

December 9, 2011

## Topics In This Issue

- [Federal Issues](#)
- [State Issues](#)
- [Courts](#)
- [Firm News](#)
- [Mortgages](#)
- [Banking](#)
- [Consumer Finance](#)
- [Securities](#)
- [Litigation](#)
- [Credit Cards](#)
- [Criminal Enforcement Action](#)

## Federal Issues

**CFPB Releases Prototype Credit Card Agreement.** On December 7, the Consumer Financial Protection Bureau (CFPB) released a prototype credit card agreement designed to simplify for consumers the presentation of certain credit card information, including fees, risks, and terms. The two-page prototype is broken down into three sections. The first section highlights the costs associated with the card, including interest rates and fees. The second section identifies events that could trigger a change in agreement terms, as well as any advance notice requirements. Finally, the third section provides certain "additional information" including, for example, privacy terms and dispute resolution provisions. Standardized definitions for all terms contained in the agreement are maintained online by CFPB, and in a separate document to be provided by the card issuer. CFPB is testing the prototype through an agreement with Pentagon Federal Credit Union, but the CFPB also is seeking broader public input through its website. The CFPB noted that the proposed agreement is not a model form, and its use is not mandatory. [Click here for a copy of the prototype agreement, a link to the definitions, and access to the public comment portal.](#)

**Legislators Ask CFPB to Study Credit Card "Ability to Pay" Rules.** On December 7, a bipartisan group of legislators, including the Chairman and Ranking Member of the House Financial Services Committee, sent a letter to the CFPB requesting a study regarding certain credit card rules issued by the Federal Reserve Board (FRB). The lawmakers seek a report regarding the so-called "ability to pay" rules issued pursuant to the Credit CARD Act, which took effect on October 1. Specifically, the study and report should address any unintended consequences resulting from those rules, including the potential for the rules to restrict credit for nonworking spouses. [Please click here for a copy of the letter.](#)

**CFPB Announces Opening of Ombudsman Office.** On December 8, the CFPB announced the opening of the Ombudsman's Office, led by Acting Ombudsman Wendy Kamenshine. Established by charter as required by the Dodd-Frank Act, the Ombudsman's Office describes itself as "an independent, impartial, confidential resource" for CFPB-regulated depository and non-depository entities. Regulated entities that have issues with the CFPB or its processes, which are not adequately being addressed through existing Bureau processes, can seek assistance from the Ombudsman in resolving those issues. [Click here for the Ombudsman's web site with contact information and a link to the charter.](#)

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**Federal Bank Regulatory Agencies Seek Comment on Two Proposed Rules and Guidance Regarding Assessment of Risk Capital Requirements.** On December 7, the federal bank regulatory agencies approved for publication two proposed rules and one proposed guidance document. The approved proposed rules relate to the Dodd-Frank Act requirement that all federal agencies (i) remove from their regulations references to, and requirements of reliance on, third-party credit ratings, and (ii) replace such references with an alternative standard for evaluating risk capital requirements. The first proposed rule seeks to incorporate into pending market risk rules, through an amendment to a [January 2011 proposed rule](#), certain alternative standards for calculating specific risk requirements for debt and securitization positions that do not rely on credit ratings. For example, under the proposed rule, sovereign debt positions would be assigned a capital charge based on country risk classifications of sovereign entities assigned by the Organization for Economic Cooperation and Development. Further, the proposed rule includes creditworthiness standards based on company-specific financial information and stock market volatility for corporate debt positions and a supervisory formula for securitization positions. Comments can be submitted through February 3, 2012.

The second proposed rule would prohibit a savings association from acquiring or retaining a corporate debt security unless the savings association determines that the issuer of the security has adequate capacity to meet all financial commitments under the securities' projected life of the investment. An issuer would satisfy this requirement if it presents a low risk of default and is likely to make a full and timely repayment of principal and interest. The savings association would be permitted to use third-party credit ratings as one of several factors in determining the credit worthiness of the issuer. The proposed rule is consistent with the Office of Comptroller of the Currency's recent proposed rule on creditworthiness ([see InfoBytes, December 2, 2011.](#)) A related proposed guidance document also was approved, which would outline for savings associations elements of the due diligence process to determine whether a corporate debt security is eligible for investment. According to the proposed guidance, savings associations should consider internal analyses, third party research and analytics including external credit ratings, internal risk ratings, default statistics, and other sources of information appropriate for the particular security. Comments will be accepted for sixty days following publication in the Federal Register. [Click here for information about all of the above proposals and their presentation at a recent Federal Deposit Insurance Corporation board meeting.](#)

**CFTC Approves Final Rule Restricting Futures Brokerages' Use of Customer Funds.** On December 5, the Commodities Futures Trading Commission (CFTC) voted to approve a final rule that amends the CFTC's regulations regarding the investment of segregated customer funds and secured amount funds. In an effort to meet the CFTC's goal of preserving principal and maintaining liquidity, the final rule: (i) narrows the scope of investment choices; (ii) raises certain standards imposed on permitted investments individually and on a

portfolio basis; and (iii) promotes diversification to increase safety. Specifically, the rule bans use of customer funds for in-house transactions, including repurchase agreements, and eliminates foreign sovereign debt as a permitted investment. The final rule takes effect sixty days after publication in the Federal Register; full compliance with the rule is required within 180 days of publication. [Click here for a copy of the final rule.](#)

