

August 30, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)[FEDERAL ISSUES](#)[STATE ISSUES](#)[COURTS](#)[MISCELLANY](#)[FIRM NEWS](#)[FIRM PUBLICATIONS](#)[MORTGAGES](#)[BANKING](#)[CONSUMER FINANCE](#)[PAYMENTS](#)[PRIVACY/DATA SECURITY](#)[CRIMINAL ENFORCEMENT](#)**FEDERAL ISSUES**

CFPB Seeks To Ratify Director's Pre-Confirmation Actions. On August 30, the CFPB published a "[Notice of Ratification](#)" in the Federal Register in response to concerns about the legal validity of its actions during the period that Director Richard Cordray served as recess appointee. Director Cordray was first appointed on January 4, 2012 pursuant to the President's recess authority and was re-appointed on July 17, 2013 after confirmation by the Senate.

Fannie Mae Announces Miscellaneous Servicing Policy Changes. On August 28, Fannie Mae issued [Announcement SVC-2013-17](#), which describes miscellaneous servicing policy changes and updates. The announcement provides that a servicer is no longer obligated to treat a servicer name change as a transfer of servicing (although all other notification requirements related to name changes remain unchanged). In addition, the announcement clarifies servicer obligations with respect to unemployment forbearance arrangements, providing that (i) prior to expiration of an initial unemployment forbearance term (or upon re-employment), the borrower must be evaluated for an extension or another workout option and (ii) prior to expiration of an extended unemployment forbearance term or upon notification of re-employment, the borrower must be evaluated for other available foreclosure alternatives. The announcement also provides that (i) a borrower in a trial period plan who receives an evaluation notice has 14 days to indicate his or her intent to accept or reject the modification offer, and (ii) in situations where a due-on-sale clause is not enforceable because the property transfer constitutes an "exempt transaction," a servicer must implement policies and procedures allowing it to promptly identify and communicate with the new property owner (including a widow, executor or administrator of the borrower's estate, or other authorized representative upon notice of the death of a borrower) and allow such new property owner to make mortgage payments, to pursue an assumption, and to be evaluated for foreclosure alternatives, as applicable. If a mortgage loan is delinquent and the new property owner is unable to bring the

mortgage loan current, he or she must be evaluated for all available workout options, and the servicer must follow Servicing Guide eligibility and Borrower Response Package requirements in doing so. All changes and updates take effect immediately for mortgage loans that become delinquent on or after the date of the announcement, except those related to unemployment forbearance. Servicers are required to implement the unemployment forbearance policies no later than November 1, 2013.

Banking, Housing Regulators Release Revised Credit Risk Retention/QRM Rule. On August 28, the FDIC, OCC, Federal Reserve Board, FHFA, SEC, and HUD released a [revised rule](#) to implement the credit risk retention requirements of the Dodd-Frank Act, including provisions defining "qualified residential mortgages" (QRMs). A [memorandum](#) prepared by FDIC staff in connection with the re-proposal highlights certain substantial changes from the rule [as originally proposed](#), including, among others: (i) generally defining a QRM as a mortgage meeting the requirements for a "qualified mortgage" as defined by the CFPB; (ii) calculating the 5% risk retention requirement for non-QRM mortgages and other non-exempt assets based on fair value (rather than par value) of the securitization transaction; (iii) eliminating the premium capture cash reserve account requirements; (iv) permitting the sale and hedging of required risk retention after specified time periods; (v) permitting a sponsor to hold any combination of vertical and horizontal first-loss interests that together represent 5% of the fair value of a securitization; (vi) providing that commercial, commercial real estate and automobile loans satisfying underwriting requirements for exemption from risk retention could be blended in asset pools with non-qualifying loans of the same asset class and remain eligible for reduced risk retention; and (vii) adding a new risk retention option for open market collateralized loan obligations (CLOs), available if the lead arrangers of the loans purchased by the CLO retain the required risk. The agencies also seek comment on an alternative QRM definition called QM-plus, which would encapsulate the core QM requirements but add additional conditions, including a 70% cap on LTV at closing, certain evaluation criteria with respect to credit history, and other product limitations. Comments on the re-proposed rule are due by October 30, 2013.

CFPB Announces Student Loan Debt Toolkit. On August 28, the CFPB [announced](#) the launch of a [toolkit](#) for use by school districts and other public service organizations in assisting employees repay student loan debt. The CFPB also asked such employers to [pledge to inform](#) their employees of available loan debt forgiveness options. The initiative accompanies the CFPB's issuance of a [Public Service & Student Debt](#) report, which analyzes loan repayment options for various types of public service employers in both the public and private sectors. The CFPB also released an online [action guide](#) to advise employees about public service loan forgiveness benefits and eligibility.

