Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

March 8, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

Regulators, Lawmakers Scrutinize BSA/AML Compliance and Enforcement. On March 7, the Senate Banking Committee held a hearing entitled "Patterns of Abuse: Assessing Bank Secrecy Act Compliance and Enforcement," which featured testimony from representatives of the Treasury Department, the Comptroller of the Currency, and the Federal Reserve Board. During the hearing, Senators challenged the regulators on what they view as insufficient civil and criminal enforcement of the Bank Secrecy Act (BSA) and Anti-Money Laundering (AML) rules, and pressed the regulators to act more aggressively in bringing actions against banks. Senators also pressed lawmakers on comments made by Attorney General Holder at a hearing the day before where he expressed concern that some of the world's biggest banks have become "too big to jail" because a potential punishment could negatively impact the broader economy. With regard to possible regulatory and legislative changes, Comptroller of the Currency Thomas Curry stated that the OCC is drafting guidance for banks on BSA/AML compliance, in part, to make it easier for the OCC to remove bank officers who violate federal anti-money laundering laws. Curry said the OCC also would support expanded safe harbors for banks submitting and sharing Suspicious Activity Reports. Comptroller Curry's comments at the hearing follow remarks he made earlier in the week when he called on banks to devote more resources to BSA/AML compliance. Mr. Curry stressed that controls with regard to international activities - *e.g.*, foreign correspondent banking and remote deposit capture - need to be commensurate with risk. He also directed banks to focus on third-party relationships and payment processors. Finally, the Comptroller cautioned banks to understand risks presented by deployment of new technologies and payment activities, including prepaid access cards, mobile banking, and mobile wallets.

Federal Reserve Board Inspector General Reviewing CFPB's Use of Enforcement Attorneys During Examinations. Recently, the Federal Reserve Board's Office of Inspector General (OIG), which also serves as the OIG for the CFPB, released an updated Work Plan. The Work Plan includes as a "work in progress," an evaluation of the CFPB's integration of enforcement attorneys

into its examinations of financial institutions. According to the Plan, the OIG is assessing (i) the potential risks associated with this examination approach and (ii) the effectiveness of any safeguards that the CFPB has adopted to mitigate the potential risks associated with this approach. Banks and nonbanks have previously expressed concern with the CFPB's approach, which differs from the traditional approach taken by other federal regulators. In fact, in November 2012, the CFPB Ombudsman recommended that the CFPB review its implementation of the policy. The Work Plan states that the OIG expects to complete its review during the second quarter of 2013.

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FinCEN Reminds Financial Institutions about E-Filing Reports. On March 7, FinCEN issued a notice reminding institutions that they must use FinCEN's new electronic reports to file most Bank Secrecy Act Reports, including Suspicious Activity Reports, Currency Transaction Reports, Registration of Money Services Business, and Designation of Exempt Person Reports. In February 2012, FinCEN issued a final notice requiring electronic filing of most reports by July 1, 2012. Shortly

thereafter, FinCEN made available new formats for those reports, which all institutions must begin using by April 1, 2013. The new forms will support the agency's enforcement efforts. For example, FinCEN Director Jennifer Shasky Calvery explained recently that in 2012 more than 23 percent of SAR filers selected "other" as the type of suspicious activity. The new form expands the number of options for type of activity being reported from 21 to 70 and adds a text field, allowing filers to described activities more accurately. FinCEN warned that companies that fail to comply with the electronic filing mandate may be subject to civil money penalties.

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STATE ISSUES

New York Investigates Post-Sandy Mortgage Servicing Practices. On March 7, New York Governor Andrew Cuomo announced that the New York Department of Financial Services (DFS) is investigating certain bank and servicer practices related to Hurricane Sandy relief. Specifically, the DFS is looking into complaints that homeowners impacted by Hurricane Sandy and allowed to forgo mortgage payments are now being burdened by requests to make up all past payments in an immediate lump sum amount. In November and December of 2012, the DFS reached agreements with major banks and servicers for borrowers who were struggling to make mortgage payments after Hurricane Sandy. Under the agreement, the banks and servicers agreed to offer forbearance on mortgage payments to certain homeowners for three to six months without a lump sum balloon payment at the end of such period. The DFS is now receiving reports that homeowners at the end of their forbearance period are being asked for these lump sum payments. In addition, some homeowners are receiving pre-foreclosure notices based on missed payments during the forbearance period. The DFS sent letters to banks and servicers that seek by March 12, 2013 information on (i) the number of homeowners who asked for and received forbearance, (ii) lenders' forbearance-related policies and practices, (iii) how the institutions implemented forbearances internally, and (iv) whether and under what circumstances they would consider offering forgiveness of principal and interest payments for up to 12 months post-storm.