**CFTC Issues Interpretation Related to Anti-Fraud Authority Under Dodd-Frank.** On December 2, the CFTC approved for publication an interpretation document related to its anti-fraud authority under the Dodd-Frank Act (Act). Pursuant to the Act, which amended the Commodity Exchange Act, "retail commodity transactions" must be conducted on a regulated exchange, thereby subjecting such transactions to the CFTC's anti-fraud authority. However, such transactions are exempt if "actual delivery" of the commodity is made within twenty-eight days. According to the CFTC's interpretation, it will look beyond the plain terms of the contract documents and "will . . . examine how the agreement, contract, or transaction is marketed, managed, and performed." This approach will consider such factors as (i) ownership, possession, title, and physical location of the commodity, both before and after execution of the transaction; (ii) the nature of the relationship between the buyer, seller, and possessor of the commodity; and (iii) the manner in which the purchase or sale is recorded and completed. The interpretation provides several illustrative examples of how this approach will be used to determine actual delivery. [Click here for a copy of the interpretation.](#)

**Senate Fails to Proceed to Consideration of CFPB Nominee.** On December 8, the Senate failed to agree to a procedural measure that would have allowed the Senate to consider the pending nomination of Richard Cordray to serve as director of the CFPB. That nomination has been awaiting full Senate action since gaining approval by the Senate Banking Committee in October. Mr. Cordray originally was nominated by President Obama on July 18. [Please click here for more information about the Senate vote.](#)

**Director of Financial Fraud Enforcement Task Force Named.** On December 7, U.S. Attorney General Eric Holder announced the appointment of Michael J. Bresnick to serve as executive director of the Financial Fraud Enforcement Task Force formed by President Obama in November 2009. Mr. Bresnick comes to the position from the Criminal Division of the U.S. Department of Justice (DOJ), where he investigated and prosecuted complex fraud cases, including mortgage and bank fraud. [Click here for the DOJ announcement.](#)

**Freddie Mac Sets Date for Access to ULDD Test System.** On December 7, Freddie Mac announced that its selling system customer test environment will be accessible starting December 13. This test system will provide an opportunity to prepare for the implementation of the Uniform Loan Delivery Dataset (ULDD), which is designed to improve data accuracy, simplify data exchange, and increase confidence that loan data is accurately delivered. While the selling system delivery process has not changed, the system will present new features based on the new ULDD requirements. Introductory training is required before accessing the test environment. [Click here for the Freddie Mac announcement with more information about training registration.](#)

**FINRA and SEC Issue Joint Guidance Regarding Broker-Dealer Branch Inspections.** On November 30, the Financial Industry Regulatory Authority (FINRA) and the Securities and Exchange Commission (SEC) issued a joint National Exam Risk Alert to assist broker-dealers with developing effective policies and procedures for branch office inspections. Under the Securities and Exchange Act and FINRA rules, broker-dealer firms must, among other things, develop and execute such inspection programs. The Alert notes that elements of a successful inspection program include: (i) tailoring exams based on risks specific to the inspected branch; (ii) basing the frequency of exams on risk; (iii) conducting unannounced exams; (iv) using senior inspection officers; and (v) avoiding conflicts of interest through use of appropriate procedures. [Click here for the FINRA notice with a link to the alert providing additional guidance.](#)

## State Issues

**California and Nevada Join Forces to Pursue Mortgage-Related Investigations, New Criminal Charges Announced.** On December 6, the Attorneys General for California and Nevada announced a joint effort to pursue mortgage-related civil and criminal investigations. Citing similarities in mortgage-related issues impacting the two states, and the states' shared status as non-judicial foreclosure jurisdictions, the Attorneys General have agreed to share resources, information, evidence, subpoena power, and litigation strategies. This new "joint investigative alliance" aims to accelerate the states' investigations related to the origination of subprime loans, mortgage servicing and foreclosure practices, and securitization of loans, particularly those securities sold to state public entities.

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Each state also recently announced new charges against individuals allegedly involved in mortgage-related criminal activity. The California Attorney General's Office announced on December 7 the arrest of two individuals alleged to have collected \$6 million in fees as part of a sham nationwide loan modification program. In Nevada, on December 5 the Attorney General's Office announced new notaries charged in connection with the state's ongoing investigation into so-called robo-signing practices. [Click here for the California Attorney General's Office press release regarding the new arrests;](#) [click here for Nevada's announcement regarding its new criminal charges.](#)

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## Firm News

[Jeff Naimon](#), [Jonice Gray Tucker](#), and [Lori Sommerfield](#) presented a complimentary webinar entitled "The CFPB in Focus: Where Are We Now and What Lies Ahead?" on December 8, 2011 from 2:00 to 3:15 PM. The webinar reviewed the current status of CFPB and its progress to date and offer a projection of what lies ahead. [Click here to download the presentation materials.](#)

