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DODD-FRANK
NEWS

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The Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted as a measure to promote financial stability and protection for consumers through increased regulation of nearly every aspect of the consumer finance industry. In the two years since its enactment, the Dodd-Frank Act has led to significant industry reforms and the promulgation of numerous new laws and regulations. In an effort to stay apprised of these significant industry changes, Burr & Forman's Dodd-Frank Newsletter will serve as a periodic update of recent case law, news, and developments related to the Dodd-Frank Act.

- - RECENT CASES - -

Dodd-Frank Act Amendments to RESPA

Steele v. Quantum Servicing Corp., No. 3:12-CV-2897-L, 2013 WL 3196544 (N.D. Tex. Jun. 25, 2013).

The U.S. District Court for the Northern District of Texas recently granted a motion to vacate its prior order determining that Plaintiffs' Real Estate Settlement Practices Act ("RESPA") claim was barred by *res judicata*. The Court nonetheless concluded, however, that dismissal of the claim was proper for other reasons, including that the foreclosure on Plaintiffs' property took place before expiration of the pre-Dodd-Frank deadline for Defendants to act under RESPA.

Plaintiffs asserted RESPA claims against Defendants based on three separate qualified written requests ("QWRs") made in October 2008, March 2009, and March 2012. The Court originally found the claims to be barred entirely by *res judicata*, as Plaintiffs had asserted RESPA claims related to the October 2008 and March 2009 QWRs against Defendants in a prior action. In their motion to vacate and response to Defendants' motion to dismiss, however, Plaintiffs argued their current claim related only to the March 2012 QWR. As such, the Court concluded that "even though Plaintiffs alleged facts pertaining to alleged QWRs sent in 2008 and 2009, they did not intend to assert a RESPA claim based on these alleged prior violations, which the court dismissed in *Steele I*." *Id.* at *5. Thus, the Court held Plaintiffs' RESPA claim was not, in fact, barred by *res judicata*.

The Court nonetheless found that Plaintiffs' RESPA claims were due to be dismissed. In so determining, the Court noted that the Dodd-Frank Act shortened the period of time in which a servicer is required to provide a written response to a QWR under 12 U.S.C. § 2605(e)(1)(A) from twenty days to five days. The Act likewise shortened the period of time in which a servicer is required to make necessary corrections to the borrower's account, provide a written explanation as to why the loan servicer believes the account is correct, or explain why the information requested is unavailable under 12 U.S.C. § 2605(e)(2) from sixty days to thirty days. *See* 2013 WL 3196544 at *5-6. Importantly, however, these Dodd-Frank amendments "are not effective until January 10, 2014." *Id.* at *6 (citing *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1145 n.3 (10th Cir. 2013)). Thus, the Court found the revised deadlines did not apply to Plaintiffs' RESPA claim based on their March 30, 2012 QWR. *See id.*.

The Court went on to find that Plaintiffs failed to state a RESPA claim against Defendants because they did not allege any actual damages that could have resulted from the purported failure of Defendants to acknowledge and respond to their QWR. As part of this analysis, the Court found that Plaintiffs' claim for damages related to the foreclosure and loss of title to their property was without merit, as the foreclosure occurred before expiration of the pre-Dodd-Frank 20-day deadline for Defendants to respond to the QWR. *Id.* at *9. It further noted that "given the foreclosure and sale of the Property occurred before the deadline under RESPA to respond to Plaintiffs' March 30, 2012 letter, the court questions whether Defendants had any obligation under RESPA to respond to Plaintiffs' additional last-minute requests for information and contentions regarding inaccuracies in their account." *Id.* Finally, the Court rejected

Plaintiffs' claim that their March 30, 2012 QWR impacted Defendants' authority to foreclosure, because "the statute provides damages as a remedy and nothing more." *Id.*

Accordingly, because the Court could not "reasonably infer" from Plaintiffs' allegations that their alleged damages resulted from any failure by Defendants to acknowledge or respond to the March 30, 2012 QWR, Plaintiffs failed to state a RESPA claim upon which relief could be granted. *Id.* at *11.

Amendments to Preemption Standards

Lenhart v. Bank of America, N.A., No. 2:12-cv-4184, 2013 WL 1814820 (S.D. W. Va. Apr. 29, 2013).

