Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

March 15, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Proposes Rule to Supervise Nonbank Student Loan Servicers. On March 14, the CFPB proposed a rule to allow it to supervise "larger participant" nonbank student loan servicers. The CFPB has authority to supervise, regardless of size, nonbanks that originate private education loans, and can define and supervise larger participants in other markets for consumer financial products or services. The CFPB proposes to supervise any nonbank student loan servicer whose volume exceeds one million accounts, which the CFPB expects will cover the seven largest servicers. The CFPB's test to determine volume would consider the number of accounts serviced, whether for federal or private loans, for which an entity and its affiliated companies were responsible as of December 31 of the prior calendar year. After designation, a servicer would remain a larger participant until two years after the first day of the tax year in which the servicer last met the account volume test. The CFPB would use its existing student loan examination procedures to review larger participants' "student loan servicing," which the proposed rule defines as: (i) collecting and processing loan payments on behalf of holders of promissory notes, (ii) maintaining account records and communicating with borrowers on behalf of loan holders during deferment periods, and (iii) interacting with borrowers to facilitate collection and processing of loan payments. An entity notified that the CFPB intends to undertake supervisory activity would have an opportunity to challenge the larger participant determination. The CFPB is accepting comments on the proposal for 60 days following publication in the Federal Register.

Federal Government Plans Appeal of Recess Appointment Ruling. On March 12, the National Labor Relations Board (NLRB) announced that it will seek, in consultation with the Department of Justice, U.S. Supreme Court review of the D.C. Circuit Court's decision invalidating the appointment of certain NLRB members. On January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit held that appointments to the NLRB made by President Obama in January 2012 during a purported

Senate recess were unconstitutional. CFPB Director Richard Cordray was appointed in the same manner and on the same day as the NLRB members, and his appointment is the subject of a lawsuit currently pending in the U.S. District Court for the District of Columbia. The NLRB's petition is due on April 25, 2013.

CFPB Introduces Regional Directors. On March 12, the CFPB publicly introduced its four regional directors. Edwin Chow heads the West Region. He joined the CFPB in September 2010, bringing 26 years of experience with the Office of Thrift Supervision and its predecessor. The Midwest Region is led by Anthony Gibbs, who recently joined the CFPB after 19 years with a major bank. Steve Kaplan, a former Pennsylvania Secretary of Banking, leads the Northeast Region, and Jim Carley, previously at the division of banking regulation at the Federal Housing Finance Agency, heads the Southeast Region. The CFPB announced the directors as part of its push to hire more examiners for its field offices.

Senate Banking Committee Holds Confirmation Hearing for CFPB Director, SEC Commissioner. On March 12, the Senate Banking Committee held a confirmation hearing for Richard Cordray to serve as CFPB Director, and for Mary Jo White to serve as SEC Commissioner/Chairman. While majority and minority committee members commended Mr. Cordray for his leadership of the CFPB to date, the basic disagreement over the structure of the agency itself remains. Democrats maintain that Mr. Cordray deserves a confirmation vote, citing the facts that Congress already approved the structure of the CFPB, and that it is the only financial regulator subject to a funding cap and whose rules are subject to a veto. Republicans argue that the CFPB lacks transparency and accountability, and that it should be changed to a commission structure and subject to congressional appropriations. In his testimony, Mr. Cordray stressed his efforts to be transparent and accountable, and Chairman Johnson (D-ND) entered into the record a letter from Rep. Stivers (R-OH) to the Committee calling on members to confirm Mr. Cordray as someone who could help bridge the gap on policy differences. Committee members also generally supported Ms. White. In her testimony, Ms. White addressed concerns from Senators on both sides about potential conflicts of interest given her recent work as a defense attorney, and stated her primary focus will be to finalize rules required by the Dodd-Frank Act and the JOBS Act. Additional priorities identified by committee members that Ms. White agreed should be agency priorities included finalizing rules for (i) credit rating agency conflicts of interest, (ii) money market funds, (iii) CEO pay versus median employee pay disclosures, (iv) high frequency trading, and (vi) crowd funding. Ms. White also pledged to vigorously enforce existing laws. The committee is scheduled to vote on both nominees on March 19, 2013.