Georgia Eliminates Double Taxation on Auto Leases. On March 5, Georgia enacted HB 266, which, among other things, eliminates a monthly sales tax on auto leases. The bill responds to a 2012 overhaul of the state's tax code that mistakenly created a double tax on car leases, requiring payment of a Title Ad Valorem Tax of 6.5% to be paid by both lessees and purchasers of motor vehicles in the state, as well as the monthly sales and use tax to be paid by lessees. This additional tax had the effect of making motor vehicle leases less attractive than purchases, and at the same time likely would have resulted in lower overall taxes payable to the state. The bill also allows the Georgia Department of Revenue to decide whether and how to regulate "buy here, pay here" dealers. If the Department does create such rules, it has discretion to provide those dealers a larger discount from the normal title tax. The bill took effect immediately.

COURTS

Second Circuit Reinstates MBS Suit, Easing Standing Hurdle for Investors. On March 1, the U.S. Court of Appeals for the Second Circuit held that an investor plaintiff may be able to assert claims on behalf of a class for securities in which it had not invested, and additionally found that the investor had alleged sufficient facts of abandoned mortgage underwriting standards to survive

defendants' motion to dismiss. *N.J. Carpenters Health Fund v. The Royal Bank of Scot. Grp., PLC*, No. 12-1701, 2013 WL 765178 (2d Cir. Mar. 1, 2013). An investor claimed on behalf of a putative class that the offering documents for six mortgage-backed securities (MBS) materially misrepresented the standards used to underwrite the loans. The district court initially dismissed the case as to five of the trusts, holding that the investor could not bring claims on securities in which it had not invested. The investor amended its complaint and focused on the one trust in which it had invested. The district court then held that the allegations were not specific enough to the loans at issue, and that the risks were sufficiently disclosed and known at the time of the transaction. After the district court's rulings, the Second Circuit held in another case, *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012), that where an issuer had issued multiple securities under the same shelf registration statement, an investor who invested in at least some of those securities could, on behalf of a putative class, bring claims on securities in which it had not invested so long as all of the relevant claims involved "the same set of concerns." On appeal in the instant case, the Second Circuit held that in light of its decision in *NECA-IBEW*, the investor had standing to bring its claims as to all six of the original MBS. The court also held that the "allegations in the complaint-principally, that a disproportionately high number of the mortgages in a security defaulted, that rating agencies downgraded the security's ratings after changing their methodologies to account for lax underwriting, and that prior employees of the relevant underwriter had attested to systematic disregard of underwriting standards-state a plausible claim that the offering documents" violated the 1933 Securities Act. The court remanded the case for further proceedings.

Maryland's Highest Court Holds Auctions that Charge Admission Fee are Private Sales. On March 1, the Court of Appeals of Maryland, answering a question of law certified to it by the U.S. Court of Appeals for the Fourth Circuit, held that the sale of repossessed automobiles at an auction where individuals had to pay a refundable $1,000 cash deposit was a "private sale", and not a "public auction," under the provisions of Maryland's Creditor Grantor Closed End Credit Act (CLEC). *Gardner v. Ally Fin. Inc.*, Misc. No. 10, 2013 WL 765013 (Md. Mar. 1, 2013). The court determined, based on legislative history, that one purpose of 1987 amendments to the CLEC was to protect the debtor against "favored buyer private sales that are not . . . commercially reasonable." The court held that although the sale of the automobiles in this case was publicly advertised and open to the public for competitive bidding, the admission fee, which was charged to all participants, even those who merely wanted to observe the proceedings, "obscured transparency" and "shielded the process used to sell [the] cars from observation and, thus, could not constitute a 'public auction' under CLEC." Thus, the court held that the creditors were subject to the more stringent post-sale disclosure requirements required for "private sales" under the CLEC.

Federal Court Holds Borrowers Must Allege Sufficient Basis To Exercise TILA Three-Year Right of Rescission. On February 28, 2013, the U.S. Court of Appeals for the Fourth Circuit held that a borrower failed to state sufficient facts to avail herself of TILA's extended three-year right to rescind her mortgage. *Wolf v. Federal Nat'l Mortg. Assoc.*, No. 11-2419, 2013 WL 749652 (4th Cir. Feb. 28, 2013). Nearly three years after refinancing her loan, and just a few days before the scheduled foreclosure sale, the borrower attempted to rescind her mortgage loan pursuant to TILA, based on arguments that the original lender under-disclosed certain material finance charges. The district court held that the borrower's TILA claims were untimely because she failed to file a lawsuit within the three-year deadline. Since the district court's decision was issued, the Fourth Circuit held in another case, *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012), that a borrower need not file a lawsuit seeking rescission within the three-year deadline but instead must only notify the lender that she is exercising her rescission right. The Fourth Circuit reasoned that, in light of *Gilbert*, the borrower's claim had not necessarily expired and the relevant question centered on whether she had adequately alleged facts that the three-year deadline applied. The Fourth Circuit found that the borrower's allegations amounted to bare assertions and presented no facts as to why