The U.S. District Court for the Southern District of West Virginia reiterated the holding of the Fourth Circuit Court of Appeals in *McCauley v. Home Loan Inv. Bank, F.S.B.*, 710 F.3d 551 (4th Cir. 2013), finding that Dodd-Frank amendments to the preemption standards under the Home Owners' Loan Act ("HOLA") do not apply retroactively.

Plaintiffs filed a five-count amended complaint against their former and current loan servicers, Bank of America and EverBank. Among other allegations, Plaintiffs claimed EverBank violated the West Virginia Consumer Credit Protection Act ("WVCCPA") by attempting to collect payment by communicating directly with Plaintiffs despite knowing they were represented by counsel. 2013 WL 1814820 at *11. EverBank moved to dismiss the claim, arguing that it was preempted by HOLA and the Office of Thrift Supervision's pre-Dodd-Frank regulation governing preemption, 12 C.F.R. § 560.2. In response, Plaintiffs argued the Dodd-Frank Act preemption amendments precluded a finding of preemption. *Id.*

Addressing Plaintiffs' argument, the Court turned to the Fourth Circuit's decision in *McCauley* finding that "the applicable HOLA regulation governing preemption was that which was in effect when the loan contract was entered into." *Id.* Because Plaintiffs' loan was entered into before the effective date of the Dodd-Frank, the Court analyzed the preemption issue with respect to the prior governing regulation, 12 C.F.R. § 560.2. Nonetheless, the Court concluded that the nature of Plaintiff's WVCCPA claim "resides outside of the preemptive scope of section 560.2(a) generally, and moreover, it only incidentally -- if at all -- affects lending." Thus, the claim was not preempted under pre-Dodd-Frank HOLA standards, and EverBank's motion to dismiss the claim was denied. *Id.* at *12.

Whistleblower Protection

Murray v. USB Securities, LLC, No. 12 CIV. 5914 (JMF), 2013 WL 2190084 (S.D.N.Y. May 21, 2013).

Plaintiff Trevor Murray filed suit against his former employer, UBS Securities, LLC, and its parent company alleging violations of the whistleblower protection provisions of the Dodd-Frank Act. Murray based his claim on allegations that Defendants' decision to terminate his employment was "motivated, in part, by his making disclosures that are protected by Section 806 of the Sarbanes-Oxley Act (18 U.S.C. § 1514A)." Defendants moved to dismiss the Complaint on the grounds that Murray did not make a report to the SEC and, therefore, was not a "whistleblower" as defined by the Act.

Defendants argued that pursuant to the plain language of 15 U.S.C. § 78u-(a)(6), a "whistleblower" is an "individual who provides . . . information relating to a violation of the securities laws *to the Commission*." Thus, the whistleblower protection provisions of the Dodd-Frank Act apply "exclusively to someone who provided information to the SEC," a category that would exclude Murray, as he provided information only to UBS supervisors. 2013 WL 2190084 at *3.

In contrast, Murray argued that 15 U.S.C. § 78u-6(h)(1)(A)(iii) establishes a narrow exception to the definition of "whistleblower" and "protects any employee who makes any of the provision's enumerated disclosures, including disclosures that are required or protected under the Sarbanes-Oxley Act." *Id.*

Analyzing the parties' positions, the Court first noted that four other district courts have endorsed Murray's reading of the statute. *Id.* It further noted that the SEC promulgated a final rule on August 12, 2011 addressing the interplay between 15 U.S.C. §§ 78u-6(a)(6) and (h)(1)(A), the comments to which provide that "the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission." *Id.* at *3 (quoting SEC Securities

Whistleblower Incentives and Protections, 76 Fed. Reg. 34300-01, at *34304, 2011 WL 2293084 (2011) ("Comments to Final Rule")). Thus, the Court concluded that under the SEC's view of the Act, "the anti-retaliation provision's protections extend to those who make disclosures that are protected under the Sarbanes-Oxley Act, whether or not the disclosures were made to the SEC itself." *Id.* at *4.

