Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

July 27, 2012

TOPICS - COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB RELEASES REPORT ON PRIVATE STUDENT LOANS, TESTIFIES IN SENATE. On July 20, the CFPB released a report on private student loans, prepared in conjunction with the Department of Education. Pursuant to Section 1077 of the Dodd-Frank Act, the report covers (i) the evolution and current state of the private lending market, (ii) the characteristics of consumers of private student loans, (iii) consumer protections, including recent changes and possible gaps, (iv) fair lending compliance information currently available and its implications, and (v) statutory or legislative recommendations to improve consumer protections. The report includes a series of recommendations from the CFPB and the Department of Education. The CFPB recommends that Congress require lenders to obtain a certification of the student's financial need from the educational institution before disbursing private student loan funds. The CFPB also recommends that Congress examine the impact that the 2005 amendments to the bankruptcy code that made private student loans non-dischargeable in bankruptcy absent a showing of undue hardship, have had on young borrowers. On July 24, the CFPB's Student Loan Ombudsman appeared before the Senate Banking Committee's Subcommittee on Financial Institutions and Consumer Protection to discuss the report and the CFPB's recommendations. The hearing also included testimony from consumer groups and one private student lender.

Bills Introduced on Regulation of Short Term, Small Dollar Lending. On July 18, Representatives Luetkemeyer (R-MO) and Baca (D-CA) introduced H.R. 6139, a bill that would create a national charter for qualified non-depository creditors, to be known as National Consumer Credit Corporations (NCCCs). The bill would task the OCC with assessing applications with a focus on the applicant institution's ability to offer products that provide credit to underserved consumers, and developing a process for approving financial products to be offered by NCCCs. The OCC would be able to establish an annual fee for a charter, but it would not be permitted to restrict the method by which an NCCC offers its products, or to establish usury limits. NCCCs would be subject to certain restrictions, including a prohibition on consumer loans with terms of 30 days or less. The House Financial Services Committee's Subcommittee on Financial Institutions and Consumer Credit held a hearing to consider H.R. 6139 on July 24, 2012.

On July 24, Senators Merkley (D-OR), Udall (D-NM), and Durbin (D-IL) introduced a bill, first revealed by Senator Merkley in March 2012, and now formalized as S. 3426, the Stopping Abuse and Fraud in Electronic Lending Act. According to a press release, the bill seeks to (i) ensure that a

third party doesn't gain control of a consumer's account through remotely created checks, (ii) allow consumers to cancel a debit in connection with a small-dollar loan, (iii) require all lenders, including banks, to abide by a state's rules for small-dollar, payday-like loans they offer customers in the state, (iv) ban lead generators and anonymously registered payday lending websites, and (v) give the CFPB authority to shut down payment processing for lenders that are violating state and other consumer lending laws through the Internet.

OCC and DOJ Announce SCRA Enforcement Action Against a National Bank. On July 26, the OCC and the DOJ announced resolution of actions brought against a national bank for alleged violations of the Service members Civil Relief Act (SCRA). The DOJ filed a complaint and consent order in the U.S. District Court for the Eastern District of Virginia, simultaneously bringing and resolving allegations that over a roughly five year period the bank failed to provide sufficient protections to service members (i) denying valid requests for interest rate reductions because the service members' military orders did not include specific end dates for the period of military service, (ii) foreclosing without a court order, (iii) repossessing motor vehicles without a court order, and (iv) obtaining default judgments without first filing accurate affidavits. Under the DOJ settlement, the bank must pay $12 million in damages to service members. Concurrently, the OCC released consent orders resolving similar allegations. Under both the DOJ and OCC orders, the bank must take specific actions to enhance compliance with SCRA, including with regard to vendor management, training, and internal reporting. The OCC also is requiring that the bank report periodically to the OCC, and conduct a look-back review of its service member accounts. The DOJ notes that the bank already has adopted enhanced SCRA policies on its own initiative, including extending a four percent interest rate to qualifying service members and giving an additional one-year grace period before de-enrolling service members from the reduced interest rate program.

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House Members Seek Information from Data Brokers. On July 24, a bipartisan group of members of the House of Representatives, led by Representatives Barton (R-TX) and Markey (D-MA), sent letters to nine firms the members identified as "major data brokerage companies." The letters ask each firm to provide information about how it collects, assembles, and sells consumer information. Among the series of specific inquiries, the letters seek information about collection processes and sources, data security measures, and consumer fees and notices. The House members asked each company to respond by August 15, 2012.