CFPB Announces New Leadership Positions. On August 26, the CFPB [announced](#) four individuals to serve in new leadership roles at the Bureau. Cheryl Parker Rose will serve as Assistant Director for the Office of Intergovernmental Affairs, which is responsible for coordinating the CFPB's work with other federal and state regulators, including state attorneys general. She joins the CFPB from the Bill and Melinda Gates Foundation, where she was Deputy Director of U.S. Government Relations. Prior to that, she was Senior Advisor and Director of Intergovernmental Affairs for House Speaker Nancy Pelosi. Christopher Carroll will serve as Assistant Director and Chief Economist for the Office of Research. Dr. Carroll is an economics professor at Johns Hopkins University and will be taking a leave of absence to join the CFPB in January 2014. Dr. Carroll also has served as a senior economist for the Council of Economic Advisors on two separate occasions, and as an economist for the Board of Governors of the Federal Reserve System. Ron Borzekowski—who joined the CFPB from the Federal Reserve Board at its inception and played a major role in the CFPB's mortgage rulemakings—will be the acting head of the Office of Research until January. Kathleen Ryan will serve as Deputy Assistant Director for the Office of Regulations, which is responsible for drafting amendments to the CFPB's regulations and providing guidance to

supervision and enforcement staff regarding the current regulations. Ms. Ryan joins the CFPB from JPMorgan Chase, where she was Senior Regulatory Counsel. Prior to that, she was Senior Counsel in the Federal Reserve Board's Division of Consumer and Community Affairs. Elizabeth Brennan Ellis will serve as Deputy Assistant Director for the Office of Financial Institutions and Business Liaison. Ms. Ellis has been with the CFPB since its inception and previously served as a Senior Advisor to the Chief of Staff.

OCC Announces Additional Foreclosure Review Settlement. On August 23, the OCC [announced](#) an amended consent order with one of the financial institutions that entered into a consent order in April 2011 to resolve allegations that the institutions engaged in improper mortgage servicing and foreclosure processing practices. The agreement follows numerous others [released](#) earlier this year and requires the institution to pay roughly \$43 million, including \$37 million in cash payments to more than 32,000 borrowers. The amendment also effectively ends the Independent Foreclosure Review process set forth under the original consent order for the institution and its customers.

Republican House Members Object To DOJ Online Lender Probe. Last week, a group of 31 Republican House Members [reportedly](#) submitted a letter to the DOJ and FDIC accusing the agencies of "intimidating some community banks and third party payment processors with threats of heightened regulatory scrutiny unless they cease doing business with online lenders." According to reports, the letter argues that the government's actions effectively cut off access to lawful, short-term, high-interest loans available online. Several prominent online lenders have [reportedly](#) ceased their lending operations in response to similar pressure from state regulators.

Banking Trade Group Objects To CFPB Consumer Complaint Data Collection. Last week, the American Bankers Association submitted a [letter](#) in response to the CFPB's [notice and request for comment](#) on certain information collection activities, namely its request for a generic clearance covering its consumer complaint and information collection system. The letter opposes the CFPB's clearance request, maintaining that such action by the CFPB would present substantive and policy issues that "mandate a level of public engagement and accountability not available pursuant to a generic clearance process." The comment period closed on August 26, 2013.

STATE ISSUES

Texas Finance Commission Increases Allowable Administrative Fees, Acquisition Charges; Sets Maximum Allowable Documentary Fees. On August 27, the Texas Finance Commission, Office of Consumer Credit Commissioner, issued a [bulletin](#) on recently adopted rules to increase certain allowable fees and charges on consumer loans and cash advances. The Commission exercised authority [recently granted](#) by the state legislature to set maximum amounts for administrative fees charged on consumer loans and acquisition charges on cash advances. The rules allow, respectively, authorized lenders to (i) collect on consumer loans an administrative fee that does not exceed \$100 and (ii) collect on cash advances an acquisition charge that does not exceed the lesser of 10% of the cash advance of the loan or \$100. The Commission also issued a second [bulletin](#) on a new rule setting the maximum documentary fees chargeable by Chapter 345 retail creditors in retail installment transactions, including a maximum fee of \$125 on transactions for the purchase of covered land vehicles or watercrafts. For transactions involving both the purchase of a land vehicle and a watercraft, the maximum amount chargeable is \$175. All of the changes take effect on September 5, 2013.

Washington Announces Enforcement Action Against Mortgage Transmitter. On August 26, the Washington State Department of Financial Institutions [announced](#) that it issued a [statement of](#)

[charges](#) against a company that accepts and transmits mortgage payments on behalf of homeowners in the state, alleging that the company (i) violated state licensing requirements by failing to obtain the required license as a money transmitter, (ii) misled consumers about the company's affiliation with their lender, servicer, or a government agency and how often payments would be transmitted, and (iii) falsely represented the amount of interest borrowers would save by having the company make payments.