Finding the statutory text to be sufficiently ambiguous as to warrant deference to the SEC's interpretation, the Court ultimately concluded that "the anti-retaliation whistleblower protections of the Dodd-Frank require Plaintiff to show that he either provided information to the SEC *or* that his disclosures fell under the four categories listed in Section 78u-6(h)(1)(A)(iii)." *Id.* at *7. Because Murray had sufficiently alleged he was terminated in part due to making disclosures protected by Section 608 of the Sarbanes-Oxley Act, the Court denied Defendants' motion to dismiss.

Asadi v. G.E. Energy (USA), L.L.C., -- F.3d --, No. 12-205222, 2013 WL 3742492 (5th Cir. Jul. 17, 2013).

Ruling opposite of *Murray* and a number of other district courts addressing the issue, the Fifth Circuit Court of Appeals recently held the whistleblower-protection provisions of the Dodd-Frank Act create a private cause of action only for individuals who provide information relating to a violation of securities laws directly to the SEC.

Plaintiff-Appellant Khaled Asadi filed a complaint alleging his employer, Defendant-Appellee G.E. Energy (USA), L.L.C., violated the whistleblower protection provisions of the Dodd-Frank Act, 15 U.S.C. § 78u-6(h), by terminating him after he made an internal report of a possible securities law violation. The U.S. District Court for the Southern District of Texas granted GE Energy's motion to dismiss, and Asadi appealed. Finding Asadi was not a "whistleblower" as defined by the Dodd-Frank Act, the Fifth Circuit Court of Appeals affirmed the dismissal.

The Court of Appeals premised the question before it as "relatively straightforward" concerning whether an individual who is not a "whistleblower" under the statutory definition of that term found in 15 U.S.C. § 78u-6(a)(6) may, in some circumstances, nevertheless seek relief under the whistleblower-protection provision.

Turning first to the language of the statute, the Court noted that 15 U.S.C. § 78u-6(a)(6) defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission* . . ." *Id.* (emphasis added). In response to this language, Asadi argued the provision should be construed to protect individuals who take actions falling within 15 U.S.C. § 78u-6(h)(1)(A)(iii) -- *i.e.,* making disclosures required or protected under any law, rule, or regulation subject to the jurisdiction of the SEC -- whether or not such disclosures are made directly to the SEC. Noting that "Asadi has some case law, as well as the SEC regulation on this issue, in his corner," the Court nonetheless rejected Asadi's proposed construction of the statute, finding the "perceived conflict between § 78u-6(a)(6) and § 78u-6(h)(1)(A)(iii) rests on a misreading of the operative provisions of § 78u-6." 2012 WL 3742492 at *3.

The Court explained that the definition of "whistleblower" in § 78u-6(a)(6) and the third category of protected activity in § 78u-6(h)(1)(A)(iii) could only conflict "if we read the three categories of protected activity as additional definitions of three types of whistleblowers." *Id.* at *5. Importantly, however, the Court found that "§ 78u-6(h)(1)(A) does not provide alternative definitions of the term 'whistleblower' for purposes of the whistleblower-protection provision. Instead the text of § 78u-6 clearly and unambiguously provides a single definition of 'whistleblower.'" *Id.* It further found that "the interplay between § 78u-6(a)(6) and § 78u-6(h)(1)(A)(iii) does not render § 78u-6(h)(1)(A)(iii) superfluous," as the "third category of protected activity has effect even when we construe the protection from retaliation under Dodd-Frank to apply only to individuals who qualify as 'whistleblowers' under the statutory definition of that term." *Id.*

Given its determination that the statutory language was not ambiguous, the Court rejected the SEC's "expansive interpretation" of the term "whistleblower" indicated in its final rule addressing the statute. The Court also noted that Asadi's proposed construction of the Dodd-Frank's statutory protection would render moot, for practical purposes, the anti-retaliation provision of the Sarbanes-Oxley Act ("SOX"), as any individual making a disclosure protected by the SOX could also bring a Dodd-Frank Act claim on the same disclosure, thereby taking advantage of greater monetary damages, the lack of a federal agency filing prerequisite, and a longer statute of limitations. *See id.* at *6-7.

For all of the above reasons, the Court ultimately held that the plain language of the Dodd-Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of securities laws directly to the SEC. Because Asadi did not do so, his whistleblower-protection claim failed as a matter of law, and the Court affirmed dismissal of his Dodd-Frank claim.