CFPB Publishes Preliminary List of Rural and Underserved Counties For Escrow Rule Implementation. On March 12, the CFPB published a preliminary list of rural and underserved counties for use in implementing certain new mortgage rules, including the rule on escrow account requirements for first-lien higher-priced mortgage loans (HPMLs). That rule created a new exemption for small creditors that operate predominantly in rural or underserved areas. Such a creditor is not required to establish an escrow account for taxes and insurance for an HPML if (i) during the preceding calendar year, it extended more than 50 percent of its total covered transactions on properties that are located in designated rural or underserved counties; (ii) the creditor and its affiliates together originated 500 or fewer covered transactions during the preceding calendar year; (iii) as of the end of the preceding calendar year, the creditor had total assets of less than $2 million; and (iv) the creditor and its affiliates do not maintain certain types of escrow accounts. The CFPB expects to finalize the list of counties, together with technical changes to the rule, before the escrow rule takes effect on June 1, 2013, and notes that some counties' rural status may change for the 2014 list based on the 2010 Census. The list also impacts implementation of several other CFPB mortgage rules that take effect in January 2014, including the ability to repay/qualified mortgage rule, the HOEPA rule, and the appraisals for HPMLs rule. BuckleySandler

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CFPB To Hold Field Hearing on Consumer Complaints. On March 11, the CFPB announced a field hearing about its Consumer Complaint Database, to be held in Des Moines, IA on March 28, 2013. The CFPB has not yet announced witnesses but has stated the event will feature remarks from CFPB Director Richard Cordray, as well as testimony from consumer groups, industry representatives, and members of the public. The CFPB currently accepts complaints regarding credit cards, mortgages, bank accounts and services, auto/consumer loans, student loans, and consumer reporting, but so far has only published the credit card complaints in the public database. In the past, the CFPB has made policy announcements in connection with field hearings. Accordingly, the CFPB may announce that it is making additional types of complaints publicly available, or that it will accept complaints regarding an additional product or service.

FTC Updates Guidance for Mobile and Internet Advertising Disclosures. On March 12, the FTC released guidance for mobile and other online advertisers. The new guidance, ".com Disclosures: How to Make Effective Disclosures in Digital Advertising," adapts and expands prior FTC guidance to account for a decade's worth of additional experience with online marketing practices, consumers' increasing use of smartphones, and merchants' increasing use of social media marketing. The new guidance highlights several considerations for businesses as they develop advertisements for online and mobile media:(i) the same consumer protection laws regarding unfair or deceptive acts or practices that apply to commercial activities in other media apply online and in the mobile marketplace; (ii) limitations and qualifying information should be incorporated into any underlying claim, rather than provided as a separate disclosure qualifying the claim; (iii) marketing materials that may be viewed on a variety of platforms, including handheld devices, should be designed so that required disclosures are effectively delivered on each platform; (iv) required disclosures must be clear and conspicuous, and (v) if a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a FTC rule, and it is not possible to make the disclosure clearly and conspicuously, then that ad should not be disseminated. The FTC offers specific guidance, with corresponding examples, for complying with the clear and conspicuous standard in online and mobile advertisements. For example, the FTC reminds advertisers that a disclosure should be placed as close as possible to the trigger claim, and provides guidance for space constraints and the use of hyperlinks.

FTC Issues Report on Mobile Payment Consumer Protections. On March 8, the FTC released a report on mobile payments by consumers. The report, based on a FTC workshop held in April 2012, focuses on financial, security, and privacy consumer protections. The FTC encourages companies to develop clear dispute resolution policies to address customer claims of fraudulent mobile payments or unauthorized charges. The report highlights "special concerns" with mobile carrier billings, in which mobile carriers place charges on phone bills on behalf of third-parties, based on the FTC's concern that there are no federal statutory protections governing consumer disputes about fraudulent or unauthorized charges placed on mobile carrier bills. The FTC also encourages industry-wide adoption of strong security measures and suggests ways sensitive financial information can be kept secure during the mobile payment process, including end-to-end encryption. The report highlights the need for mobile payment companies to practice "privacy by design," incorporating strong privacy practices, consumer choice, and transparency into their products from the outset. Finally, the report notes privacy issues arising from the consolidation of consumers' personal information in the mobile payment process.

