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FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

March 1, 2013

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FEDERAL ISSUES

Federal Reserve Board and OCC Release Amended Foreclosure Consent Orders. On February 28, the Federal Reserve Board and the OCC jointly released amendments to their enforcement actions against multiple mortgage servicers to resolve allegations that the servicers engaged in improper mortgage servicing and foreclosure processing practices. The amendments resolve consent orders issued in April 2011 by memorializing several recent agreements in principle that provide for $3.6 billion in cash payments and $5.7 billion in other assistance, such as loan modifications and forgiveness of deficiency judgments, to 4.2 million borrowers whose homes were in foreclosure in 2009 or 2010. For the participating servicers, the amendments also replace the requirements related to the Independent Foreclosure Review process set out under the original consent orders. The servicers are also required to undertake loss mitigation efforts focused on foreclosure prevention, and will continue to be monitored by examiners for implementation of corrective actions to address alleged deficient servicing and foreclosure practices.

Cordray and Curry Address AGs Regarding Enforcement Initiatives. On February 26, CFPB Director Richard Cordray and Comptroller of the Currency Thomas Curry addressed the National Association of Attorneys General. Mr. Cordray's remarks were largely duplicative of those given a week earlier to the CFPB Consumer Advisory Board, and again identified several "problems" observed by the CFPB. Those problems were (i) deceptive and misleading marketing of consumer financial products and services, (ii) "debt traps" that trigger a cycle of debt, such as short-term credit products, (iii) "dead ends" in markets such as debt collection, loan servicing, and credit reporting where consumers cannot choose their provider and lack typical market influences, and (iv) discrimination. With regard to short-term loans, Mr. Cordray identified as an enforcement challenge lenders that lack a physical presence, and acknowledged ongoing efforts by the CFPB to address "loans that involve off-shore or other jurisdictional issues." In his remarks, Mr. Curry first stressed the similar objectives of, and close working relationship among, the OCC, the CFPB, and the attorneys general. He then spent the majority of his remarks explaining why most OCC enforcement

actions are resolved by settlement, adding that the first enforcement goal of the OCC as a "prudential bank supervisor" is remediation. Mr. Curry also responded to criticisms that OCC enforcement actions are "insufficiently severe," and noted that the OCC is prepared to litigate if an institution refuses to consent.

Senate Confirms Jack Lew as Treasury Secretary. On February 27, the U.S. Senate confirmed President Obama's nominee for Treasury Secretary, Jack Lew, by a vote of 71-26. Mr. Lew most recently served as President Obama's Chief of Staff, but also twice served as Director of the OMB, and held executive positions at Citigroup and New York University.

HUD Launches Fair Housing Complaint Mobile Application. On February 28, HUD launched a mobile application for iPhone and iPad that will allow the public to learn about their housing rights and file housing discrimination complaints. The application will also inform the housing industry of its responsibilities under the FHA. HUD expects the application to assist fair housing groups and other civil rights advocacy organizations seeking to enforce fair housing rights. Adaptive mobile pages will also allow web content to display properly on all smartphone and tablet brands, and for fair housing complaints to be completed and submitted in Spanish.

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payments and pursue an assumption of the mortgage loan as well as a foreclosure prevention alternative, if applicable. In addition, for delinquent mortgage loans that are exempt transactions, if the new owner is unable to bring the mortgage loan current but may be able to resolve the delinquency with a foreclosure prevention alternative and assume the mortgage loan, the servicer must collect a Borrower Response Package from the new owner, evaluate the request as if it were a borrower, and submit a recommendation to Fannie Mae if the servicer determines a foreclosure prevention alternative is appropriate. Finally, servicers are reminded that, in the case of an exempt transaction, before finalizing any permanent modification entered into in conjunction with an assumption for an MBS Pool mortgage loan, the mortgage loan must be (i) in a continuous state of delinquency for at least four consecutive monthly payment dates (or at least eight consecutive payment dates in the case of a biweekly mortgage loan) without a full cure of the delinquency, and (ii) removed from the MBS pool.