SEC Final Rule Pursuant to Dodd-Frank Act Vacated

American Petroleum Institute v. S.E.C., -- F. Supp. 2d --, No. 12-1668 (JDB), 2013 WL 3307114 (D.D.C. Jul. 2, 2013).

The U.S. District Court for the District of Columbia recently vacated a rule issued by the Securities and Exchange Commission ("SEC") requiring public disclosure of payments made to foreign governments in connection with the commercial development of oil, natural gas, or minerals.

Section 1504 of the Dodd-Frank Act added Section 13(q) to the Securities Exchange Act, codified at 15 U.S.C. § 78m(q), which directs the SEC to issue final rules requiring companies that engage "in the commercial development of oil, natural gas or minerals," to "include in an annual report of the resource extraction issuer information relating to any payment made . . . to a foreign government or the [U.S.] government for the purpose of the commercial development of oil, natural gas or minerals." 15 U.S.C. § 78m(q)(2)(A). Section 13(q) further directs, in a separate subsection titled, "Public availability of information," that, "to the extent practicable, the commission shall make available online, to the public, a compilation of the information required to be submitted [in the annual report]." 15 U.S.C. § 78m(q)(3).

Pursuant to these requirements, the SEC promulgated a final rule setting forth information issuers must provide in certain annual reports and directing that disclosures be made in a new form rather than the existing Exchange Act annual report. The American Petroleum Institute, U.S. Chamber of Commerce, Independent Petroleum Association of America and the National Foreign Trade Council then filed a lawsuit challenging the rule. Together, Plaintiffs argued that Section 13(q) and the rule improperly compel speech in violation of the First Amendment and presented various challenges under the Administrative Procedures Act ("APA"). The Court, however, did not reach Plaintiffs' First Amendment challenge or most of their APA arguments, as it found that "two substantial errors require vacatur [of the rule]: the commission misread the statute to mandate public disclosure of the reports, and its decision to deny any exemption was, given the limited explanation provided, arbitrary and capricious." 2013 WL 3307114 at *4.

With respect to public disclosure, the Court noted the SEC's position in creating the rule that it was bound by the Dodd-Frank to require the public filing of annual reports. *See id.* Assessing the statute's plain language, however, the Court found the section 13(q) "says nothing about *public* filing of these reports . . . The statute speaks of 'disclosure' and 'an annual report,' not 'public disclosure' and not a 'publicly filed annual report.'" *Id.* The Court went on to find that nothing in the phrase "annual report," whether viewed alone or in the context of section 13(q), required public disclosure, and use of the term "report" throughout the Exchange Act as a whole contained no "unstated" public filing requirement. *Id.* at *6-7. Moreover, the Court found that section 13(q)'s provisions related to publically-available information were narrower than the underlying disclosure requirement, noting that public availability is limited to "a compilation of the information," and is required only "to the extent practicable."

The Court then turned to the SEC's decision to deny any exemption from the rule for countries that prohibit payment disclosure. *Id.* at *12. During the rulemaking process, industry participants argued that absent an exemption, they may be forced to withdraw from certain countries -- including Angola, Cameroon, China and Qatar -- which prohibit disclosure of payment information. The SEC declined to adopt the exemption, explaining that it "would be inconsistent with the structure and language of Section 13(q)," and that it "could undermine the statute by encouraging countries to adopt laws, or interpret existing laws, specifically prohibiting the disclosure required under the final rules." *Id.* Finding the SEC's reason for rejecting the exemption did not "hold water," the Court stated the SEC "impermissibly rested on the blanket proposition that avoiding all exemptions best furthers Section 13(q)'s purpose." *Id.* at *14. The Court held that "[g]iven the proportion of the burdens on competition and investors associated with this single decision, a fuller analysis was warranted." *Id.* Nonetheless, the SEC "undertook no such specific analysis . . . instead focusing heavily on the statute's apparent purpose -- a purpose it conceived more broadly than the statutory text, which emphasizes practicability." *Id.* at *15. Thus, the SEC's exemption analysis was "arbitrary and capricious and independently invalidates the rule." *Id.*

Based on these reasons, the Court granted plaintiffs' motion for summary judgment and entered an order vacating the rule and remanding it to the SEC for further proceedings.