House Passes Gramm-Leach-Bliley Privacy Disclosure Exemption. On March 12, the U.S. House of Representatives passed H.R. 749, a bill that would exempt from the Gramm-Leach-Bliley Act's annual privacy policy notice requirements any financial institution that (i) provides nonpublic personal information only in accordance with specified requirements and (ii) has not changed its

policies and practices with regard to disclosing nonpublic personal information from its most recent disclosure. The bill is identical to one passed by the House last year, H.R. 5817, but which the Senate never addressed. H.R. 749 now awaits consideration by the Senate.

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STATE ISSUES

Two Nebraska Bills Amend Lender Licensing Rules. On March 7, Nebraska enacted two bills intended to amend and clarify requirements for installment loan brokers, payday lenders, mortgage bankers, and mortgage loan originators (MLOs). The first, LB 279, makes nonsubstantive clarifications to the definition of a "loan broker" and narrows the exemption for accountants to certified public accountants only. The bill also authorizes the Nebraska Department of Banking and Finance to share examination reports and other confidential information with the CFPB and other state regulators. The second, LB 290, removes many mortgage licensing requirements previously applicable to individuals and separately identifies MLO duties. Those duties include providing notification to the Department (i) within 10 days of events such as bankruptcy, criminal indictments, and suspension/revocation proceedings; and (ii) within 30 days of certain changes, including changes of employer and address. The bill also allows firms to electronically submit certain required reports and provides that the 120-day period for calculating abandonment of a license application runs from the date the Department sends the applicant electronic notice of deficient items. By state rule, both bills take effect three months after the end of the state's legislative session, which scheduled to conclude May 30, 2013.

COURTS

California Federal Court First to Outline Factors Governing FIRREA Civil Penalty Awards. On March 6, the U.S. District Court for the Central District of California identified for the first time factors for courts to consider when assessing a civil penalty under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). *United States v. Menendez*, No. CV 11-06313, 2013 WL 828926 (C.D. Cal. Mar. 6, 2013). The DOJ sued a real estate broker, alleging bank fraud when he submitted a false certification to HUD on behalf of a homeowner in connection with a short sale. The DOJ claimed the certification represented there were no hidden terms or special understandings with the buyer of the property, when in fact the broker himself, through a company

he controlled, also was the buyer and intended to immediately resell the property for a profit of nearly $40,000. Drawing upon principles applied by courts in other civil penalty contexts, the court considered eight factors to assess the civil penalty under FIRREA: (i) the good or bad faith of the defendant and degree of scienter; (ii) the injury to the public and loss to other persons; (iii) the egregiousness of the violation; (iv) the isolated or repeated nature of the violation; (v) the defendant's financial condition and ability to pay; (vi) the criminal fine that could be levied for the conduct; (vii) the amount of the defendant's profit from the fraud; and (viii) the penalty range available under FIRREA. In this case, the court found that the first three factors weighed in favor of a substantial civil penalty, while factors four and five favored the broker. For the remaining factors, the court found that the civil penalty requested by the government - nearly $1.1 million - was excessive, considering that the amount of the criminal penalty for bank fraud was capped at $1 million, and the likely fine under the sentencing guidelines would have been "in the $20-30,000 range;" the broker's profit was only approximately $40,000; and FIRREA precluded a penalty in excess of $1 million when the gain or loss was less than $1 million. The court awarded a civil penalty of $40,000, an amount proportionate to the broker's profit.

Massachusetts High Court Holds State Credit Card Law Intended to Protect against Invasion of Privacy, ZIP Codes Protected. On March 11, the Massachusetts Supreme Judicial Court held that a credit card holder may bring an action for violation of a state law prohibiting businesses from requiring personal identification information as part of a credit card transaction, even in the absence of identity fraud. *Tyler v. Michaels Stores, Inc.*, No. SJC-11145, 2013 WL 854097 (Mass. Mar. 11, 2013). The card holder moved the Massachusetts Supreme Judicial Court to certify three questions interpreting the statute after a case she brought against the retailer in federal court was dismissed. The U.S. District Court for the District of Massachusetts had held that a retailer's collection of ZIP codes during a credit card transaction can constitute a violation of the credit card law, but that the card holder failed to allege actual harm. The Massachusetts Supreme Judicial Court agreed that a ZIP code amounts to personal information under the statute, and found that the law is "intended primarily" to protect card holders from invasion of privacy by merchants, not against credit card identity fraud. However, the court noted that the statute did not contain an express limitation barring card holders who were not the victim of fraud. On a third question, the court held that the term "credit card transaction form" refers equally to electronic and paper transaction forms.