North Carolina Amends Anti-Predatory Lending Law. On August 23, North Carolina enacted [HB 692](#), which amends the state's anti-predatory lending law. Effective October 1, 2013, the law increases the points and fees threshold for high cost home loans from 4% to 5% for loans of \$20,000 or more and excludes from the points and fees calculation any up-front fees collected and paid to the FHA, VA, or USDA. The bill also alters the state's rate spread home loans provisions to match federal restrictions.

Illinois Adds Foreclosure Tenant Rights. On August 21, Illinois enacted [SB 56](#), which adds rights for tenants of foreclosed properties. The law provides, among other things, that the entry of a judgment of foreclosure shall not terminate or otherwise affect the rights or interest of any occupant of a dwelling unit who has a lease or tenancy resulting from an arm's length transaction and who is not the mortgagor, whether or not the occupant has been made a party in the foreclosure. The bill also provides that the holder of the certificate of sale, the holder of the deed issued pursuant to that certificate, or, if no certificate or deed was issued, the purchaser at the sale shall: (i) assume the lease or tenancy of the mortgaged real estate resulting from an arm's length transaction entered into prior to the confirmation of sale; (ii) assume any federal, state, or local housing subsidy contract for the dwelling unit for the duration of the contract or the assumed lease, whichever is shorter; (iii) assume his or her interest in the mortgaged real estate subject to the rights of any occupant; and (iv) not terminate the occupancy or any occupant's tenancy, except as otherwise allowed under state law. The law also states that a deficiency judgment may not be sought or entered against a deceased mortgagor. All of the changes take effect on November 19, 2013.

Illinois Criminalizes Electronic Vehicle Tracking With Limited Exceptions. Recently, Illinois enacted [HB 1199](#), which makes it illegal for any person or entity in Illinois to use an electronic vehicle tracking device to determine the location or movement of a person. The law provides an exception for "telematics" services that were installed by a vehicle manufacturer, or installed by or with the consent of the owner or lessee of the vehicle and to which the owner or lessee has subscribed. Telematics include, but are not limited to, automatic airbag deployment and crash notification, remote diagnostics, navigation, stolen vehicle location, remote door unlock, transmitting emergency and vehicle location information to public safety answering points, and any other service integrating vehicle location technology and wireless communications. The bill takes effect on January 1, 2014.

COURTS

Fourth Circuit Holds TCPA Disclosure Requirements Constitutional. On August 28, the U.S. Court of Appeals for the Fourth Circuit published an [opinion](#), previously under seal, in which it held that provisions of the Telephone Consumer Protection Act (TCPA) requiring all automated telephone messages to disclose the entity initiating the call and its telephone number are constitutional. *State of Maryland v. Universal Elections, Inc.*, No. 12-1791 (4th Cir. July 29, 2013). In affirming the district court's judgment, the court identified three important government interests served by the disclosure requirements: (i) protecting residential privacy, by providing call recipients the information needed to stop future calls; (ii) promoting disclosure to avoid misleading recipients of recorded calls, by enabling call recipients to better evaluate the veracity of such messages; and

(iii) promoting effective law enforcement by assisting the government in detecting violations.

Petitioners File Supreme Court Opening Brief in Fair Housing Act Case. On August 26, the petitioners in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc. et al.*, No. 11-1507, filed their opening merits [brief](#) in the U.S. Supreme Court on the issue of whether disparate impact claims are cognizable under the Fair Housing Act (FHA). The petitioners argue that (i) under the ordinary meaning of the relevant FHA provision, intentional discrimination-and not a mere disparate impact-is required to establish a violation of Section 804(a) of the FHA, and (ii) because the HUD rule authorizing such claims "cannot be reconciled" with the plain language of the statute, it cannot be allowed *Chevron* doctrine deference and must be struck down. The respondents' brief is due October 21.

Federal District Court Holds Fannie Mae, Freddie Mac Exempt From Chicago's Property Maintenance Ordinance. On August 23, the U.S. District Court for the Northern District of Illinois [held](#) that Fannie Mae and Freddie Mac are exempt from a 2011 ordinance that established new requirements for mortgagees and their agents regarding the maintenance of vacant property. *FHFA v. City of Chicago*, No. 11-8795, 2013 WL 4505413 (N.D. Ill. Aug. 23, 2013). The FHFA, as conservator of Fannie Mae and Freddie Mac, sued the city over the ordinance, which requires mortgagees to register vacant properties and pay a \$500 registration fee per property. The ordinance also imposes maintenance and other obligations on mortgagees and their agents (including servicers, Fannie Mae and Freddie Mac), regardless of whether the properties are foreclosed upon, and mandates fines for non-compliance. The court granted summary judgment for the FHFA, holding that the statute that created the FHFA-the Housing and Economic Recovery Act of 2008 (HERA)-preempts the local ordinance. The court reasoned that although HERA does not expressly preempt local laws, Congress intended for the FHFA to be the only entity responsible for operating Fannie Mae's and Freddie Mac's business and could not have intended to allow thousands of municipalities to impose varying obligations on the FHFA. On those grounds, the court granted the FHFA's motion for summary judgment. The court also held in the alternative "for purposes of completeness" that the registration fees imposed on Fannie and Freddie by the ordinance would constitute an impermissible tax on the FHFA in violation of the federal government's immunity from taxation.