Dodd-Frank Act Amendments to SIPA

In re MF Global, Inc., -- B.R. --, No. 11-2790 (MG) SIPA, 2013 WL 3223375 (Bankr. S.D.N.Y. Jun. 27, 2013).

The U.S. Bankruptcy Court for the Southern District of New York recently held that Dodd-Frank Act amendments to the Securities Investor Protection Act of 1970 ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.*, did not lead to a different result regarding the "customer" status of claimant Cobalt Mortgage, Inc.

The Dodd-Frank Act amended SIPA § 78lll(2)(B) to extend the protections of SIPA beyond simply securities futures. Prior to the Dodd-Frank Act, § 78lll(2)(B) explained that a "customer" under the SIPA "includes any person who has a claim against the debtor arising out of sales or conversions of such securities, and any person who has deposited cash with the debtor for the purpose of purchasing securities . . ." The Dodd-Frank amended this provision to add that a "customer" under SIPA also includes "any person who has a claim for cash, securities, futures, contracts, or options on futures contracts received, acquired, or held in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the Commission . . ." 2013 WL 3223375 at *6.

The legislative history to the amendment explains that "[u]nder current law, the protections of SIPA do not extend to futures contracts other than securities futures. As a result, customers currently are effectively precluded from including securities and related futures in a single securities account." *Id.* at *6 (quoting S. Rep. 111-176 at 155-56). Through the amendment, the section "will now enable customers to benefit from hedging activities by facilitating the inclusion of both securities and related futures products in a single 'portfolio management account' provided for under rules of self-regulatory organizations approved by the [SEC]." *Id.*

Having already found that Cobalt did not qualify as a "customer" under the pre-Dodd-Frank version of SIPA, the Court turned to the impact of the amendment on its decision. The Court noted that "[i]n order for the Dodd-Frank Act to alter Cobalt's status under the statute, Cobalt must have a claim against MFGI for (1) cash, securities, futures, contracts, or options on future contracts that are (2) 'received, acquired, or held in a portfolio margining program approved by the Commission.'" *Id.* at *7. In light of this framework, the Court first noted that Cobalt had put forth no factual or legal arguments in support of its position that the contracts at issue were held in a portfolio margining account carried and regulated by the SEC. Nonetheless, the Court found it unnecessary to decide that issue, as Cobalt had not transferred any cash to MFGI related to the contracts prior to the filing date. Moreover, the Court noted that the Dodd-Frank Act did not amend the definition of "security" under the SIPA, and the contracts at issue did not qualify as "securities" under the statute. Accordingly, the Court found that Cobalt was not entitled to "customer" status under SIPA and the Dodd-Frank Act amendments did not alter its conclusion.

- - NEWS & DEVELOPMENTS - -

Senate Introduces Bank Regulatory Relief Bill

Senators Jerry Moran (R-Kan.), Jon Tester (D-Mont.), and Mark Kirk (R-Ill.) recently introduced H.R. 1750, a bill which would provide regulatory relief in the banking industry.

Specifically, the bill would exempt banks with $10 billion or less in assets from many of Sarbanes-Oxley's requirements. The bill would also expand the qualified mortgage safe harbor, provide escrow requirement exemptions on first-lien mortgages for lenders with $10 billion or less in assets, and require the Federal Reserve to increase its small bank holding company asset threshold to $5 billion.

To read the bill, visit: http://www.gpo.gov/fdsys/pkg/BILLS-113hr1750ih/pdf/BILLS-113hr1750ih.pdf

House Financial Services Committee Approves Housing Reform Bill for Consideration

The House Financial Services Committee recently approved a housing reform bill, H.R. 2767. Known as the Protecting American Taxpayers and Homeowners Act of 2013, the bill ultimately aims to privatize the mortgage market.

First, the bill would wind down Fannie Mae and Freddie Mac over a five year period. Second, the bill would make several reforms to the FHA, including limiting FHA insurance to first-time and low-income borrowers. Finally, the bill would establish a National Mortgage Market Utility as a replacement for Fannie Mae and Freddie Mac, which would exist to enhance efficiency, liquidity, and security in the secondary market for residential mortgages.