Federal Reserve Board Extends Comment Period for Foreign Bank Rule. On February 22, the Federal Reserve Board, citing the "range and complexity of the issues addressed in the rulemaking," as well as a "request from the public" for more time, extended the public comment period from March 31, 2013 until April 30, 2013 pertaining to its proposal to (i) enhance its oversight of certain foreign banks that operate in the U.S., and (ii) move from the SEC to the Federal Reserve oversight of foreign bank broker-dealers.

FTC Settles Privacy-By-Design Case against Mobile Device Manufacturer, Plans Forum on Threats to Mobile Devices. On February 22, the FTC announced that a mobile device manufacturer agreed to settle charges that it placed consumer information at risk by failing to employ reasonable and appropriate security practices in the design and customization of the software on its mobile devices. The FTC's complaint alleged that the manufacturer failed to (i) provide its engineering staff with adequate security training, (ii) review or test the software on its mobile devices for potential security vulnerabilities, (iii) follow well-known and commonly accepted secure coding practices, and (iv) establish a process for receiving and addressing vulnerability reports from third parties. The settlement requires the manufacturer to establish a comprehensive security program, deploy software patches to consumers' devices, and undergo independent security assessments. The manufacturer also is prohibited from making any false or misleading statements about the security and privacy of consumers' data on its devices. Also on February 22, the FTC announced that it will host a one-day public forum to address malware, viruses, and other similar threats to mobile device users. The June 4, 2013 forum will focus on the security of existing and developing mobile technologies and the roles various members of the "mobile ecosystem" can play in protecting consumers from security threats.

Ramirez Expected to Chair FTC. On February 28, the FTC announced that President Obama will designate Edith Ramirez as Chairman of the FTC, effective March 4, 2013. Ms. Ramirez became an FTC commissioner on April 5, 2010, and has focused on promoting competition and innovation in the technology and healthcare sectors, protecting vulnerable consumers from deceptive and unfair practices, and safeguarding consumer privacy. Prior to joining the FTC, Ms. Ramirez was a lawyer in private practice, and before that served as the Vice President on the Board of Commissioners for the Los Angeles Department of Water and Power.

SEC National Examination Program Publishes 2013 Examination Priorities. On February 21, the NEP published its examination priorities for 2013. The NEP's market-wide priorities include (i) fraud detection and prevention, (ii) corporate governance and enterprise risk management, (iii) conflicts of interest, and (iv) technology. The NEP also identifies priorities for its (i) investment advisers and investment companies, (ii) broker-dealers, (iii) clearing and transfer agents, and (iv) market oversight program areas. For example, for the investment advisers and investment companies program area, the NEP plans to focus on certain ongoing risks including (i) safety of

assets, (ii) marketing and performance advertising, and (iii) fund governance, as well as certain new and emerging risks.

FinCEN Reminds Institutions about Tax Refund Fraud and SAR Filing. On February 26, FinCEN issued Advisory FIN-2013-A001 to remind financial institutions of their important role in identifying tax refund fraud and provide a list of red flags to aid in such identification. The Advisory also reminds institutions that they may be required to filed a SAR if they know, suspect or have reason to suspect that a transaction conducted or attempted by, at, or through the financial institution (i) involves funds derived from illegal activity or an attempt to disguise funds derived from illegal activity, (ii) is designed to evade regulations promulgated under the Bank Secrecy Act, or (iii) lacks a business or apparent lawful purpose. Institutions completing a tax refund fraud SAR should use the term "tax refund fraud" in the narrative section of the SAR and provide a detailed description of the activity, and are encouraged to notify their local IRS Criminal Investigation Field Office of the filed SAR.

