Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

May 4, 2012

Topics In This Issue

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Federal Issues

CFPB Announces Director of Diversity Office, Outlines Planned Activities. On April 30, the CFPB announced that Stuart Ishimaru will lead its Office of Minority and Women Inclusion. A former Equal Employment Opportunity Commissioner, Mr. Ishimaru will lead an office that plans to (i) develop standards for assessing the diversity policies and practices of CFPB-regulated entities, (ii) provide advice on the impact of CFPB policies and regulations on minority and women-owned businesses, (iii) coordinate with the Director to create and implement solutions to civil rights violations, and (iv) develop and implement standards of equal employment for the CFPB. In announcing Mr. Ishimaru's hiring, Director Cordray stated that the financial industry "has not traditionally reflected all of its customers" and the new office will work with banks and nonbanks to develop systems that encourage diversity.

Lawmakers Request CFPB Budget Details. On May 2, Republican members of the House Financial Services Committee sent a letter to CFPB Director Cordray following up on their initial request and the CFPB's response, seeking additional details regarding the CFPB's budget and plans. Although Congress does not appropriate funds to the CFPB, the members argue that the CFPB still must provide the committee with detailed budget information. The CFPB, according to the letter, cannot act as other non-appropriated federal banking regulators because the CFPB budget impacts the national debt while the others do not. In an attempt to exercise some oversight over CFPB spending, the members seek (i) a financial operating plan for the agency; (ii) a detailed fiscal year 2013 budget justification, (iii) performance measures, (iv) a commitment to notify Congress prior to seeking funds from the Federal Reserve Board, (v) information about the CFPB headquarters design and renovation, and (vi) the process for determining employment needs.

FDIC Issues Statement Regarding Applicability of CFPB Mortgage Compensation Rules. On April 17, the FDIC issued Financial Institution Letter 2012-02 to apply the recent CFPB guidance on compensation for mortgage originators to FDIC-regulated institutions. The statement directs covered institutions to ensure that their policies and practices are consistent with the compensation rules as interpreted by the CFPB.

Fannie Mae Announces Changes to Pricing Terms. On May 1, Fannie Mae updated terms pertaining to its ability to change the pricing applicable to lenders' deliveries of mortgage loans under the standard Selling Guide provisions, as well as under existing Master Agreements and related MBS contracts. In Announcement SEL-2012-03, Fannie Mae stated that it may change the base guarantee fee, loan-level pricing adjustments, and/or guaranty fee adjustments for MBS Express or rapid payment method remittance cycles applicable to mortgages delivered under MBS contracts or as whole loans. Under the change (i) Fannie Mae reserves the right to change the pricing one or more times during the term of a Master Agreement or related MBS contract, (ii) Fannie Mae will provide the lender with written notice of the pricing change prior to it taking effect, and (iii) either party can cancel the affected contract or agreement if the parties are unable to come to terms on the new pricing. The effective date of the changes will be no later than October 1, 2012.

Federal Reserve Releases Interchange Fee Comparison Results. On May 1, the Federal Reserve Board released a comparison of interchange fees by payment network for 2011. The Federal Reserve Board plans to publish this information annually to assists card issuers and merchants in choosing payment card networks. The results, which also are expected to assist policymakers in evaluating the impact of the interchange fee regulations that took effect in October 2011, show each network provider's average fee per transaction and the portion of each transaction value attributable to the fee. On an aggregate level, the average interchange fee declined substantially for non-exempt issuers from 43 cents to 24 cents following implementation of the regulation. For exempt issuers, the average fee remained at 43 cents.

State Issues

Maryland Adds Foreclosure Registration Requirement, Authorizes Pre-file Mediation, Amends Mortgage Licensing. On May 2, Maryland

Governor O'Malley signed House Bill 1373, which establishes a state foreclosed property registry. Foreclosure purchasers are required to (i) file an initial registration and pay a $50 registration fee for each foreclosed property within 30 days after a foreclosure sale, and (ii) file a final registration, with no additional fee, within 30 days after a deed transferring the title has been recorded. The law allows local jurisdictions to (i) enact laws that impose a civil penalty for failure to register under the new state requirement and (ii) collect from the foreclosure purchaser, as a charge on the property's property tax bill, any costs associated with abating a nuisance on a registered property. The Governor also signed on May 2, House Bill 1374, which authorizes a secured party to offer to participate in pre-file mediation with a mortgagor or grantor to whom the secured party has delivered a notice of intent to foreclose. If the mortgagor or granter elects to participate, an order to docket or complaint to foreclose cannot be filed until the completion of the mediation. The bill also establishes a process through which a person with a secured interest in residential property that is in default can seek from a local jurisdiction a certificate of vacancy. If a certificate is not challenged by the record owner or occupant of the property the secured party can expedite the foreclosure process.

