB. On June 21, the U.S. District Court for the Eastern District of Virginia dismissed a shareholder derivative action against a national bank's officers and directors that was based on the bank's settlements with the CFPB and OCC over allegedly deceptive marketing of ancillary products. *In re Capital One Derivative S'holder Litig.*, No. 1:12-cv-1100 (E.D. Va. June 21, 2013). The shareholders, relying on Delaware law, alleged that the officers and directors breached their fiduciary duty of loyalty, committed corporate waste, and were unjustly enriched by failing to prevent the allegedly deceptive sales practices at the bank's third-party call centers which led to the consent orders. The court held that the shareholders did not adequately allege corporate waste because the bank's settlement payments were not "transfers of assets with no corporate purpose" but instead achieved final resolution of the investigations. The unjust enrichment claim failed because the shareholders did not allege any facts indicating a relationship between the officers and directors' compensation and the settlements with the agencies. With respect to the duty of loyalty claim, the shareholders alleged two theories: (i) that the officers and directors failed to implement controls that would have prevented the alleged misconduct, and (ii) that defendants ignored numerous "red flags" that should have alerted them to the alleged misconduct. First, the controls theory failed because the shareholders could not satisfy the demanding *Caremark* standard, which requires an utter failure to implement any controls. Second, most of the alleged red flags were either not actually red flags at all or there were no allegations that the individual officers and directors were aware of them. However, as to a small number of the alleged red flags, the court found the claims sufficiently plausible to allow the shareholders an opportunity to amend their complaint to add additional facts.

PRIVACY/DATA SECURITY

FTC Updates Guidance for Search Engines on Advertising. On June 25, the FTC announced updated guidance for the search engine industry on distinguishing paid search results from natural search results. The updated guidance was in the form of letters sent to seven general purpose search engines and 17 high traffic specialized search engines. The FTC noted that the principles of its original 2002 guidance still apply, but that changes in the search industry and requests from industry and consumer groups led the agency to issue the revised guidance. The guidance states that the failure to clearly and prominently distinguish advertising from natural search results, such as through visual cues, labels, or other techniques, could constitute a deceptive practice. The FTC also noted that the principles of the guidance should be applied to new means used by consumers to search for information, such as social media, mobile applications and voice assistants on mobile devices.

NIST Issues Mobile Device Security Guidelines. On June 25, the National Institute of Standards and Technology (NIST) released a mobile device management guide to help federal agencies centrally manage the security of mobile devices. While the NIST document was developed for use by federal agencies, the device management principles may be applicable to other organizations

facing similar security concerns. The guide focuses on smart phones and tablets and provides recommendations for selecting, implementing, and using centralized management technologies. It also explains the security concerns inherent in mobile device use and provides recommendations for securing mobile devices throughout their life cycles. The recommendations aim to address security issues related to both organization-provided and personally-owned ("bring your own device") mobile devices.

CRIMINAL ENFORCEMENT

FinCEN Announces Functional Reorganization. On June 24, FinCEN announced its new organizational structure, effective immediately. The new structure organizes employees based on their job function, whereas previously employees were organized based on the stakeholder that they served. FinCEN believes the change will maximize its ability to efficiently further its anti-money laundering and counterterrorist financing efforts.