NIST Requests Information Regarding Cybersecurity Framework. On February 26, the National Institute of Standards and Technology (NIST), issued a request for information to begin developing the "Cybersecurity Framework" required by a recent executive order directing NIST to develop a framework to reduce cyber risks to critical infrastructure. The request explains that the framework will incorporate voluntary consensus standards and industry best practices to the fullest extent possible, and should include flexible standards, guidelines, and best practices that provide (i) a consultative process to assess the cybersecurity-related risks to organizational missions and business functions, (ii) a menu of management, operational, and technical security controls, including policies and processes, available to address a range of threats, (iii) a consultative process to identify adequate security controls, (iv) metrics to assess and monitor the effectiveness of security controls, (v) a comprehensive risk management approach that provides the ability to assess, respond to, and monitor information security-related risks and provide industry leadership with necessary information to help make ongoing risk-based decisions, and (vi) a menu of privacy controls. The goal of the framework development process is to (i) identify existing cybersecurity standards, guidelines, frameworks, and best practices that are applicable to increase the security of critical infrastructure sectors and other interested entities, (ii) specify high-priority gaps for which new or revised standards are needed, and (iii) collaboratively develop action plans by which those gaps can be addressed. NIST asks that comments be provided by April 8, 2013.

STATE ISSUES

New York Warns Payday Loan Debt Collectors. On February 22, the New York Department of Financial Services (DFS) sent letters to all debt collectors in the state to remind them that it is illegal to attempt to collect a debt on a payday loan made in New York, even if such loans were made on the Internet. Under New York law, nonbank lenders and state-charted banks are prohibited from making loans or forbearances under $250,000 at an interest rate of 16 percent or higher. Any loans made in violation of those limitations are void and cannot be collected by a debt collector. The DFS claims that "[l]enders attempt to skirt New York's prohibition on payday lending by offering loans over the Internet, hoping to avoid prosecution." The DS states that, regardless of the method used to make the loan, payday loans made in New York are not valid debts and cannot lawfully be collected.

Illinois Adopts Court Rules Governing Foreclosure Cases. On February 22, the Illinois Supreme Court announced additional rules governing the state's home foreclosure process. The three rules, respectively, (i) add requirements for mortgage foreclosure mediation programs in state circuit courts and counties (Rule 99.1); (ii) establish required practice, procedure, and notice obligations by

the lender as plaintiff (Rule 113); and (iii) require a lender to attest that it has complied with the requirements of any loss mitigation program which applies to the specific home loan (Rule 114). With regard to this final rule, a judge may deny entry of a foreclosure judgment absent the required affidavit. All of the rules take effect on March 1, 2013. Those counties and circuit courts that already have mortgage foreclosure mediation programs in place, including Cook, Will, Peoria, Madison, Bond, McLean and Cane, have until June 1, 2013 to bring their programs into compliance with the new statewide rule on mediation programs.

Virginia Amends Mortgage Originator Licensing Statute. On February 20, Virginia enacted HB 1803, which conforms Virginia law to federal SAFE Act regulations, as recommended by the Virginia Housing Commission. The bill (i) expands the definition of a mortgage loan originator to include an individual who represents to the public that he can or will take an application for, or offer or negotiate the terms of, a residential mortgage loan, (ii) exempts from licensing requirements any individual acting as a loan originator in financing the sale of his or her own residence, (iii) specifies conditions under which an attorney engaged in mortgage loan origination activities is exempt from licensing requirements, (iv) removes the definition of "federal banking agencies", and (v) defines the term "employee."

COURTS

U.S. Supreme Court Rejects SEC's Bid for More Time to Bring Civil Fraud Enforcement Action. On February 27, the U.S. Supreme Court held that the clock on the five-year statute of limitations for the SEC to pursue civil fraud claims under the Investment Advisers Act begins to run when the fraud occurs, and not when it is discovered, because the "discovery rule" does not apply to government enforcement actions for civil penalties. *Gabelli v. SEC*, No. 11-1274, 2013 WL 691002 (Feb. 27, 2013). The Court's holding followed an investment adviser's appeal from a Second Circuit decision that, under the discovery rule, the statute of limitations had not accrued until the fraud was discovered or could have been discovered with reasonable diligence because the claims sounded in fraud. The Court reversed the Second Circuit's decision and remanded for further proceedings on the basis that extending the fraud discovery rule to government civil penalty enforcement actions would improperly leave defendants exposed to government action for an uncertain period beyond the five years after their alleged misdeeds. The Court explained that the discovery rule is meant to preserve the claims of parties who have no reason to suspect fraud, but that the government, here the SEC, is different insofar as it is specifically tasked with rooting out fraud and possesses several legal tools to that end. The Court also observed that, unlike a standard victim of fraud seeking only recompense, the government also seeks remedies intended to punish.