To read the bill, visit: http://thomas.loc.gov/cgi-bin/query/D?c113:5:./temp/~c113BInfW4::

CFPB Sues Mortgage Company Alleging Violations of Loan Originator Compensation Rule

On July 23, 2013, the CFPB filed a lawsuit against Castle & Cooke Mortgage LLC in the U.S. District Court for the District of Utah, seeking restitution and civil penalities for alleged violations of the Federal Reserve's loan originator compensation rule.

The CFPB alleges that Castle & Cooke's executives violated the loan originator compensation rule by awarding substantial quarterly bonuses to employees who persuaded consumers to take on more expensive loans. The CFPB believes that tens of thousands of consumers may have been affected by this alleged practice.

Dodd-Frank provides for civil penalties of up to $5,000 for an unintentional violation, up to $25,000 for reckless violations, and up to $1,000,000 for knowing violations. The CFPB alleges that Castle & Cooke's violations were committed recklessly or knowingly.

To read the CFPB's complaint, visit: http://doddfrankupdate.com/Resource.ashx?sn=CFPBvCastleCookeLLC-Complaint

CFPB Testifies on Debt Collection

On July 17, 2013, Corey Stone, Assistant Director of the CFPB's Office of Deposits, Cash, Collections and Reporting Markets, testified before the Senate Banking, Housing, and Urban Affairs Subcommittee on Financial Institutions and Consumer Protection.

Stone noted that "debt collection has more salience today than perhaps at any time in our country's history" because the recent financial crisis has left many consumers with one or more debts in collection. Stone remarked that it is the CFPB's role to protect these consumers against unfair, deceptive, or abusive debt collection practices.

Stone also emphasized that debt collectors are "an essential part of the credit system" because, "without collection activity, more debts would go unpaid, and lenders would both be more reluctant to extend credit and would need to charge more for doing so."

Stone concluded by pointing out several important challenges in the debt collection industry. All industry participants, Stone noted, agree that the industry must develop clear standards for record-keeping. Moreover, because the Fair Debt Collection Practices Act is becoming outdated in light of technological developments, the CFPB intends to work with other federal agencies to establish guidelines for the use of new communication technologies in debt collection.

To read Stone's testimony, visit: http://www.consumerfinance.gov/testimonies/corey-stone-before-the-senate-subcommittee-on-financial-institutions-and-consumer-protection/

Treasury Issues Summary of May 2013 Garnishment Rule

On July 22, 2013, the Fiscal Management Service of the U.S. Treasury Department issued a summary of the May 2013 final rule on garnishments. The rule gives banks two business days to identify and protect federal benefit payments from garnishment orders.

The summary emphasized three key implications of the final rule. First, a financial institution cannot surrender any funds under a garnishment order before completing a review of the account in question. Second, if protected federal benefit payments are identified by a financial institution, the account holder must be given access to those funds. Finally, the only exception to the final rule's requirements is for state child support enforcement agencies and certain federal garnishment orders, where a "Notice of Right to Garnish Federal Benefits" has been attached to the garnishment order.

To read the summary, visit: http://fmsq.treas.gov/greenbook/Garnishment-Rule-Summ-State-Law-Enforcement-07-16-2013.pdf

CFPB Amends 2013 Mortgage Rules Under RESPA and TILA

On July 10, 2013, the CFPB issued a final rule amending the final mortgage rules issued by the CFPB in January 2013. There are six key parts to the amendments.

First, the amended commentary clarifies that the regulations do not occupy the field for preemption purposes. Second, the amendments clarify the implementation dates of the TILA Servicing Final Rule for adjustable-rate mortgages. Third, the amendments clarify that construction and bridge loans and reverse mortgages are not subject to Regulation Z's repayment ability rule and prepayment penalties.

Fourth, the amendments clarify the small servicers exemption of Regulation Z. Fifth, the revised rule and official interpretation clarify provisions which allow QM status to certain loans that are eligible for purchase, guarantee, or insurance by GSEs or federal agencies. Finally, amendments to appendix Q of Regulation Z will assist creditors in determining a consumer's debt-to-income ratio.