Texas Appeals Court Affirms Holding that Certain Emails Read Together Can Be Construed as One Contract. On March 7, the Texas Court of Appeals of the Thirteenth District affirmed a trial court's holding that the essential terms of an option contract for the purchase of real estate were present when three e-mail messages exchanged by the parties were read together. *Dittman v. Cerone*, No. 13-11-00196-CV, 2013 WL 865423 (Mar. 7, 2013). The defendant sued for specific performance pursuant to the terms of the three emails, and the trial court ultimately concluded that the e-mails constituted a valid option contract and ordered the plaintiffs to convey the property. The Texas Court of Appeals affirmed the trial court's holding that the option contract complied with the statute of frauds because (i) the emails construed together provided the essential terms of the contract, (ii) the property was sufficiently identified and confirmed by extrinsic evidence, (iii) the parties' actions evidenced an intent to conduct certain business electronically, and (iv) the real estate broker had authority to act for the sellers.

Federal Court Holds Litigation Privilege Bars SCRA Claim Based on Inaccurate Military Affidavit. Recently, the U.S. District Court for the Central District of California barred a claim for violation of Section 521 of the Servicemembers Civil Relief Act (SCRA) by holding that California's litigation privilege applies to military affidavits.*William v. U.S. Bank Nat'l Assoc.*, No. 12-748, 2013 WL 571844 (C.D. Cal. Feb 13, 2013).While the plaintiff was serving overseas, the defendants filed an inaccurate affidavit stating that the plaintiff was not on active military duty, and on that basis obtained a default judgment of unlawful detainer against the plaintiff. After returning from military

service, the plaintiff sued the defendants for violating the SCRA by fling an inaccurate military affidavit. The court held that California's litigation privilege, which protects communications made in the course of litigation, applied to the military affidavit and thus barred the plaintiff's claim based on the accuracy of that affidavit. Although the borrower could-and successfully did-move to set aside the default judgment, the litigation privileged barred this secondary suit. The court also held that federal law did not preclude the state-law litigation privilege because the alleged violations occurred prior to enactment of a private right of action under the SCRA.

MISCELLANY

New Study Claims Mortgage Lenders Discriminate against Women. On March 12, the Chicago-based Woodstock Institute released research claiming that mortgage lenders discriminate against female applicants. The research is presented in a "fact sheet" and previews a longer report the group plans to publish later this year. The study reviewed 2010 HMDA data on first lien single-family home purchase and refinance mortgage applications in the Chicago area and purports to show that (i) female-headed joint applications are much less likely to be originated than male-headed joint applications and (ii) this disparity holds true across all racial categories and is most pronounced for African American women. The Woodstock Institute further claims that these disparities are more pronounced for refinance loans. Based on its conclusions, the group urges federal regulators and enforcement authorities to conduct further investigation, including through enforcement of HUD's recently finalized disparate impact rule. It also recommends that the CFPB prioritize enhancing the HMDA rules to make public more information to better identify discriminatory lending practices.

FIRM NEWS

Complimentary Webinar - Whistleblowers 101: DOJ, SEC, and CFPB Enforcement Trends. Please join BuckleySandler LLP attorneys Andrew Schilling, Thomas Sporkin, and Michelle Rogers on April 11, 2013 at 2:00-3:00 PM ET, for a complimentary webinar that will provide an overview of whistleblower efforts, recovery programs, and protections under the FCA, FIRREA, Dodd-Frank, SOX, and by the CFPB; a discussion of recent enforcement trends; and tips for preventing or mitigating whistleblower risk. For registration and other information, please click here.

Andrew Sandler and Warren Traiger 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". Mr. Traiger will participate on a panel addressing "Why Federal Banking Regulators are Important For Your Neighborhood."

Jeffrey Naimon, Chris Witeck, and Jon Langlois will present a webinar titled, "MBA Compliance Essentials: Vendor Management" in association with the Mortgage Bankers Association's CampusMBA program on March 20, 2013.