U.S. Supreme Court Upholds Discretion to Award Costs to Prevailing FDCPA Defendant Creditors. On February 26, the U.S. Supreme Court held that the FDCPA does not limit a court's discretion under federal rules to award costs to a prevailing defendant creditor alleged to have violated the Act. *Marx v. Gen. Revenue Corp.*, No. 11-1175, 2013 WL 673254 (Feb. 26, 2013). The Tenth Circuit had earlier held that the defendant creditor did not violate the FDCPA, and that the creditor could be awarded costs under Federal Rule of Civil Procedure 54(d)(1). On appeal, the debtor, supported by the United States as *amicus*, argued that any statute specifically providing for costs displaces Rule 54(d)(1), regardless of whether it is contrary to the Rule. The relevant FDCPA provision, §1692k(a)(3), provides that "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." The Court affirmed the Tenth Circuit and held that the language and context of §1692k(a)(3) indicate that Congress did not intend it to prohibit courts from awarding costs. The Court explained that (i) the statute is best read as codifying a court's pre-existing authority to award both attorney's fees and costs, (ii) by including

"and costs" in the second sentence of the statute, Congress foreclosed the argument that defendants can only recover attorney's fees when plaintiffs bring an action in bad faith and removed any doubt that defendants may also recover costs in such cases, and (iii) the statutory language sharply contrasts with that of other statutes in which Congress has placed conditions on awarding costs to prevailing defendants.

Florida Supreme Court Limits Discretion to Strike Voluntary Dismissals of Foreclosure Actions. The Florida Supreme Court recently held that when a borrower alleges fraud on the court as a basis for setting aside a lender's notice of voluntary dismissal of a foreclosure action, the trial court has jurisdiction to sanction the lender by reinstating the dismissed action only when the fraud resulted in the lender securing affirmative relief to the detriment of the borrower before voluntarily dismissing the case to prevent the court from undoing the improperly obtained relief. *Pino v. Bank of New York*, No. SC11-697, 2013 WL 452109 (Fla. Feb. 7, 2013). In the trial court foreclosure proceeding, the defendant borrower had challenged the plaintiff lender's assignment documents as fraudulent and moved for sanctions, after which the lender voluntarily dismissed the case without prejudice before a decision could be rendered on the motion. The trial court denied the borrower's subsequent motion to vacate the notice of voluntary dismissal, reinstate the proceeding, and then dismiss it again with prejudice. The Florida Fourth District Appellate Court affirmed, but certified to the Florida Supreme Court the question of whether a trial court has jurisdiction or inherent authority to grant relief from a voluntary dismissal where the motion alleges a fraud on the court but the plaintiff has obtained no affirmative relief. The Florida Supreme Court then affirmed the Fourth District and held that the trial court did not have jurisdiction or inherent authority to reinstate the dismissed foreclosure action because the lender did not obtain affirmative relief before taking the voluntary dismissal, and as such, measures other than reinstatement existed to protect the borrower. Finally, in light of concerns regarding the abuses that can occur from the filing of fraudulent pleadings, the court requested the Civil Procedure Rules Committee to review those concerns and make recommendations for possible amendments to governing rules.

MISCELLANY

European Lawmakers Agree to New Capital Rules and Caps on Bank Executive Pay. On February 28, the European Parliament announced that negotiators from the Parliament and the European Council agreed to alter bank capital rules and limit executive pay. The capital requirements, developed to implement aspects of Basel III, would raise to eight percent the minimum thresholds of high quality capital that banks must retain. The announcement does not specify what types of capital would satisfy the requirement, but does indicate that good quality capital would be mostly Tier 1 capital. With regard to executive pay, the base salary-to-bonus ratio would be 1:1, but the ratio could increase to a maximum of 1:2 with the approval of at least 65 percent of shareholders owning half the shares represented, or of 75 percent of votes if there is no quorum. Further, if a bonus is increased above 1:1, then a quarter of the whole bonus would be deferred for at least five years. Finally, the legislation would require banks to disclose to the European Commission certain information that subsequently would be made public, including profits, taxes paid, and subsidies received country by country. The European Parliament is expected to vote on the legislation in mid-April, and each member state also must approve the legislation. Once approved, member states must implement the rules through their national laws by January 2014.