Senators Unveil Bill to Increase SEC Civil Penalties; House Members Propose Competing Bills to Enhance the SEC's Investment Adviser Oversight. On July 23, Senators Reed (D-RI) and Grassley (R-IA) unveiled legislation toincrease statutory limits on SEC civil monetary penalties to $1 million per violation for individuals, and $10 million per violation for entities. The bill, S. 3416, would also allow for the size of penalties to be linked to the scope of harm and associated investor losses, and provide substantially higher penalties for repeat offenders.The legislation follows a letter SEC Chairman Shapiro sent to Senators Reed and Crapo (R-ID) in November 2011, seeking reforms to the SEC's authority to impose civil penalties.

On July 24, Representatives Waters (D-CA), Frank (D-MA), and Capuano (D-MA) announced new legislation, H.R. 6204, that would provide the SEC with the authority to impose user fees on investment advisers for the purpose of funding an increase in the number and frequency of SEC examinations. This bill follows an earlier bill from Reps. Bachus (R-AL) and McCarthy (D-NY), H.R. 4624, which also seeks to improve oversight of investment advisers, but through the establishment of self-regulatory organizations overseen by the SEC that investment advisers with retail customers would be required to join.

Fannie Mae Announces Numerous Servicing Policy Changes; ULDD Mandate Takes Effect. On July 25, Fannie Mae issued *Servicing Guide* Announcement SVC-2012-12, which provides notice of miscellaneous changes to the Fannie Mae Servicing Guide related to (i) the MERS Rule 14 Notice, (ii) approved title company requirements for certain states, and (iii) allowable attorney fees. With respect to the MERS Rule 14 notice, servicers will now be required to notify Fannie Mae whenever they are required to send MERS notice of certain MERS-related legal challenges. Fannie Mae announced that it is eliminating the requirement that servicers select a Fannie Mae-approved title company for work performed in Arizona, California and Washington. Instead, servicers may select the title company of their choice. Fannie Mae also announced changes to the allowable amount of attorney's and trustee's fees in several jurisdictions.

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OCC Releases Bank Accounting Advisory Series Update. On July 25, the OCC released an update to its Bank Accounting Advisory Series, which provides accounting guidance for financial institutions. The updates are intended to address industry questions related to acquired loans, other real estate owned, troubled debt restructurings, nonaccrual, allowance for loan and lease losses, insurance claims, and debt discharged in bankruptcy.

NCUA Reorganizes Examination and Supervision Offices. On July 26, the NCUA announced the creation of the Office of National Examinations and Supervision, effective January 1, 2013. The new office will focus on consumer credit unions with more than $10 billion in assets. The NCUA is making the change to alter what it identifies as an imbalance in its current examination and supervision program by shifting resources from examination of smaller credit unions to the largest credit unions.

STATE ISSUES

Illinois Enhances Borrower Protections. On July 25, Illinois enacted SB 1692, which enhances consumer protections related to mortgages and tax refund anticipation loans. The bill amends the state's High Risk Home Loan Act to (i) update the definition of "high risk home loan" to be consistent with the federal standard, and prohibit prepayment penalties, balloon payments and modification fees for such loans, (ii) revise the definition of "points and fees" and clarify the prohibition on the financing of such fees in connection with high risk loans, and (iii) limit late payment fees to 4% of the amount past due. The bill also amends the state's Tax Refund Anticipation Loan Disclosure Act to (i) revise certain definitions, (ii) limit the fees that can be charged in connection with tax refund loans and establish other prohibited activities, and (iii) amend the disclosures required for creditors making such loans. These and other changes in the bill are effective January 1, 2013.