the charges were unreasonable. The court also rejected the borrower's argument that the lender had inadequately disclosed the right to rescind. Accordingly, the Fourth Circuit affirmed the district court's ruling - on different grounds - and dismissed the TILA claims. The Fourth Circuit also held that the borrower had failed to state claims for fraud, defamation, breach of the implied covenant of good faith and fair dealing, and a claim that the assignment was invalid, thus invalidating the foreclosure sale.

Federal Court Holds Credit Furnisher Must Show Proof of Investigation of Consumer Dispute under FCRA. On February 22, the U.S. District Court for the District of Arizona held that a furnisher of credit information must present evidence regarding its investigation of a consumer's credit reporting dispute in order to satisfy the FCRA dispute resolution requirements. *Modica v. Am. Suzuki Fin. Servs.*, No. CV11-02183-PHX, 2013 WL 656495 (D. Ariz. Feb. 22, 2013). The plaintiff leased a vehicle from the defendant and did not return it at the end of the lease term. The defendant reported the account as "current/paying as agreed" after the plaintiff returned the vehicle. The plaintiff disputed this charge to the credit bureaus which contacted the defendant to notify them of the dispute and confirm the charge. The defendant eventually changed the report to show an unpaid balance with a charge-off, prompting the plaintiff to bring suit alleging breach of contract, violation of a state law regarding credit reporting, and violation of FCRA. In denying the defendant's motion for summary judgment as to the FCRA claim, the court noted that FCRA requires a furnisher of credit information to conduct a "reasonable investigation" upon receipt of a consumer dispute. The court found that the creditor did not engage in a reasonable investigation-the defendant was unable to explain discrepancies between what it submitted to the credit reporting agencies and a letter it submitted to the plaintiff which showed she had no past due payments. In fact, the defendant was unable to say what the credit investigation entailed, a fact that precluded its claim for summary judgment.

MISCELLANY

U.K. OFT Takes Broad Action against Payday Lenders. On March 6, the U.K. Office of Fair Trading (OFT) announced that it will institute enforcement actions and seek to revoke the licenses of payday lenders that do not change certain business practices within 12 weeks. The action applies to the leading 50 payday lenders who account for 90 percent of the U.K. payday market. The OFT action comes in a final report on a broad payday lending investigation, which revealed widespread irresponsible lending and a failure to comply with the standards set out in the OFT's Irresponsible Lending Guidance. The OFT also proposed to refer the payday lending market to the Competition Commission to investigate competition in that market.

U.K. FSA Seeks Comments on New Consumer Credit Regulatory Regime. On March 6, the U.K. Financial Services Authority (FSA) issued a consultation paper (CP) to outline the regulatory regime for consumer credit markets after its regulatory powers transfer to the Financial Conduct Authority (FCA). The FCA is a new regulatory body that will succeed the FSA later this year, and will assume regulatory responsibility over the U.K.'s consumer credit and retail markets regulatory responsibilities. In addition to those markets, the FCA also will regulate conduct in wholesale markets, supervise the trading infrastructure that supports retail and wholesale markets, and prudentially regulate firms not regulated by the new Prudential Regulatory Authority. The CP outlines (i) the supervision of and reporting by covered firms, (ii) the interim permission for OFT license holders to continue operations, (iii) the supervision of credit advertising being subject to the Financial Services and Markets Act financial promotions regime, (iv) prudential requirements for debt management firms, (v) the Consumer Credit Act provisions that survive under the new FCA credit regime, and (vi) the sources of funding for the regime. Comments on the proposal are due by

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May 1, 2013.

FIRM NEWS

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

Andrew Sandler will participate in the "Fair Lending Forum" at CBA Live 2013, the Consumer Bankers Association's annual conference for retail banking leaders, to be held March 11-13, 2013 in Phoenix, AZ.

John Redding will speak on March 12, 2013 at the Independent Community Bankers of America National Convention in Las Vegas, NV about the impact of the CFPB's new mortgage origination and servicing rules on community banks.