Third Circuit Holds TCPA Allows Consumers To Revoke Prior Consent. On August 22, the U.S. Court of Appeals for the Third Circuit [held](#) that the TCPA provides consumers the right to revoke their "prior express consent" to be contacted on their cellular phones by an automated telephone dialing system. *Gager v. Dell Fin. Servs., LLC*, No. 12-2823, 2013 WL 4463305 (3rd Cir. Aug. 22, 2013). The consumer provided her cellular number on an application for a line of credit where prompted to provide a home phone number and did not indicate it was her cellular phone number or that the financial services company should not use an automated dialing system to call the number. The consumer later sent a letter asking the company to stop calling the phone number she had provided on the application, but did not indicate that it was a cellular number. The district court dismissed the consumer's complaint alleging that the company violated the TCPA by continuing to call after she asked the company to stop calling the number, holding that the consumer could not revoke her prior express consent for three reasons, among them the premise the TCPA does not provide for "post-formation revocation of consent" and that any contrary instructions regarding contact by an automatic dialing system had to be given at the time she provided the number. On appeal, the court held that the absence of an express statutory authorization for revocation of prior express consent in the TCPA's provisions on autodialed calls to cellular phones does not mean no such right exists. The court held that the consent is revocable-with no limit on the time period for revocation-for three reasons: (i) the common law concept of consent shows that it is revocable; (ii) given the TCPA's purpose to protect and not constrict consumers rights, any silence in the statute as to revocation should be construed in favor of

consumers; and (iii) an FCC declaratory ruling in another matter that consumers may revoke their prior express consent to be contacted by autodialing systems delivering text messages. The court reversed the district court's dismissal and remanded for further proceedings.

MISCELLANY

US, Switzerland Announce Tax Evasion Program. On August 29, the DOJ [announced](#) a program to encourage Swiss banks to cooperate in its ongoing efforts to prosecute offshore tax evasion. The program-which, according to a [joint statement](#) with the Swiss Federal Department of Finance, Switzerland will encourage Swiss banks to consider participating in-requires, among other things, Swiss banks to make significant disclosures to the DOJ about cross-border activities and accounts that affect U.S. taxpayers in exchange for non-prosecution agreements or non-target letters.

FIRM NEWS

BuckleySandler is a sponsor of Five Star Institute's [Compliance Caucus](#), which takes place in Dallas, TX on September 9 and 10, 2013. The firm will have two speakers at this year's event: [Andrea Mitchell](#) will speak on the panel, "Understanding UDAAP and Emerging Regulations in Compliance," and [Ben Olson](#) will speak on the panel, "Get to Know CFPB and What's on the Agenda."

[James Shreve](#) will participate in the Knowledge Congress webinar, "Credit Union Alert: Understanding FFIEC's Cloud Computing Guidance," on September 9, 2013 at 12:00 PM (EDT). There are 30 complimentary passes for this event which can be accessed by [clicking here](#). Passes are on a first-come, first-served basis.

[Jeffrey Naimon](#) will speak at Mortgage Bankers Association's [Risk Management and Quality Assurance Forum](#) in Phoenix, AZ on September 11, 2013. His session entitled, "Regulatory Compliance Update," will analyze the Dodd-Frank Ability to Repay/QM rule requirements.

[Andrew Sandler](#) will speak at the Compliance Testing Manager's Annual Conference in Minneapolis, MN on September 19, 2013.

[Ben Olson](#) will speak at the National Mortgage News [Annual Mortgage Regulatory Forum](#), which takes place in Arlington, VA on September 23 and 24, 2013. His panel, scheduled for September 24, is entitled, "Navigating Future Regulatory Compliance Challenges and Enhancing Regulatory Relationship Management."

[Richard Gottlieb](#) will speak at American Conference Institute's [Residential Mortgage Litigation and Regulatory Enforcement](#) conference in Dallas, TX on September 27, 2013. He will participate in the panel, "Fair Lending: Managing and Defending Against Claims of Discriminatory Lending and Assessing the Status of 'Disparate Impact' in Lending Litigation and Enforcement," and will speak specifically on the interplay between UDAAP and fair lending enforcement.

[Jeffrey Naimon](#) will participate in the American Bar Association's [Consumer Financial Services Basics](#) seminar on September 30, 2013. He will speak on "Truth-in-Lending" and address key consumer financial services disclosure regulations and the future of disclosures as a regulatory technique.