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.

Andrew Sandler will participate in an American Association of Bank Directors webinar titled "Legal Actions by the FDIC to Recover Losses of Failed Banks: The Potential Liability of Officers and Directors" on April 2, 2013, 2:00-3:15 PM ET. The complimentary webinar will the review FDIC's professional liability program, including the FDIC's program to investigate potential claims against certain directors and officers of failed banks and savings institutions, strategies to avoid or defend

such suits, and strategies for ensuring that your bank's board and officers comply with their duties and mitigate the potential for personal liability from FDIC suits.

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.

Andrea Mitchell and Lori Sommerfield will present a session titled "Fair & Responsible Lending in the Regulatory Crosshairs" at the 2013 Minnesota Banking Law Institute, on April 5, 2013 in Minneapolis, MN.

Jonice Gray Tucker will speak to the Financial Services Roundtable on May 1, 2013 on the topic of Managing Fair Lending and on May 2, 2013 on the topic of Litigation Trends.

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

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.

Jonice Gray Tucker and Kendra Kinnaird wrote "Mortgage Crisis Triggers Stronger Focus on Vendors," published by the National Notary Association on March 8, 2013.

Andrew Schilling, Ross Morrison, and Michelle Rogers published "Finally, 8 Factors Governing FIRREA Civil Penalty Awards," in Law360 on March 12, 2013.

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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Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (310) 424-3900
Orange County: 3121 Michelson Drive, Suite 210, Irvine, CA 92612, (949)398-1360

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

In addition, please feel free to email our attorneys. A list of attorneys can be found here.

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

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MORTGAGES

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House Passes Gramm-Leach-Bliley Privacy Disclosure Exemption. On March 12, the U.S. House of Representatives passed H.R. 749, a bill that would exempt from the Gramm-Leach-Bliley Act's annual privacy policy notice requirements any financial institution that (i) provides nonpublic personal information only in accordance with specified requirements and (ii) has not changed its policies and practices with regard to disclosing nonpublic personal information from its most recent disclosure. The bill is identical to one passed by the House last year, H.R. 5817, but which the Senate never addressed. H.R. 749 now awaits consideration by the Senate.

CONSUMER FINANCE

CFPB Proposes Rule to Supervise Nonbank Student Loan Servicers. On March 14, the CFPB proposed a rule to allow it to supervise "larger participant" nonbank student loan servicers. The CFPB has authority to supervise, regardless of size, nonbanks that originate private education loans, and can define and supervise larger participants in other markets for consumer financial products or services. The CFPB proposes to supervise any nonbank student loan servicer whose volume exceeds one million accounts, which the CFPB expects will cover the seven largest servicers. The CFPB's test to determine volume would consider the number of accounts serviced, whether for federal or private loans, for which an entity and its affiliated companies were responsible as of December 31 of the prior calendar year. After designation, a servicer would remain a larger participant until two years after the first day of the tax year in which the servicer last met the account volume test. The CFPB would use its existing student loan examination procedures to review larger participants' "student loan servicing," which the proposed rule defines as: (i) collecting and processing loan payments on behalf of holders of promissory notes, (ii) maintaining account records and communicating with borrowers on behalf of loan holders during deferment periods, and (iii) interacting with borrowers to facilitate collection and processing of loan payments. An entity notified that the CFPB intends to undertake supervisory activity would have an opportunity to challenge the larger participant determination. The CFPB is accepting comments on the proposal for 60 days following publication in the Federal Register.

Federal Government Plans Appeal of Recess Appointment Ruling. On March 12, the National Labor Relations Board (NLRB) announced that it will seek, in consultation with the Department of Justice, U.S. Supreme Court review of the D.C. Circuit Court's decision invalidating the appointment of certain NLRB members. On January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit held that appointments to the NLRB made by President Obama in January 2012 during a purported Senate recess were unconstitutional. CFPB Director Richard Cordray was appointed in the same manner and on the same day as the NLRB members, and his appointment is the subject of a lawsuit currently pending in the U.S. District Court for the District of Columbia. The NLRB's petition is due on April 25, 2013.