[Jeff Naimon](#) and [Jonice Gray Tucker](#) will be speaking on an American Bankers Association Telephone Briefing entitled "Mortgage Servicing: Development and Impact." The Panel will be moderated by the ABA's

Rod Alba. The briefing will be on Wednesday, December 14, 2011 from 2:00 to 4:00 p.m. Eastern time. The briefing will discuss servicing guidance from the Consumer Financial Protection Bureau's (CFPB) new examination manual and the Office of the Comptroller of the Currency's OCC-2011-29 Guidance to Banks Regarding Foreclosure Practices. [Click here to register.](#)

**Jonice Gray Tucker** will be speaking in an ALI-ABA phone seminar, titled "CFPB: Redefining the Consumer Credit Market by Defining 'Abusive' Standards," on December 21, 2011. The seminar will discuss the the CFPB's structure, powers, and enforcement priorities; key initiatives; the new Supervisory Manual; anticipated collaboration with other government regulators; and the Bureau's interim rules. For more information on this seminar, visit: [www.ali-aba.org/TSTK01](http://www.ali-aba.org/TSTK01)

**Donna Wilson** will be participating as a panelist at the Round Table on 2011-2012 Legal Developments and Trends for the Retail and Fashion Industries on January 19, 2012 in New York, New York.

**James Parkinson** will be speaking on a panel at the ACI Latin America Summit on Anti-Corruption held in Sao Paulo, Brazil on February 8, 2012. The panel is entitled: "Assessing the Risk of Personal Liability in Bribery Investigations."

**David Krakoff** will be participating in a panel at the International Association of Defense Counsel program on worldwide anti-corruption laws in Palm Springs in February 2012.

**Donna Wilson** will be speaking at the ABA Section of Litigation Insurance Coverage CLE Seminar held at the Loews Ventana Canyon Resort in Tucson, Arizona from March 1-3, 2012. Ms. Wilson will be representing the defense counsel perspective in a plenary session panel entitled "The Credit Crisis and D&O Insurance Coverage: Challenges facing Insureds, Insurers, and Regulators" on March 1 from 1:00 PM to 2:10 PM.

**Andrew Sandler** will be speaking at PLI's A Guide to Financial Institutions 2012 Program in New York on March 6, 2012 at 4:00 PM in a session entitled "The New Era of Consumer Protection & Enforcement: The CFPB & Other Initiatives."

**James Parkinson** will be chairing a panel at the International Bar Association's 10th Annual Anti-Corruption Conference in Paris, France on March 13 and 14, 2012. The panel is entitled: "The Privileged Profession: Risks faced by legal professionals advising in international transactions."

**James Parkinson** will be speaking at a PLI program seminar entitled "Foreign Corrupt Practices Act 2012" in San Francisco, California on April 17, 2012 and in New York, New York on May 4, 2012.

## Mortgages

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## Credit Cards

**CFPB Releases Prototype Credit Card Agreement.** On December 7, the Consumer Financial Protection Bureau (CFPB) released a prototype credit card agreement designed to simplify for consumers the presentation of certain credit card information, including fees, risks, and terms. The two-page prototype is broken down into three sections. The first section highlights the costs associated with the card, including

interest rates and fees. The second section identifies events that could trigger a change in agreement terms, as well as any advance notice requirements. Finally, the third section provides certain "additional information" including, for example, privacy terms and dispute resolution provisions. Standardized definitions for all terms contained in the agreement are maintained online by CFPB, and in a separate document to be provided by the card issuer. CFPB is testing the prototype through an agreement with Pentagon Federal Credit Union, but the CFPB also is seeking broader public input through its website. The CFPB noted that the proposed agreement is not a model form, and its use is not mandatory.

[Click here for a copy of the prototype agreement, a link to the definitions, and access to the public comment portal.](#)

**Legislators Ask CFPB to Study Credit Card "Ability to Pay" Rules.** On December 7, a bipartisan group of legislators, including the Chairman and Ranking Member of the House Financial Services Committee, sent a letter to the CFPB requesting a study regarding certain credit card rules issued by the Federal Reserve Board (FRB). The lawmakers seek a report regarding the so-called "ability to pay" rules issued pursuant to the Credit CARD Act, which took effect on October 1. Specifically, the study and report should address any unintended consequences resulting from those rules, including the potential for the rules to restrict credit for nonworking spouses. [Please click here for a copy of the letter.](#)

### **Criminal Enforcement Action**

**Director of Financial Fraud Enforcement Task Force Named.** On December 7, U.S. Attorney General Eric Holder announced the appointment of Michael J. Bresnick to serve as executive director of the Financial Fraud Enforcement Task Force formed by President Obama in November 2009. Mr. Bresnick comes to the position from the Criminal Division of the U.S. Department of Justice (DOJ), where he investigated and prosecuted complex fraud cases, including mortgage and bank fraud.

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Email: [infobytes@buckleysandler.com](mailto:infobytes@buckleysandler.com)

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