FIRM NEWS

Jonathan Cannon will speak at the Lenders One Winter Conference in Kissimmee, Florida, on

March 4, 2013. His topics are the new qualified mortgage/ability to repay rules, and the new loan originator compensation rules.

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.

Donna Wilson will be a panelist at the Second Annual Round Table on Current "Hot Topics" and Legal Developments Facing the Retail and Fashion Industries on March 7, 2013 in New York, NY.

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.

John Redding will speak on March 12, 2013 at the Independent Community Bankers of America National Convention in Las Vegas, NV about the impact of the CFPB's new mortgage origination and servicing rules on community banks.

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.

Andrew Sandler will speak at the National Community Reinvestment Coalition Annual Conference, March 20-23, 2013 in Washington, D.C. Mr. Sandler's workshop is entitled "The Future of Fair Lending: Key Lessons from 2012".

Joseph Reilly will speak on an October Research webinar hosted by RESPA News titled "Part 1: The New Loan Servicing Standards Webinar," at 2:00 pm on March 21, 2013. Mr. Reilly will discuss components of CFPB's new rules for mortgage servicing and compliance strategies.

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.

James Parkinson will speak in New York, NY on May 14-15, 2013 at the ACI conference on "FCPA and Anti-Corruption for the Life Sciences Industry."

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.

FIRM PUBLICATIONS

Donna Wilson and Brandon Reilly published "California's Homeowner Bill of Rights" in the January 2013 edition of Mortgage Banking.

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.

Margo Tank and David Whitaker authored "Is Regulatory Uncertainty an Impediment to Mobile Payments," which was published on PaymentsJournal.com on January 23, 2013.

Amanda Raines and A.J. Dhaliwal published "Petitions to Modify or Set Aside CFPB Civil Investigative Demands (CIDs): Analysis of Recent Decisions" on January 29, 2013, as part of the LexisNexis 2013 Emerging Issues commentary series.

Ben Saul, Aaron Mahler, and Jared Kelly published "Know the Standard of FDIC Liability for Community Banks" in Law360 on February 5, 2013.

David Baris and Jared Kelly recently published a book entitled "FDIC Director Suits - Lessons Learned." The authors reviewed all of the FDIC's current civil suits against directors of failed banks and savings institutions -34 cases as of the book's printing, involving over 250 directors-and extracted key points for consideration. The book is available for purchase here.

About BuckleySandler LLP (www.buckleysandler.com)

With more than 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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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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fraudulent and moved for sanctions, after which the lender voluntarily dismissed the case without prejudice before a decision could be rendered on the motion. The trial court denied the borrower's subsequent motion to vacate the notice of voluntary dismissal, reinstate the proceeding, and then dismiss it again with prejudice. The Florida Fourth District Appellate Court affirmed, but certified to the Florida Supreme Court the question of whether a trial court has jurisdiction or inherent authority to grant relief from a voluntary dismissal where the motion alleges a fraud on the court but the plaintiff has obtained no affirmative relief. The Florida Supreme Court then affirmed the Fourth District and held that the trial court did not have jurisdiction or inherent authority to reinstate the dismissed foreclosure action because the lender did not obtain affirmative relief before taking the voluntary dismissal, and as such, measures other than reinstatement existed to protect the borrower. Finally, in light of concerns regarding the abuses that can occur from the filing of fraudulent pleadings, the court requested the Civil Procedure Rules Committee to review those concerns and make recommendations for possible amendments to governing rules.