[Andrew Sandler](#) will speak at the Mortgage Bankers Association's [Regulatory Compliance](#)

[Conference](#), which takes place in Washington, DC from September 29 to October 1, 2013 in Washington, DC. His panel, "Litigation and Enforcement Trends," is scheduled for September 30.

[James Shreve](#) will speak at the International Association of Privacy Professionals [Privacy Academy](#) in Seattle, WA on October 1, 2013. The session, "Is the Best Defense a Good Offense?," will discuss legal issues involved in employing active defense techniques in responding to cybersecurity incidents and risks.

[Thomas Sporkin](#) will speak at the [2013 Securities Enforcement Forum](#) in Washington, DC on October 9, 2013. His session is entitled, "Insider Trading, Whistleblowers, and Other 2013 Enforcement Priorities."

[James Shreve](#) will speak at the [Information Systems Security Association International Conference](#) in Nashville, TN on October 10, 2013. The session, "Get Up to Date: 20 Security & Privacy Laws in 50 Minutes," will examine the primary privacy and data security laws impacting information security professionals.

[David Baris](#) will speak at the American Bankers Association's [2013 Directors' Forum](#) in New Orleans, LA on October 20, 2013. The event immediately precedes the ABA's 2013 Annual Convention. His session is entitled, "Establishing an Effective Board Risk Management Committee."

[Thomas Sporkin](#) will be a panelist at the [Securities Fraud 2013 Conference](#), which takes place in New Orleans, LA on October 24 and 25, 2013. The panel will discuss whistleblowers.

[Andrew Sandler](#) will be a panelist at the [CRA and Fair Lending Colloquium](#), which takes place in Orlando, FL from November 3 to 6, 2013. He will participate on the panel, "Cool Head, Hot Topics: Reform Impact, Oversight Trends, and Regulator Expectations Realigning Priorities to Today's Hottest Trends," which will discuss recent Congressional and regulatory actions affecting the financial services industry.

[Margo Tank](#) and [David Whitaker](#) will speak at Electronic Signature and Record Association's [E-Signatures 2013 Annual Conference](#) in New York, NY on November 14, 2013. The panel is entitled, "E-Sign 101 - Questions, Answers, and Best Practices."

[James Parkinson](#) will speak at American Conference Institute's [30th International Conference on the Foreign Corrupt Practices Act](#) in Washington, DC on November 19, 2013. His panel is entitled "Anticipating and Managing Litigation Collateral to an FCPA Investigation: What May Happen When Allegations become Public."

[Richard Gottlieb](#) will speak at American Conference Institute's [Bank and Non-Bank Forum on Mortgage Servicing Compliance](#) in Washington, DC on November 21 and 22, 2013. His panel, "When Is a Residential Mortgage Loan Servicer Considered a Debt-Collector and Thus Potentially Subject to Liability for Violations of the FDCPA," will analyze federal and state laws relating to mortgage servicers and any potential inconsistencies, discuss the requirements for mortgage servicers who qualify as a debt collectors, and examine how to avoid violations under the FDCPA when servicing mortgage loans.

FIRM PUBLICATIONS

[Margo Tank](#), [Sara Emley](#), and [David Whitaker](#) published "[A Brief Guide to Using Electronic Signatures in Securities Transactions](#)" in the July-August 2013 issue of Practical Compliance and

Risk Management for the Securities Industry.

[John Redding](#) authored "[How the CFPB's Servicing Rules Apply to Small Servicers](#)," which was published by BankNews Mobile on July 1, 2013.

[Kirk Jensen](#) and [Valerie Hletko](#) authored "[More Scrutiny for Short-Term, Small-Dollar Lenders](#)," which appeared on Law360 on July 8, 2013.

[Jonice Gray Tucker](#) and [Amanda Raines](#) authored "[CFPB Investigations in Focus: Navigating CIDs](#)," which appeared on Law360 on July 11, 2013.

[Valerie Hletko](#) authored "[A Broader Application of Fair Debt Collection Principles](#)," which was published by Law360 on July 12, 2013.

[Jeffrey Naimon](#) and [Valerie Hletko](#) published "[HUD Sets the Stage for FCA Claims against Fund Recipients](#)," in Law360 on July 23, 2012.

[Margo Tank](#) was interviewed for Law360's [Rainmaker Q&A](#) series on July 23, 2012.

[Joseph Reilly](#) and [Shara Chang](#) published "[An Overview of the CFPB's Ability-to-Repay/Qualified Mortgage Rule](#)" in the July 2013 issue of the Banking & Financial Services Policy Report.

[Margo Tank](#) and [Ian Spear](#) authored "[What Emerging Payment Providers Can Learn From Liberty Reserve and Mt. Gox](#)," which appeared in the August 1, 2013 issue of Payments Journal.