To read the final rule, visit: http://files.consumerfinance.gov/f/201307_cfpb_final-rule_titlexiv.pdf

CFPB Issues Bulletin on Unfair, Deceptive, and Abusive Acts in Debt Collection

On July 10, 2013, the CFPB issued a bulletin entitled "Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts" in an attempt to clarify the obligation under the Dodd-Frank Act to refrain from "unfair, deceptive, or abusive acts or practices" ("UDAAPs").

The bulletin states that an act is unfair when "(1) It causes or is likely to cause substantial injury to consumers; (2) The injury is not reasonably avoidable by consumers; and (3) The injury is not outweighed by countervailing benefits to consumers or to competition." While a substantial injury is often monetary, the CFPB noted than an injury need not be monetary to be substantial.

An act is deceptive when "(1) The act or practice misleads or is likely to mislead the consumer; (2) The consumer's interpretation is reasonable under the circumstances; and (3) The misleading act or practice is material." The CFPB stated that it considers implied representations. Whether an act is deceptive is determined from the perspective of a reasonable member of the target audience.

Finally, an act is abusive if it "(1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) Takes unreasonable advantage of – (A) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service; (B) a consumer's inability to protect his or her interests in selecting or using a consumer financial product or service; or (C) a consumer's reasonable reliance on a covered person to act in his or her interests."

Examples of UDAAPs include: collecting an amount not expressly authorized by law or the governing contract; failing to post payments timely to a consumer's account; revealing the consumer's debt to third parties without consent; and threatening an action that is not intended or legal.

To read the bulletin, visit: http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf

CFPB Issues Bulletin on Fair Debt Collection Practices Under Dodd-Frank

On July 10, 2013, the CFPB issued a bulletin entitled "Fair Debt Collection Practices Act and the Dodd-Frank Act" to provide compliance guidance to creditors, debt buyers, and debt collectors regarding the Fair Debt Collection Practices Act ("FDCPA") and the Dodd-Frank Act.

The bulletin begins by noting that debt collectors often attempt to induce consumers to pay a debt by representing that doing so will improve their credit score or increase the likelihood of their receiving favorable credit terms. The CFPB noted that sometimes such representations are false or deceptive under the FDCPA, Dodd-Frank, or both.

For instance, a debt collector's representation that paying an obsolete debt will improve a consumer's credit is likely false or misleading because FCRA imposes time limits on how long a debt may appear on a consumer's report. Moreover, because many factors impact one's overall credit score, a representation that paying a debt will significantly improve one's credit score may be false or misleading.

The CFPB implored debt collectors to take steps to ensure that their representations regarding the impact of debt payment upon a consumer's credit score are not false or misleading.

To read the bulletin, visit: http://files.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf

CFPB Issues Procedural Rule on Establishing Supervisory Authority Over Nonbank Entities

On June 26, 2013, the CFPB issued a final rule establishing procedures to implement section 1024(a)(I)(C) of the Dodd-Frank Act.

Under Dodd-Frank, the CFPB has authority to supervise nonbank entities involved in certain consumer financial products. Section 1024(a)(I)(C) gives the CFPB the authority to supervise any nonbank covered person that the CFPB "has reasonable cause to determine, by order, after notice . . . and a reasonable opportunity . . . to respond . . . is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services."

The proposed rule proposes procedures under which the CFPB would bring a nonbank within the ambit of its supervisory authority. According to the CFPB, a final rule was not necessary to accomplish this purpose, but would promote consistent application of section 1024(a)(I)(C).

Generally speaking, the procedures established in the final rule include: issuing a notice commencing a proceeding; the contents and service of such notice; response to notice; oral response; determinations by the Director; and voluntary consent.

For more information, visit: https://www.federalregister.gov/articles/2013/07/03/2013-15485/procedural-rule-to-establish-supervisory-authority-over-certain-nonbank-covered-persons-based-on

CFTC Adopts Guidance on Regulation of Cross-Border Derivatives Transactions

On July 12, 2013, the Commodity Futures Trading Commission adopted guidance on the regulation of cross-border derivatives transactions. The guidance clarifies who constitutes a "U.S. person" and what activities are deemed to have a "direct and significant connection" to U.S. commerce.

As a result of the guidance, market participants will be allowed in some circumstances to comply with either Dodd-Frank or "comparable and comprehensive" foreign rules.