BANKING

Cordray and Curry Address AGs Regarding Enforcement Initiatives. On February 26, CFPB Director Richard Cordray and Comptroller of the Currency Tom Curry addressed the National Association of Attorneys General. Mr. Cordray's remarks were largely duplicative of those given a week earlier to the CFPB Consumer Advisory Board, and again identified several "problems" observed by the CFPB. Those problems were (i) deceptive and misleading marketing of consumer financial products and services, (ii) "debt traps" that trigger a cycle of debt, such as short-term credit products, (iii) "dead ends" in markets such as debt collection, loan servicing, and credit reporting where consumers cannot choose their provider and lack typical market influences, and (iv) discrimination. With regard to short-term loans, Mr. Cordray identified as an enforcement challenge lenders that lack a physical presence, and acknowledged ongoing efforts by the CFPB to address "loans that involve off-shore or other jurisdictional issues." In his remarks, Mr. Curry first stressed the similar objectives of, and close working relationship among, the OCC, the CFPB, and the attorneys general. He then spent the majority of his remarks explaining why most OCC enforcement actions are resolved by settlement, adding that the first enforcement goal of the OCC as a "prudential bank supervisor" is remediation. Mr. Curry also responded to criticisms that OCC enforcement actions are "insufficiently severe," and noted that the OCC is prepared to litigate if an institution refuses to consent.

Senate Confirms Jack Lew as Treasury Secretary. On February 27, the U.S. Senate confirmed President Obama's nominee for Treasury Secretary, Jack Lew, by a vote of 71-26. Mr. Lew most recently served as President Obama's Chief of Staff, but also twice served as Director of the OMB, and held executive positions at Citigroup and New York University.

European Lawmakers Agree to New Capital Rules and Caps on Bank Executive Pay. On February 28, the European Parliament announced that negotiators from the Parliament and the European Council agreed to alter bank capital rules and limit executive pay. The capital requirements, developed to implement aspects of Basel III, would raise to eight percent the minimum thresholds of high quality capital that banks must retain. The announcement does not specify what types of capital would satisfy the requirement, but does indicate that good quality capital would be mostly Tier 1 capital. With regard to executive pay, the base salary-to-bonus ratio would be 1:1, but the ratio could increase to a maximum of 1:2 with the approval of at least 65 percent of shareholders owning half the shares represented, or of 75 percent of votes if there is no quorum. Further, if a bonus is increased above 1:1, then a quarter of the whole bonus would be deferred for at least five years. Finally, the legislation would require banks to disclose to the European Commission certain information that subsequently would be made public, including

profits, taxes paid, and subsidies received country by country. The European Parliament is expected to vote on the legislation in mid-April, and each member state also must approve the legislation. Once approved, member states must implement the rules through their national laws by January 2014.

Federal Reserve Board Extends Comment Period for Foreign Bank Rule. On February 22, the Federal Reserve Board, citing the "range and complexity of the issues addressed in the rulemaking," as well as a "request from the public" for more time, extended the public comment period from March 31, 2013 until April 30, 2013 pertaining to its proposal to (i) enhance its oversight of certain foreign banks that operate in the U.S., and (ii) move from the SEC to the Federal Reserve oversight of foreign bank broker-dealers.

FinCEN Reminds Institutions about Tax Refund Fraud and SAR Filing. On February 26, FinCEN issued Advisory FIN-2013-A001 to remind financial institutions of their important role in identifying tax refund fraud and provide a list of red flags to aid in such identification. The Advisory also reminds institutions that they may be required to filed a SAR if they know, suspect or have reason to suspect that a transaction conducted or attempted by, at, or through the financial institution (i) involves funds derived from illegal activity or an attempt to disguise funds derived from illegal activity, (ii) is designed to evade regulations promulgated under the Bank Secrecy Act, or (iii) lacks a business or apparent lawful purpose. Institutions completing a tax refund fraud SAR should use the term "tax refund fraud" in the narrative section of the SAR and provide a detailed description of the activity, and are encouraged to notify their local IRS Criminal Investigation Field Office of the filed SAR.