Michigan Updates Guidance on Return Check Fees on Installment Sales Contracts. On July 19, the Michigan Office of Financial and Insurance Regulation (OFIR) published a letter to installment seller/sales finance licensees clarifying the regulator's position on the use of return check fees in installment sales contracts. Previously, the OFIR had taken the position that inclusion of an NSF fee in a vehicle installment sales contract was not permitted because such a fee was not expressly permitted under the state's Motor Vehicle Sales Finance Act (MVSFA). However, in its July 19 letter the OFIR clarified that the OFIR considers it a violation of state law for a licensee under the MVSFA to charge a fee for returned checks if the motor vehicle installment sales contract does not specifically provide for the assessment of such a fee. The OFIR states that the MVSFA requires a contract contain all of the terms of the agreement between a buyer and a seller, including any default charges. Although the state Credit Reform Act permits regulated lenders to charge return check fees up to a maximum of $25, because a returned check constitutes a default under the contract, a return check fee is considered a default charge and can only be assessed if disclosed in the agreement.

OregonAdopts Rules to Implement Foreclosure Avoidance Program. Recently, the Oregon Department of Justice adopted temporary rules to implement the Foreclosure Avoidance Mediation Program established earlier this year. The rules establish (i) the accepted methods of notice required to be provided to the state Attorney General, (ii) the minimum training and qualifications for mediators, (iii) the fees and timing of fee payments, and (iv) the form of mediation notice for use in seeking nonjudicial foreclosure. The rules took effect July 11, 2012, and expire January 6, 2013.

COURTS

Eleventh Circuit Holds Loan Servicer May Be Debt Collector Subject to FDCPA. On July 18, the U.S. Court of Appeals for the Eleventh Circuit held that a mortgage servicer may be a debt collector subject to the FDCPA where it attempts to both enforce a security interest and collect a debt. *Birster v. American Home Mortgage Servicing, Inc.*, No. 11-13574, 2012 WL 2913786 (11th Cir. July 18, 2012). The borrowers alleged that the servicer harassed them with phone calls and

home inspections in connection with trying to collect mortgage payments. The district court granted summary judgment to the servicer, holding that the servicer's actions constituted efforts to enforce a security interest, and not to collect a debt. As such, the borrower's claims under the FDCPA could not survive. The appellate court reversed and remanded, relying on its decision in *Reese v. Ellis, Painter, Rattertree & Adams, LLP*, No. 10-14366, 2012 WL 1500108 (11th Cir. May 1, 2012), which came after the district court ruled in favor of the servicer, and which provides that an entity can both enforce a security interest and collect a debt. The court held that the borrowers sufficiently alleged facts to support a claim under the FDCPA, citing a letter the servicer sent in which it stated that it was attempting to collect a debt.

Oregon Supreme Court Agrees to Address Electronic Mortgage Registry's Role as Beneficiary; Two California Appellate Courts Affirm Electronic Registry's Beneficiary Role. On July 19, the Oregon Supreme Court accepted certified questions arising from four cases pending in the U.S. District Court for the District of Oregon related to the role of an electronic mortgage registry as beneficiary. *Brandrup v. ReconTrust Company, N. A.*(S060281) (question certified from D. Or. Case No. 3:11-cv-1390-JE). The judge in those matters asked Oregon's highest court to determine whether under state law (i) such a registry, that is neither a lender nor successor to a lender, may be a "beneficiary," (ii) an electronic registry may be designated as beneficiary where the trust deed provides the registry holds only the legal title to the interests granted by the borrower, but, if necessary to comply with law or custom, the registry has the right to exercise any or all of those interests, (iii) the transfer of a promissory note from the lender to a successor results in an automatic assignment of the securing trust deed that must be recorded prior to the commencement of nonjudicial foreclosure, and (iv) an electronic registry can retain and transfer legal title to a trust deed as nominee for the lender, after the note secured by the trust deed is transferred from the lender to a successor or series or successors. The court's decision on these questions may also have implications for a recent decision in which the a state appellate court held that, under Oregon law, the term beneficiary can only mean the person named or otherwise designated in the trust deed as the person to whom the secured obligation is owed. *Niday v. GMAC Mortgage LLC*, No. CV 10020001**,** 2012 WL 2915520 (Or. App. Ct. Jul. 18, 2012). As such, the court held, a beneficiary that uses an electronic registry, and does not publicly record assignments of a trust deed, cannot avail itself of the state's nonjudicial foreclosure process. That holding is contrary to substantial Oregon case law.