[Jonice Gray Tucker](#) and [Amanda Raines](#) authored "[The CFPB's Amicus Program - Friend or Foe?](#)" for the August 6, 2013 issue of BNA's Banking Report.

[Valerie Hletko](#) and [Sarah Hager](#) authored "[Which One of Us is the Service Provider? The Dodd-Frank Act's Infinite Loop of Oversight](#)," which was published on August 9, 2013 in LexisNexis Emerging Issues Analysis.

About BuckleySandler LLP (www.buckleysandler.com)

With nearly 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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Petitioners File Supreme Court Opening Brief in Fair Housing Act Case. On August 26, the petitioners in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc. et al.*, No. 11-1507, filed their opening merits [brief](#) in the U.S. Supreme Court on the issue of whether disparate impact claims are cognizable under the Fair Housing Act (FHA). The petitioners argue that (i) under the ordinary meaning of the relevant FHA provision, intentional discrimination-and not a mere disparate impact-is required to establish a violation of Section 804(a) of the FHA, and (ii) because

the HUD rule authorizing such claims "cannot be reconciled" with the plain language of the statute, it cannot be allowed *Chevron* doctrine deference and must be struck down. The respondents' brief is due October 21.

Federal District Court Holds Fannie Mae, Freddie Mac Exempt From Chicago's Property Maintenance Ordinance. On August 23, the U.S. District Court for the Northern District of Illinois [held](#) that Fannie Mae and Freddie Mac are exempt from a 2011 ordinance that established new requirements for mortgagees and their agents regarding the maintenance of vacant property. *FHFA v. City of Chicago*, No. 11-8795, 2013 WL 4505413 (N.D. Ill. Aug. 23, 2013). The FHFA, as conservator of Fannie Mae and Freddie Mac, sued the city over the ordinance, which requires mortgagees to register vacant properties and pay a \$500 registration fee per property. The ordinance also imposes maintenance and other obligations on mortgagees and their agents (including servicers, Fannie Mae and Freddie Mac), regardless of whether the properties are foreclosed upon, and mandates fines for non-compliance. The court granted summary judgment for the FHFA, holding that the statute that created the FHFA—the Housing and Economic Recovery Act of 2008 (HERA)—preempts the local ordinance. The court reasoned that although HERA does not expressly preempt local laws, Congress intended for the FHFA to be the only entity responsible for operating Fannie Mae's and Freddie Mac's business and could not have intended to allow thousands of municipalities to impose varying obligations on the FHFA. On those grounds, the court granted the FHFA's motion for summary judgment. The court also held in the alternative "for purposes of completeness" that the registration fees imposed on Fannie and Freddie by the ordinance would constitute an impermissible tax on the FHFA in violation of the federal government's immunity from taxation.

BANKING

Banking, Housing Regulators Release Revised Credit Risk Retention/QRM Rule. On August 28, the FDIC, OCC, Federal Reserve Board, FHFA, SEC, and HUD released a [revised rule](#) to implement the credit risk retention requirements of the Dodd-Frank Act, including provisions defining "qualified residential mortgages" (QRMs). A [memorandum](#) prepared by FDIC staff in connection with the re-proposal highlights certain substantial changes from the rule [as originally proposed](#), including, among others: (i) generally defining a QRM as a mortgage meeting the requirements for a "qualified mortgage" as defined by the CFPB; (ii) calculating the 5% risk retention requirement for non-QRM mortgages and other non-exempt assets based on fair value (rather than par value) of the securitization transaction; (iii) eliminating the premium capture cash reserve account requirements; (iv) permitting the sale and hedging of required risk retention after specified time periods; (v) permitting a sponsor to hold any combination of vertical and horizontal first-loss interests that together represent 5% of the fair value of a securitization; (vi) providing that commercial, commercial real estate and automobile loans satisfying underwriting requirements for exemption from risk retention could be blended in asset pools with non-qualifying loans of the same asset class and remain eligible for reduced risk retention; and (vii) adding a new risk retention option for open market collateralized loan obligations (CLOs), available if the lead arrangers of the loans purchased by the CLO retain the required risk. The agencies also seek comment on an alternative QRM definition called QM-plus, which would encapsulate the core QM requirements but add additional conditions, including a 70% cap on LTV at closing, certain evaluation criteria with respect to credit history, and other product limitations. Comments on the re-proposed rule are due by October 30, 2013.

OCC Announces Additional Foreclosure Review Settlement. On August 23, the OCC [announced](#) an amended consent order with one of the financial institutions that entered into a consent order in April 2011 to resolve allegations that the institutions engaged in improper mortgage

servicing and foreclosure processing practices. The agreement follows numerous others [released](#) earlier this year and requires the institution to pay roughly \$43 million, including \$37 million in cash payments to more than 32,000 borrowers. The amendment also effectively ends the Independent Foreclosure Review process set forth under the original consent order for the institution and its customers.