CONSUMER FINANCE

Cordray and Curry Address AGs Regarding Enforcement Initiatives. On February 26, CFPB Director Richard Cordray and Comptroller of the Currency Thomas Curry addressed the National Association of Attorneys General. Mr. Cordray's remarks were largely duplicative of those given a week earlier to the CFPB Consumer Advisory Board, and again identified several "problems" observed by the CFPB. Those problems were (i) deceptive and misleading marketing of consumer financial products and services, (ii) "debt traps" that trigger a cycle of debt, such as short-term credit products, (iii) "dead ends" in markets such as debt collection, loan servicing, and credit reporting where consumers cannot choose their provider and lack typical market influences, and (iv) discrimination. With regard to short-term loans, Mr. Cordray identified as an enforcement challenge lenders that lack a physical presence, and acknowledged ongoing efforts by the CFPB to address "loans that involve off-shore or other jurisdictional issues." In his remarks, Mr. Curry first stressed the similar objectives of, and close working relationship among, the OCC, the CFPB, and the attorneys general. He then spent the majority of his remarks explaining why most OCC enforcement actions are resolved by settlement, adding that the first enforcement goal of the OCC as a "prudential bank supervisor" is remediation. Mr. Curry also responded to criticisms that OCC enforcement actions are "insufficiently severe," and noted that the OCC is prepared to litigate if an institution refuses to consent.

New York Warns Payday Loan Debt Collectors. On February 22, the New York Department of Financial Services (DFS) sent letters to all debt collectors in the state to remind them that it is illegal to attempt to collect a debt on a payday loan made in New York, even if such loans were made on the Internet. Under New York law, nonbank lenders and state-charted banks are prohibited from making loans or forbearances under $250,000 at an interest rate of 16 percent or higher. Any loans made in violation of those limitations are void and cannot be collected by a debt collector. The DFS claims that "[l]enders attempt to skirt New York's prohibition on payday lending by offering loans

over the Internet, hoping to avoid prosecution." The DS states that, regardless of the method used to make the loan, payday loans made in New York are not valid debts and cannot lawfully be collected.

U.S. Supreme Court Upholds Discretion to Award Costs to Prevailing FDCPA Defendant Creditors. On February 26, the U.S. Supreme Court held that the FDCPA does not limit a court's discretion under federal rules to award costs to a prevailing defendant creditor alleged to have violated the Act. *Marx v. Gen. Revenue Corp.*, No. 11-1175, 2013 WL 673254 (Feb. 26, 2013). The Tenth Circuit had earlier held that the defendant creditor did not violate the FDCPA, and that the creditor could be awarded costs under Federal Rule of Civil Procedure 54(d)(1). On appeal, the debtor, supported by the United States as *amicus*, argued that any statute specifically providing for costs displaces Rule 54(d)(1), regardless of whether it is contrary to the Rule. The relevant FDCPA provision, §1692k(a)(3), provides that "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." The Court affirmed the Tenth Circuit and held that the language and context of §1692k(a)(3) indicate that Congress did not intend it to prohibit courts from awarding costs. The Court explained that (i) the statute is best read as codifying a court's pre-existing authority to award both attorney's fees and costs, (ii) by including "and costs" in the second sentence of the statute, Congress foreclosed the argument that defendants can only recover attorney's fees when plaintiffs bring an action in bad faith and removed any doubt that defendants may also recover costs in such cases, and (iii) the statutory language sharply contrasts with that of other statutes in which Congress has placed conditions on awarding costs to prevailing defendants.

Ramirez Expected to Chair FTC. On February 28, the FTC announced that President Obama will designate Edith Ramirez as Chairman of the FTC, effective March 4, 2013. Ms. Ramirez became an FTC commissioner on April 5, 2010, and has focused on promoting competition and innovation in the technology and healthcare sectors, protecting vulnerable consumers from deceptive and unfair practices, and safeguarding consumer privacy. Prior to joining the FTC, Ms. Ramirez was a lawyer in private practice, and before that served as the Vice President on the Board of Commissioners for the Los Angeles Department of Water and Power.