CFPB Introduces Regional Directors. On March 12, the CFPB publicly introduced its four regional directors. Edwin Chow heads the West Region. He joined the CFPB in September 2010, bringing 26 years of experience with the Office of Thrift Supervision and its predecessor. The Midwest Region is led by Anthony Gibbs, who recently joined the CFPB after 19 years with a major bank. Steve Kaplan, a former Pennsylvania Secretary of Banking, leads the Northeast Region, and Jim Carley, previously at the division of banking regulation at the Federal Housing Finance Agency, heads the Southeast Region. The CFPB announced the directors as part of its push to hire more examiners for its field offices.

Senate Banking Committee Holds Confirmation Hearing for CFPB Director, SEC Commissioner. On March 12, the Senate Banking Committee held a confirmation hearing for Richard Cordray to serve as CFPB Director, and for Mary Jo White to serve as SEC Commissioner/Chairman. While majority and minority committee members commended Mr. Cordray for his leadership of the CFPB to date, the basic disagreement over the structure of the agency itself remains. Democrats maintain that Mr. Cordray deserves a confirmation vote, citing the facts that Congress already approved the structure of the CFPB, and that it is the only financial regulator subject to a funding cap and whose rules are subject to a veto. Republicans argue that the CFPB lacks transparency and accountability, and that it should be changed to a commission structure and subject to congressional appropriations. In his testimony, Mr. Cordray stressed his efforts to be transparent and accountable, and Chairman Johnson (D-ND) entered into the record a letter from Rep. Stivers (R-OH) to the Committee calling on members to confirm Mr. Cordray as someone who could help bridge the gap on policy differences. Committee members also generally supported Ms. White. In her testimony, Ms. White addressed concerns from Senators on both sides about potential

conflicts of interest given her recent work as a defense attorney, and stated her primary focus will be to finalize rules required by the Dodd-Frank Act and the JOBS Act. Additional priorities identified by committee members that Ms. White agreed should be agency priorities included finalizing rules for (i) credit rating agency conflicts of interest, (ii) money market funds, (iii) CEO pay versus median employee pay disclosures, (iv) high frequency trading, and (vi) crowd funding. Ms. White also pledged to vigorously enforce existing laws. The committee is scheduled to vote on both nominees on March 19, 2013.

CFPB To Hold Field Hearing on Consumer Complaints. On March 11, the CFPB announced a field hearing about its Consumer Complaint Database, to be held in Des Moines, IA on March 28, 2013. The CFPB has not yet announced witnesses but has stated the event will feature remarks from CFPB Director Richard Cordray, as well as testimony from consumer groups, industry representatives, and members of the public. The CFPB currently accepts complaints regarding credit cards, mortgages, bank accounts and services, auto/consumer loans, student loans, and consumer reporting, but so far has only published the credit card complaints in the public database. In the past, the CFPB has made policy announcements in connection with field hearings. Accordingly, the CFPB may announce that it is making additional types of complaints publicly available, or that it will accept complaints regarding an additional product or service.

Two Nebraska Bills Amend Lender Licensing Rules. On March 7, Nebraska enacted two bills intended to amend and clarify requirements for installment loan brokers, payday lenders, mortgage bankers, and mortgage loan originators (MLOs). The first, LB 279, makes nonsubstantive clarifications to the definition of a "loan broker" and narrows the exemption for accountants to certified public accountants only. The bill also authorizes the Nebraska Department of Banking and Finance to share examination reports and other confidential information with the CFPB and other state regulators. The second, LB 290, removes many mortgage licensing requirements previously applicable to individuals and separately identifies MLO duties. Those duties include providing notification to the Department (i) within 10 days of events such as bankruptcy, criminal indictments, and suspension/revocation proceedings; and (ii) within 30 days of certain changes, including changes of employer and address. The bill also allows firms to electronically submit certain required reports and provides that the 120-day period for calculating abandonment of a license application runs from the date the Department sends the applicant electronic notice of deficient items. By state rule, both bills take effect three months after the end of the state's legislative session, which scheduled to conclude May 30, 2013.