Republican House Members Object To DOJ Online Lender Probe. Last week, a group of 31 Republican House Members [reportedly](#) submitted a letter to the DOJ and FDIC accusing the agencies of "intimidating some community banks and third party payment processors with threats of heightened regulatory scrutiny unless they cease doing business with online lenders." According to reports, the letter argues that the government's actions effectively cut off access to lawful, short-term, high-interest loans available online. Several prominent online lenders have [reportedly](#) ceased their lending operations in response to similar pressure from state regulators.

Banking Trade Group Objects To CFPB Consumer Complaint Data Collection. Last week, the American Bankers Association submitted a [letter](#) in response to the CFPB's [notice and request for comment](#) on certain information collection activities, namely its request for a generic clearance covering its consumer complaint and information collection system. The letter opposes the CFPB's clearance request, maintaining that such action by the CFPB would present substantive and policy issues that "mandate a level of public engagement and accountability not available pursuant to a generic clearance process." The comment period closed on August 26, 2013.

Texas Finance Commission Increases Allowable Administrative Fees, Acquisition Charges; Sets Maximum Allowable Documentary Fees. On August 27, the Texas Finance Commission, Office of Consumer Credit Commissioner, issued a [bulletin](#) on recently adopted rules to increase certain allowable fees and charges on consumer loans and cash advances. The Commission exercised authority [recently granted](#) by the state legislature to set maximum amounts for administrative fees charged on consumer loans and acquisition charges on cash advances. The rules allow, respectively, authorized lenders to (i) collect on consumer loans an administrative fee that does not exceed \$100 and (ii) collect on cash advances an acquisition charge that does not exceed the lesser of 10% of the cash advance of the loan or \$100. The Commission also issued a second [bulletin](#) on a new rule setting the maximum documentary fees chargeable by Chapter 345 retail creditors in retail installment transactions, including a maximum fee of \$125 on transactions for the purchase of covered land vehicles or watercrafts. For transactions involving both the purchase of a land vehicle and a watercraft, the maximum amount chargeable is \$175. All of the changes take effect on September 5, 2013.

Washington Announces Enforcement Action Against Mortgage Transmitter. On August 26, the Washington State Department of Financial Institutions [announced](#) that it issued a [statement of charges](#) against a company that accepts and transmits mortgage payments on behalf of homeowners in the state, alleging that the company (i) violated state licensing requirements by failing to obtain the required license as a money transmitter, (ii) misled consumers about the company's affiliation with their lender, servicer, or a government agency and how often payments would be transmitted, and (iii) falsely represented the amount of interest borrowers would save by having the company make payments.

North Carolina Amends Anti-Predatory Lending Law. On August 23, North Carolina enacted [HB 692](#), which amends the state's anti-predatory lending law. Effective October 1, 2013, the law increases the points and fees threshold for high cost home loans from 4% to 5% for loans of \$20,000 or more and excludes from the points and fees calculation any up-front fees collected and paid to the FHA, VA, or USDA. The bill also alters the state's rate spread home loans provisions to match federal restrictions.

CONSUMER FINANCE

CFPB Seeks To Ratify Director's Pre-Confirmation Actions. On August 30, the CFPB published a "[Notice of Ratification](#)" in the Federal Register in response to concerns about the legal validity of its actions during the period that Director Richard Cordray served as recess appointee. Director Cordray was first appointed on January 4, 2012 pursuant to the President's recess authority and was re-appointed on July 17, 2013 after confirmation by the Senate.

CFPB Announces Student Loan Debt Toolkit. On August 28, the CFPB [announced](#) the launch of a [toolkit](#) for use by school districts and other public service organizations in assisting employees repay student loan debt. The CFPB also asked such employers to [pledge to inform](#) their employees of available loan debt forgiveness options. The initiative accompanies the CFPB's issuance of a [Public Service & Student Debt](#) report, which analyzes loan repayment options for various types of public service employers in both the public and private sectors. The CFPB also released an online [action guide](#) to advise employees about public service loan forgiveness benefits and eligibility.