Finally, on the same date, Maryland enacted Senate Bill 546, which (i) requires a mortgage lender licensee to provide the commissioner with proof satisfying specified minimum net worth requirements within 90 days after the last day of the licensee's most recent fiscal year and (ii) establishes a nonactive license status and process for licensees that cease to be employed by an approved financial institution.

Minnesota Amends Debt Collector Requirements. On April 23, Minnesota enacted House Bill 2335, which amends requirements for individual debt collectors and collection agencies. The bill (i) provides individual collectors additional time to report a change of contact information, (ii) sets requirements for a personnel screening process that a debt collection agency must follow in hiring and retaining individual collectors, and (iii) revises the list of past events that disqualify a person from registration as a debt collector. The final bill did not include a proposed revision that would have allowed individual debt collectors to remedy violations of the statute.

Mississippi Adds Protections for Bank Self-Assessments. On April 19, Mississippi enacted House Bill 1460 to grant privileged treatment to certain bank reports. The law takes effect July 1, 2012. Under the new law, reports reflecting voluntary self-assessments by banks, which are submitted to a bank regulator but not otherwise provided to third parties, will be considered privileged and not admissible in any legal or investigative action and are not subject to discovery in such actions. The law sets forth exceptions and circumstances under which the protections do not apply, including if a court determines that a report shows that a bank was not in

compliance with a material provision of banking law, the bank did not initiate good-faith efforts to achieve substantial compliance within a reasonable time after the noncompliance was discovered, and the bank's failure to comply caused material harm to a bank customer or consumer.

Courts

BuckleySandler Files Amicus Brief on Behalf of Industry Groups in Tenth Circuit TILA Case. On May 3,

BuckleySandler filed an amicus brief on behalf of three industry trade groups in a Tenth Circuit case addressing the right to rescind a mortgage under the Truth in Lending Act. The CFPB previously filed an amicus brief in Rosenfield v. HSBC Bank, No. 10-1442 (10th Cir.), in which it argued that borrowers who do not receive certain TILA-required disclosures should be permitted to rescind so long as they notify their lenders within three years-even if they did not file suit within TILA's three-year repose period. The industry amicus brief, filed on behalf of the American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition, urges the Tenth Circuit to hold that TILA's statute of repose requires that any right of rescission expire three years after origination even if the consumer previously notified the lender. The industry amicus brief argues that holding otherwise contravenes the purpose of TILA's statute of repose and creates unnecessary uncertainty that will negatively affect the industry and consumers alike.

Federal Court Holds Fannie Mae Is Not a Government Entity. On April 30, the U.S. District Court for the District of Columbia held in an employment case that Fannie Mae is not a government entity and therefore the plaintiff could not sustain her Bivens claim. Herron v. Fannie Mae, No. 10-943, 2012 WL 1476051 (D.D.C. Apr. 30, 2012). The plaintiff, a former Fannie Mae employee and outside contractor to the institution, claimed that Fannie Mae is a government actor and improperly terminated her employment. She asserted a First Amendment claim under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and, in the alternative, brought claims against Fannie Mae as a private employer. Fannie Mae and its government conservator, the Federal Housing Finance Agency, which was granted intervenor status, moved to dismiss the Bivens claim on the grounds that Fannie Mae is not a government actor. The district court dismissed the Bivens claim, holding that the imposition of FHFA conservatorship did not transform Fannie Mae into a government actor. Instead, Fannie Mae was a private entity before conservatorship; FHFA stepped into that private role when it became conservator.

Federal Appeals Court Finds Plaintiff States FDCPA Claim Against Servicer, Creditor When Acquiring Debt Purportedly in Default. On April 30, the U.S. Court of Appeals for the Sixth Circuit held that a mortgage servicer and a creditor can be sued as a debt collector under the Fair Debt Collection Practices Act (FDCPA) when acquiring a debt in default at the time of acquisition. Bridge v. Ocwen Federal Bank, FSB, No. 09-4220, 2012 WL 1470146 (6th Cir. Apr. 30, 2012). The plaintiffs, a borrower and her non-borrower husband, alleged that the servicer and creditor violated the FDCPA in attempting to collect from the borrower and her husband, notwithstanding that the mortgage was not in default and despite plaintiffs' repeated requests the servicer cease further communication. The servicer argued that it could not be liable under the FDCPA based upon its status as a mortgage loan servicer and because the debt was not actually in default. Similarly, the creditor argued that as the purchaser of the debt it could not be a debt collector and that it was neither a debt collector nor a creditor under the circumstances of the case. The district court, assuming plaintiff's allegations that the servicer was not a servicer and that the creditor was not a creditor for purposes of the motion to dismiss, granted the motion on the basis that neither the servicer nor owner was a debt collector under the FDCPA. On appeal, the court, relying on congressional intent and previous decisions from the Third and Seventh Circuits, held that an entity that acquires a debt it seeks to collect must be either a creditor or a debt collector,