Recently, in matters pending in California regarding similar issues, two appellate courts rejected challenges to an electronic registry's role as beneficiary brought by borrowers as a defense in their foreclosure actions. *Taasan v. Family Lending Services, Inc.*, No. A132339, 2012 WL 2774967 (Cal. Ct. App. 1st. Dist. Jul. 10 2012); *Skov v. U.S. Bank N.A.*, No. H036483, 2012 WL 2054996 (Cal. Ct. App. 6th Dist. Jun. 8, 2012). For example, in *Taasan*, the court held that the foreclosing entity need not have physical possession of the note in order to initiate a nonjudicial foreclosure.

FIRM NEWS

Jonice Gray Tuckerand Jay Laifman will participate in the California Mortgage Bankers Association's Western States Loan Servicing Conferenceon July 30, 2012 in Las Vegas, Nevada. Ms. Tucker will moderate a panel of current and former state and federal officials regarding the implementation and enforcement of new mortgage servicing standards. Mr. Laifman will speak on a panel that will explore best practices for compliance with the new servicing standards. For further information or registration, you may click the following link: http://www.cmba.com/new/brochures/WSLC12Reg.pdf.

Jonathan Cannon will speak at the Lenders One Summer Conference in Chicago on August 7, 2012. Mr. Cannon's topics include: (i) What to Expect When the CFPB Comes Calling: The CFPB's

Enforcement and Examination Agenda, (ii) RESPA and TILA Update: The New GFE and HUD-1 Disclosures, and (iii) Compliance with the New Suspicious Activity Report Requirements.

Andrew Sandler will speak at the National Mortgage News 2nd Annual Mortgage Regulatory Forum taking place September 13-14, 2012, in Arlington, VA. The Mortgage Regulatory Forum is created to provide the most up-to-date information on newly implemented regulation, and regulation in the pipeline, for both those on the origination side of the business, as well as mortgage servicing.

James Parkinson will be speaking at the ABA's International White Collar Crime Conference in London on October 8, 2012. Mr. Parkinson's panel is entitled "What Every General Counsel Needs to Know Regarding Compliance and Internal Investigations."

John Stoner will speak on a panel addressing "The Uniform Commercial Code and the Mortgage Crisis" at the State Bar of California Annual Meeting on October 12, 2012. Mr. Stoner recently was appointed to the Commercial Transactions Committee of the State Bar of California.

FIRM PUBLICATIONS

Benjamin Saul, Bradley Marcus, and Sasha Leonhardt recently published "The Paper Chase: Effects of FDIC Document Retention Policies on D&O Suits," in Consumer Lending Litigation News.

Thomas Sporkin, Robyn Quattrone, and Kendra Kinnaird authored "Minimizing Missteps When Interfacing with SEC Staff", which was published in Law360 on July 6, 2012.

Jonice Gray Tucker and Kendra Kinnaird published in the July 2012 issue of Mortgage Banking "Will Vendors Create New Liability for Servicers?".

Thomas Sporkin authored "Seven Steps Companies Can Take to Incentivize Internal Reporting of FCPA Violations" for the July 2012 issue of The FCPA Report.

Andrew Sandler, Jeffrey Naimon, and Kirk Jensen on July 13, 2012 authored for the American Bankers Association a white paper entitled "Disparate Impact Under FHA and ECOA: A Theory Without a Statutory Basis."

Andrew Schilling published "Understanding FIRREA's Reach: When does Fraud 'Affect' a Financial Institution?" in the July, 24, 2012 BNA Banking Report.

About BuckleySandler LLP (www.BuckleySandler.com)

With over 150 lawyers in Washington, DC, Los Angeles, and New York, 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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We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes. E-mail infobytes@buckleysandler.com.

In addition, please feel free to email our attorneys. A list of attorneys can be found at: http://www.buckleysandler.com/professionals/professionals.

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MORTGAGES

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consumer lending laws through the Internet.