CFPB Announces New Leadership Positions. On August 26, the CFPB [announced](#) four individuals to serve in new leadership roles at the Bureau. Cheryl Parker Rose will serve as Assistant Director for the Office of Intergovernmental Affairs, which is responsible for coordinating the CFPB's work with other federal and state regulators, including state attorneys general. She joins the CFPB from the Bill and Melinda Gates Foundation, where she was Deputy Director of U.S. Government Relations. Prior to that, she was Senior Advisor and Director of Intergovernmental Affairs for House Speaker Nancy Pelosi. Christopher Carroll will serve as Assistant Director and Chief Economist for the Office of Research. Dr. Carroll is an economics professor at Johns Hopkins University and will be taking a leave of absence to join the CFPB in January 2014. Dr. Carroll also has served as a senior economist for the Council of Economic Advisors on two separate occasions, and as an economist for the Board of Governors of the Federal Reserve System. Ron Borzekowski—who joined the CFPB from the Federal Reserve Board at its inception and played a major role in the CFPB's mortgage rulemakings—will be the acting head of the Office of Research until January. Kathleen Ryan will serve as Deputy Assistant Director for the Office of Regulations, which is responsible for drafting amendments to the CFPB's regulations and providing guidance to supervision and enforcement staff regarding the current regulations. Ms. Ryan joins the CFPB from JPMorgan Chase, where she was Senior Regulatory Counsel. Prior to that, she was Senior Counsel in the Federal Reserve Board's Division of Consumer and Community Affairs. Elizabeth Brennan Ellis will serve as Deputy Assistant Director for the Office of Financial Institutions and Business Liaison. Ms. Ellis has been with the CFPB since its inception and previously served as a Senior Advisor to the Chief of Staff.

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Fourth Circuit Holds TCPA Disclosure Requirements Constitutional. On August 28, the U.S. Court of Appeals for the Fourth Circuit published an [opinion](#), previously under seal, in which it held that provisions of the Telephone Consumer Protection Act (TCPA) requiring all automated telephone messages to disclose the entity initiating the call and its telephone number are constitutional. *State of Maryland v. Universal Elections, Inc.*, No. 12-1791 (4th Cir. July 29, 2013). In affirming the district court's judgment, the court identified three important government interests served by the disclosure requirements: (i) protecting residential privacy, by providing call recipients the information needed to stop future calls; (ii) promoting disclosure to avoid misleading recipients of recorded calls, by enabling call recipients to better evaluate the veracity of such messages; and (iii) promoting effective law enforcement by assisting the government in detecting violations.

Third Circuit Holds TCPA Allows Consumers To Revoke Prior Consent. On August 22, the U.S. Court of Appeals for the Third Circuit [held](#) that the TCPA provides consumers the right to revoke their "prior express consent" to be contacted on their cellular phones by an automated telephone dialing system. *Gager v. Dell Fin. Servs., LLC*, No. 12-2823, 2013 WL 4463305 (3rd Cir. Aug. 22, 2013). The consumer provided her cellular number on an application for a line of credit where prompted to provide a home phone number and did not indicate it was her cellular phone number or that the financial services company should not use an automated dialing system to call the number. The consumer later sent a letter asking the company to stop calling the phone number she had provided on the application, but did not indicate that it was a cellular number. The district court dismissed the consumer's complaint alleging that the company violated the TCPA by continuing to call after she asked the company to stop calling the number, holding that the consumer could not revoke her prior express consent for three reasons, among them the premise the TCPA does not provide for "post-formation revocation of consent" and that any contrary instructions regarding contact by an automatic dialing system had to be given at the time she provided the number. On appeal, the court held that the absence of an express statutory authorization for revocation of prior express consent in the TCPA's provisions on autodialed calls to cellular phones does not mean no such right exists. The court held that the consent is revocable-with no limit on the time period for revocation-for three reasons: (i) the common law concept of consent shows that it is revocable; (ii) given the TCPA's purpose to protect and not constrict consumers rights, any silence in the statute as to revocation should be construed in favor of consumers; and (iii) an FCC declaratory ruling in another matter that consumers may revoke their prior express consent to be contacted by autodialing systems delivering text messages. The court

reversed the district court's dismissal and remanded for further proceedings.

PAYMENTS

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PRIVACY/DATA SECURITY

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Illinois Criminalizes Electronic Vehicle Tracking With Limited Exceptions. Recently, Illinois enacted [HB 1199](#), which makes it illegal for any person or entity in Illinois to use an electronic vehicle tracking device to determine the location or movement of a person. The law provides an exception for "telematics" services that were installed by a vehicle manufacturer, or installed by or with the consent of the owner or lessee of the vehicle and to which the owner or lessee has subscribed. Telematics include, but are not limited to, automatic airbag deployment and crash notification, remote diagnostics, navigation, stolen vehicle location, remote door unlock, transmitting emergency and vehicle location information to public safety answering points, and any other service integrating vehicle location technology and wireless communications. The bill takes effect on January 1, 2014.

CRIMINAL ENFORCEMENT

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US, Switzerland Announce Tax Evasion Program. On August 29, the DOJ [announced](#) a program to encourage Swiss banks to cooperate in its ongoing efforts to prosecute offshore tax evasion. The program-which, according to a [joint statement](#) with the Swiss Federal Department of Finance, Switzerland will encourage Swiss banks to consider participating in-requires, among other things, Swiss banks to make significant disclosures to the DOJ about cross-border activities and accounts that affect U.S. taxpayers in exchange for non-prosecution agreements or non-target letters.

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