SECURITIES

U.S. Supreme Court Rejects SEC's Bid for More Time to Bring Civil Fraud Enforcement Action. On February 27, the U.S. Supreme Court held that the clock on the five-year statute of limitations for the SEC to pursue civil fraud claims under the Investment Advisers Act begins to run when the fraud occurs, and not when it is discovered, because the "discovery rule" does not apply to government enforcement actions for civil penalties. *Gabelli v. SEC*, No. 11-1274, 2013 WL 691002 (Feb. 27, 2013). The Court's holding followed an investment adviser's appeal from a Second Circuit decision that, under the discovery rule, the statute of limitations had not accrued until the fraud was discovered or could have been discovered with reasonable diligence because the claims sounded in fraud. The Court reversed the Second Circuit's decision and remanded for further proceedings on the basis that extending the fraud discovery rule to government civil penalty enforcement actions would improperly leave defendants exposed to government action for an uncertain period beyond the five years after their alleged misdeeds. The Court explained that the discovery rule is meant to preserve the claims of parties who have no reason to suspect fraud, but that the government, here the SEC, is different insofar as it is specifically tasked with rooting out fraud and possesses several legal tools to that end. The Court also observed that, unlike a standard victim of fraud seeking only recompense, the government also seeks remedies intended to punish.

SEC National Examination Program Publishes 2013 Examination Priorities. On February 21, the NEP published its examination priorities for 2013. The NEP's market-wide priorities include (i) fraud detection and prevention, (ii) corporate governance and enterprise risk management, (iii) conflicts of interest, and (iv) technology. The NEP also identifies priorities for its (i) investment advisers and investment companies, (ii) broker-dealers, (iii) clearing and transfer agents, and (iv) market oversight program areas. For example, for the investment advisers and investment companies program area, the NEP plans to focus on certain ongoing risks including (i) safety of assets, (ii) marketing and performance advertising, and (iii) fund governance, as well as certain new and emerging risks.

PRIVACY/DATA SECURITY

FTC Settles Privacy-By-Design Case against Mobile Device Manufacturer, Plans Forum on Threats to Mobile Devices. On February 22, the FTC announced that a mobile device manufacturer agreed to settle charges that it placed consumer information at risk by failing to employ reasonable and appropriate security practices in the design and customization of the software on its mobile devices. The FTC's complaint alleged that the manufacturer failed to (i) provide its engineering staff with adequate security training, (ii) review or test the software on its mobile devices for potential security vulnerabilities, (iii) follow well-known and commonly accepted secure coding practices, and (iv) establish a process for receiving and addressing vulnerability reports from third parties. The settlement requires the manufacturer to establish a comprehensive security program, deploy software patches to consumers' devices, and undergo independent security assessments. The manufacturer also is prohibited from making any false or misleading statements about the security and privacy of consumers' data on its devices. Also on February 22, the FTC announced that it will host a one-day public forum to address malware, viruses, and other similar threats to mobile device users. The June 4, 2013 forum will focus on the security of existing and developing mobile technologies and the roles various members of the "mobile ecosystem" can play in protecting consumers from security threats.

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NIST Requests Information Regarding Cybersecurity Framework. On February 26, the National Institute of Standards and Technology (NIST), issued a request for information to begin developing the "Cybersecurity Framework" required by a recent executive order directing NIST to develop a framework to reduce cyber risks to critical infrastructure. The request explains that the framework will incorporate voluntary consensus standards and industry best practices to the fullest extent possible, and should include flexible standards, guidelines, and best practices that provide (i) a consultative process to assess the cybersecurity-related risks to organizational missions and business functions, (ii) a menu of management, operational, and technical security controls, including policies and processes, available to address a range of threats, (iii) a consultative process to identify adequate security controls, (iv) metrics to assess and monitor the effectiveness of security controls, (v) a comprehensive risk management approach that provides the ability to assess, respond to, and monitor information security-related risks and provide industry leadership with necessary information to help make ongoing risk-based decisions, and (vi) a menu of privacy controls. The goal of the framework development process is to (i) identify existing cybersecurity

standards, guidelines, frameworks, and best practices that are applicable to increase the security of critical infrastructure sectors and other interested entities, (ii) specify high-priority gaps for which new or revised standards are needed, and (iii) collaboratively develop action plans by which those gaps can be addressed. NIST asks that comments be provided by April 8, 2013.

CRIMINAL ENFORCEMENT

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