To read more, visit: http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/crossborder_factsheet_final.pdf

FDIC Releases Resources Related to New Capital Rules

The FDIC recently issued several resources on its website in an effort to help community bankers understand the new capital rules. These resources include a video presentation, the text of the final rules, and a list of contacts for additional questions or concerns.

To browse the resources, visit: http://www.fdic.gov/regulations/capital/

CFPB Issues Mortgage Rules Readiness Guide

The CFPB recently released a guide, entitled the "2013 Dodd-Frank Mortgage Rules Readiness Guide," in an effort to help covered institutions prepare for compliance with the mortgage rules issued in January 2013.

The guide begins by summarizing the eight final rules issued in January 2013 and listing each rule's effective date. The guide then provides a Readiness Questionnaire, intended to be used by an institution as a self-assessment in determining its progress toward compliance. Following the Readiness Questionnaire are answers to a number of frequently asked questions. The guide concludes with a list of tools to assist in compliance.

To read the guide, visit: http://files.consumerfinance.gov/f/201307_cfpb_mortgage-implementation-readiness-guide.pdf

Federal Reserve Board Finalizes Basel III Rule

On July 2, 2013, the Federal Reserve Board finalized its final rule revising the risk-based and leverage capital requirements for banking organizations under the Basel III framework.

The final rule redefines "regulatory capital" and revises certain minimum capital requirements. The final rule also establishes limits on capital distributions and discretionary bonus payments for banks that do not hold a threshold amount of common equity tier 1 capital. Finally, the rule modifies the method for determining risk-weighted assets for all banking organizations.

The final rule takes effect on January 1, 2014.

To read the final rule, visit: http://www.federalreserve.gov/aboutthefed/boardmeetings/20130702__Basel_III_Final_Rule.pdf

CFPB Revises Ability-to-Repay and QM Standards

On June 12, 2013, the CFPB issued a final rule amending Regulation Z's ability-to-repay and qualified mortgage provisions. The amendments were proposed on January 10, 2013 by the Federal Reserve Board.

The rule modifies Regulation Z in three primary ways. First, the final rule excludes several categories of loan originator compensation from the calculation of points and fees. Second, the rule creates several exemptions from the ability-to-repay rule. Finally, the rule contains provisions designed to aid small creditors--those with $2 billion or less in assets that originate 500 or less first-lien mortgages per year--in complying with Regulation Z.

The final rule becomes effective January 10, 2014.

To read the final rule, visit: https://www.federalregister.gov/articles/2013/06/12/2013-13173/ability-to-repay-and-qualified-mortgage-standards-under-the-truth-in-lending-act-regulation-z

CFPB Delays Effective Date of Credit Insurance Provision

On June 12, 2013, the CFPB issued a final rule delaying the effective date of a prohibition on the financing of credit insurance premiums in connection with consumer credit transactions secured by a principal residence. Originally scheduled to become effective June 1, 2013, the new effective date is January 10, 2014.

To read the final rule, visit: https://www.federalregister.gov/articles/2013/05/31/2013-13023/loan-originator-compensation-requirements-under-the-truth-in-lending-act-regulation-z-prohibition-on

CFPB Releases Updated Exam Procedures for January 2013 Mortgage Rules

On June 4, 2013, the CFPB released an update to its exam procedures for the mortgage rules issued in January 2013. The procedures provide guidance to financial institutions and mortgage companies regarding how they will be examined under the new rules when they become effective.

To read more, visit: http://www.consumerfinance.gov/pressreleases/the-cfpb-releases-exam-procedures-for-new-mortgage-rules/

CFPB Issues Enforcement Action on Abusive Practices Claims

On May 30, 2013, the CFPB filed a lawsuit in federal district court against Florida-based debt relief company American Debt Settlement Solutions, Inc. pursuant to its "abusive practices" authority.

According to the CFPB, an investigation revealed that the company violated the Dodd-Frank Act's abusive practices provision by misleading consumers and charging illegal fees totaling nearly $500,000.

The CFPB intends to seek a consent order that, if approved, would halt the company's business operations and impose civil fines.

To read the complaint, visit: http://files.consumerfinance.gov/f/201305_cfpb_complaint_adss.pdf

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