OCC and DOJ Announce SCRA Enforcement Action Against a National Bank. On July 26, the OCC and the DOJ announced resolution of actions brought against a national bank for alleged violations of the Service members Civil Relief Act (SCRA). The DOJ filed a complaint and consent order in the U.S. District Court for the Eastern District of Virginia, simultaneously bringing and resolving allegations that over a roughly five year period the bank failed to provide sufficient protections to service members (i) denying valid requests for interest rate reductions because the service members' military orders did not include specific end dates for the period of military service, (ii) foreclosing without a court order, (iii) repossessing motor vehicles without a court order, and (iv) obtaining default judgments without first filing accurate affidavits. Under the DOJ settlement, the bank must pay $12 million in damages to service members. Concurrently, the OCC released consent orders resolving similar allegations. Under both the DOJ and OCC orders, the bank must take specific actions to enhance compliance with SCRA, including with regard to vendor management, training, and internal reporting. The OCC also is requiring that the bank report periodically to the OCC, and conduct a look-back review of its service member accounts. The DOJ notes that the bank already has adopted enhanced SCRA policies on its own initiative, including extending a four percent interest rate to qualifying service members and giving an additional one-year grace period before de-enrolling service members from the reduced interest rate program.

Illinois Enhances Borrower Protections. On July 25, Illinois enacted SB 1692, which enhances consumer protections related to mortgages and tax refund anticipation loans. The bill amends the state's High Risk Home Loan Act to (i) update the definition of "high risk home loan" to be consistent with the federal standard, and prohibit prepayment penalties, balloon payments and modification fees for such loans, (ii) revise the definition of "points and fees" and clarify the prohibition on the financing of such fees in connection with high risk loans, and (iii) limit late payment fees to 4% of the amount past due. The bill also amends the state's Tax Refund Anticipation Loan Disclosure Act to (i) revise certain definitions, (ii) limit the fees that can be charged in connection with tax refund loans and establish other prohibited activities, and (iii) amend the disclosures required for creditors making such loans. These and other changes in the bill are effective January 1, 2013.

Michigan Updates Guidance on Return Check Fees on Installment Sales Contracts. On July 19, the Michigan Office of Financial and Insurance Regulation (OFIR) published a letter to installment seller/sales finance licensees clarifying the regulator's position on the use of return check fees in installment sales contracts. Previously, the OFIR had taken the position that inclusion of an NSF fee in a vehicle installment sales contract was not permitted because such a fee was not expressly permitted under the state's Motor Vehicle Sales Finance Act (MVSFA). However, in its July 19 letter the OFIR clarified that the OFIR considers it a violation of state law for a licensee under the MVSFA to charge a fee for returned checks if the motor vehicle installment sales contract does not specifically provide for the assessment of such a fee. The OFIR states that the MVSFA requires a contract contain all of the terms of the agreement between a buyer and a seller, including any default charges. Although the state Credit Reform Act permits regulated lenders to charge return check fees up to a maximum of $25, because a returned check constitutes a default under the contract, a return check fee is considered a default charge and can only be assessed if disclosed in the agreement.

SECURITIES

Senators Unveil Bill to Increase SEC Civil Penalties; House Members Propose Competing Bills to Enhance the SEC's Investment Adviser Oversight. On July 23, Senators Reed (D-RI) and Grassley (R-IA) unveiled legislation toincrease statutory limits on SEC civil monetary penalties

to $1 million per violation for individuals, and $10 million per violation for entities. The bill, S. 3416, would also allow for the size of penalties to be linked to the scope of harm and associated investor losses, and provide substantially higher penalties for repeat offenders.The legislation follows a letter SEC Chairman Shapiro sent to Senators Reed and Crapo (R-ID) in November 2011, seeking reforms to the SEC's authority to impose civil penalties.

On July 24, Representatives Waters (D-CA), Frank (D-MA), and Capuano (D-MA)announced new legislation, H.R. 6204, that would provide the SEC with the authority to impose user fees on investment advisers for the purpose of funding an increase in the number and frequency of SEC examinations. This bill follows an earlier bill from Reps. Bachus (R-AL) and McCarthy (D-NY), H.R. 4624, which also seeks to improve oversight of investment advisers, but through the establishment of self-regulatory organizations overseen by the SEC that investment advisers with retail customers would be required to join.

E-COMMERCE

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House Members Seek Information from Data Brokers. On July 24, a bipartisan group of members of the House of Representatives, led by Representatives Barton (R-TX) and Markey (D-MA), sent letters to nine firms the members identified as "major data brokerage companies." The letters ask each firm to provide information about how it collects, assembles, and sells consumer information. Among the series of specific inquiries, the letters seek information about collection processes and sources, data security measures, and consumer fees and notices. The House members asked each company to respond by August 15, 2012.

PRIVACY / DATA SECURITY

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