depending on the status of the debt at the time it was acquired. Similarly, the court held the servicer may be either a servicer or debt collector when acting on behalf of the debt-acquiring entity. To hold otherwise, the court reasoned, would frustrate the purpose of the FDCPA's broad consumer protections. Further, the court held that after years of attempting to collect on the debt and acting as a debt collector, the servicer could not now attempt to defeat the broad protections of the FDCPA by relying on the borrower's assertion that the loan was not actually in default. Finally, the court rejected the defendants' claims that the plaintiff-husband failed to state a claim since he was not actually obligated on the debt in light of the FDCPA's application to debt collectors when attempting to collect a debt "owed or due or asserted to be owed or due another." The appellate court reversed and remanded the case for further proceedings.

S**econd Circuit Affirms Denial of MBS Class Certification Given Limited Record**. On April 30, the U.S. Court of Appeals for the Second Circuit affirmed a district court's dismissal of an action brought by a putative class of pension fund investors against issuers of certain mortgage-backed securities. New Jersey Carpenters Health Fund v. Rali Series 2006-QO1 Trust, No. 11-1683, 2012 WL 1481519 (2nd Cir. Apr. 30, 2012). The investors claimed that the issuers made false and misleading statements in the prospectuses of the MBS at issue, and brought suit to recover damages under the Securities Act. In denying the investors' motion for class certification, the district court held that class treatment was not appropriate because individual issues predominate - each purchaser's actual knowledge of the specific false or misleading statements or omissions would need to be determined on an individual basis. Based on the "limited evidence" available "without the benefit of discovery," the circuit court affirmed the dismissal, but suggested that a different inference could have been drawn on a more complete record. The court also acknowledged several district court decisions that followed the instant case, in which the courts certified classes presenting similar claims.

Miscellany

Financial Stability Board Enhances Compensation Practices Monitoring. On April 30, the

Financial Stability Board established a new group of national experts from member jurisdictions to monitor and report to the FSB on implementation of the Principles and Standards on Sound Compensation Practices adopted by the FSB in 2009. The FSB also announced a new mechanism for member jurisdictions to bilaterally report, verify, and address specific compensation-related complaints by financial institutions.

Firm News

Jeff Naimon and **Matthew Previn** will be speaking at the Mortgage Bankers Association's National Secondary Market Conference in New York, NY on May 6-9, 2012.

Benjamin Saul will be speaking at the 24th Annual Card Forum & Expo on May 10, 2012 in Orlando, FL. Mr. Saul's session is entitled "Impact of Changes in the Consumer Compliance Regulatory Landscape."

Andrew Sandler and **Jonice Gray Tucker** will be participating in an American Bar Association webinar focusing on the Federal-State Mortgage Servicing Settlement on May 15, 2012.

Andrew Sandler, **Benjamin Klubes**, **Jeff Naimon**, **Benjamin Saul**, and **Margo Tank** will be speaking at the Mortgage Bankers Association Legal Issues and Regulatory Compliance Conference in Palm Springs, CA on May 20, 2012. Mr. Klubes will provide updates on developments in both regulatory and litigation matters in the use of various privileges. Mr. Saul's session will provide an overview and update of the Fair Credit Reporting

Act (FCRA), Fair Housing Act, Equal Credit Opportunity Act (ECOA) and Home Mortgage Disclosure Act (HMDA) requirements including recent proposed and final changes.

Jonathan Cannon will be speaking at the Predictive Methods Conference in Dana Point, CA on June 4, 2012 in a session entitled "The Dodd-Frank Act: Understanding its Impact on the Mortgage Industry."

Andrew Sandler will be speaking at the American Bankers Association's Regulatory Compliance Conference in Orlando, Florida on Monday, June 11, 2012. Mr. Sandler's session is entitled: "Hot Topics in Fair Lending."

Mortgages

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