SECURITIES

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E-COMMERCE

FTC Updates Guidance for Mobile and Internet Advertising Disclosures. On March 12, the FTC released guidance for mobile and other online advertisers. The new guidance, ".com Disclosures: How to Make Effective Disclosures in Digital Advertising," adapts and expands prior FTC guidance to account for a decade's worth of additional experience with online marketing practices, consumers' increasing use of smartphones, and merchants' increasing use of social media marketing. The new guidance highlights several considerations for businesses as they develop advertisements for online and mobile media:(i) the same consumer protection laws regarding unfair or deceptive acts or practices that apply to commercial activities in other media apply online and in the mobile marketplace; (ii) limitations and qualifying information should be incorporated into any underlying claim, rather than provided as a separate disclosure qualifying the claim; (iii) marketing materials that may be viewed on a variety of platforms, including handheld devices, should be designed so that required disclosures are effectively delivered on each platform; (iv) required disclosures must be clear and conspicuous, and (v) if a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a FTC rule, and it is not possible to make the disclosure clearly and conspicuously, then that ad should not be disseminated. The FTC offers specific guidance, with corresponding examples, for complying with the clear and conspicuous standard in online and mobile advertisements. For example, the FTC reminds advertisers that a disclosure should be placed as close as possible to the trigger claim, and provides guidance for space constraints and the use of hyperlinks.

Texas Appeals Court Affirms Holding that Certain Emails Read Together Can Be Construed as One Contract. On March 7, the Texas Court of Appeals of the Thirteenth District affirmed a trial court's holding that the essential terms of an option contract for the purchase of real estate were present when three e-mail messages exchanged by the parties were read together. *Dittman v. Cerone*, No. 13-11-00196-CV, 2013 WL 865423 (Mar. 7, 2013). The defendant sued for specific performance pursuant to the terms of the three emails, and the trial court ultimately concluded that the e-mails constituted a valid option contract and ordered the plaintiffs to convey the property. The Texas Court of Appeals affirmed the trial court's holding that the option contract complied with the statute of frauds because (i) the emails construed together provided the essential terms of the contract, (ii) the property was sufficiently identified and confirmed by extrinsic evidence, (iii) the parties' actions evidenced an intent to conduct certain business electronically, and (iv) the real estate broker had authority to act for the sellers.

PRIVACY/DATA SECURITY

Massachusetts High Court Holds State Credit Card Law Intended to Protect against Invasion of Privacy, ZIP Codes Protected. On March 11, the Massachusetts Supreme Judicial Court held that a credit card holder may bring an action for violation of a state law prohibiting businesses from requiring personal identification information as part of a credit card transaction, even in the absence of identity fraud. *Tyler v. Michaels Stores, Inc.*, No. SJC-11145, 2013 WL 854097 (Mass. Mar. 11, 2013). The card holder moved the Massachusetts Supreme Judicial Court to certify three questions

interpreting the statute after a case she brought against the retailer in federal court was dismissed. The U.S. District Court for the District of Massachusetts had held that a retailer's collection of ZIP codes during a credit card transaction can constitute a violation of the credit card law, but that the card holder failed to allege actual harm. The Massachusetts Supreme Judicial Court agreed that a ZIP code amounts to personal information under the statute, and found that the law is "intended primarily" to protect card holders from invasion of privacy by merchants, not against credit card identity fraud. However, the court noted that the statute did not contain an express limitation barring card holders who were not the victim of fraud. On a third question, the court held that the term "credit card transaction form" refers equally to electronic and paper transaction forms.

PAYMENTS

FTC Issues Report on Mobile Payment Consumer Protections. On March 8, the FTC released a report on mobile payments by consumers. The report, based on a FTC workshop held in April 2012, focuses on financial, security, and privacy consumer protections. The FTC encourages companies to develop clear dispute resolution policies to address customer claims of fraudulent mobile payments or unauthorized charges. The report highlights "special concerns" with mobile carrier billings, in which mobile carriers place charges on phone bills on behalf of third-parties, based on the FTC's concern that there are no federal statutory protections governing consumer disputes about fraudulent or unauthorized charges placed on mobile carrier bills. The FTC also encourages industry-wide adoption of strong security measures and suggests ways sensitive financial information can be kept secure during the mobile payment process, including end-to-end encryption. The report highlights the need for mobile payment companies to practice "privacy by design," incorporating strong privacy practices, consumer choice, and transparency into their products from the outset. Finally, the report notes privacy issues arising from the consolidation of consumers' personal information in the mobile payment process.