Andrew Schilling will be a panelist for "False Claims Act: Enforcement and Compliance Issues Explored," a Knowledge Congress CLE webcast, on March 13, 2013. This event will present an overview of the False Claims Act and address regulatory updates and enforcement developments, key takeaways from related cases, identifying risks for potential FCA violations, and developing a robust compliance program.

John Kromer will participate in the Mortgage Bankers Association's CambusMBA Program "The New Uniform State Test for Mortgage Loan Originators," on Friday March 15, 2013 at Noon ET. The webinar will provide state-licensed mortgage loan originators a thorough briefing and operational guidance on the new Uniform State Test developed by the Conference of State Bank Supervisors and the State Regulatory Registry, LLC.

Andrew Sandler will speak at the National Community Reinvestment Coalition Annual Conference, March 20-23, 2013 in Washington, D.C. Mr. Sandler's workshop is entitled "The Future of Fair Lending: Key Lessons from 2012".

Joseph Reilly will speak on an October Research webinar hosted by RESPA News titled "Part 1: The New Loan Servicing Standards Webinar," at 2:00 pm on March 21, 2013. Mr. Reilly will discuss components of CFPB's new rules for mortgage servicing and compliance strategies.

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

Jonice Gray Tucker will speak at the American Bar Association's Business Law Section Spring Meeting on April 4, 2013 in Washington, D.C. The panel on which she is participating will focus on CFPB enforcement actions.

Jonice Gray Tucker and Valerie Hletko will moderate a panel entitled "Extreme Makeover: Consumer Protection Edition" at the American Bar Association's Business Law Section Spring Meeting on April 4, 2013 in Washington, D.C. The panel will focus on the CFPB's new regulations and related compliance expectations.

Andrew Sandler will speak at the 39th Annual Bankers Legal Conference which will be held April 4-5, 2013 at The Westin Austin at the Domain.

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

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

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

James Parkinson will speak in New York, NY on May 14-15, 2013 at the ACI conference on "FCPA and Anti-Corruption for the Life Sciences Industry."

Andrea Mitchell will speak at an American Bankers Association Fair Lending Workshop on June 8, 2013 in Chicago, IL, offered in connection with the ABA Regulatory Compliance Conference. The Fair Lending Workshop will review current fair lending hot topics and how institutions can manage or mitigate fair lending obstacles and demonstrate compliance with fair lending laws and regulations.

FIRM PUBLICATIONS

Ben Saul, Aaron Mahler, and Jared Kelly published "Know the Standard of FDIC Liability for Community Banks" in Law360 on February 5, 2013.

David Baris and Jared Kelly recently published a book entitled "FDIC Director Suits - Lessons Learned." The authors reviewed all of the FDIC's current civil suits against directors of failed banks and savings institutions -34 cases as of the book's printing, involving over 250 directors-and extracted key points for consideration. The book is available for purchase here.

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

About BuckleySandler LLP (www.buckleysandler.com)

With more than 150 lawyers in Washington, New York, Los Angeles, and Orange County, BuckleySandler provides best-in-class legal counsel to meet the challenges of its financial services industry and other corporate and individual clients across the full range of government enforcement actions, complex and class action litigation, and transactional, regulatory, and public policy issues. The Firm represents many of the nation's leading financial services institutions. "The best at what they do in the country." (Chambers USA).

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

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

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

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

MORTGAGES

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CONSUMER FINANCE

Federal Reserve Board Inspector General Reviewing CFPB's Use of Enforcement Attorneys During Examinations. Recently, the Federal Reserve Board's Office of Inspector General (OIG), which also serves as the OIG for the CFPB, released an updated Work Plan. The Work Plan includes as a "work in progress," an evaluation of the CFPB's integration of enforcement attorneys into its examinations of financial institutions. According to the Plan, the OIG is assessing (i) the potential risks associated with this examination approach and (ii) the effectiveness of any safeguards that the CFPB has adopted to mitigate the potential risks associated with this approach. Banks and nonbanks have previously expressed concern with the CFPB's approach, which differs from the traditional approach taken by other federal regulators. In fact, in November 2012, the CFPB Ombudsman recommended that the CFPB review its implementation of the policy. The Work Plan states that the OIG expects to complete its review during the second quarter of 2013.

Georgia Eliminates Double Taxation on Auto Leases. On March 5, Georgia enacted HB 266, which, among other things, eliminates a monthly sales tax on auto leases. The bill responds to a 2012 overhaul of the state's tax code that mistakenly created a double tax on car leases, requiring payment of a Title Ad Valorem Tax of 6.5% to be paid by both lessees and purchasers of motor vehicles in the state, as well as the monthly sales and use tax to be paid by lessees. This additional tax had the effect of making motor vehicle leases less attractive than purchases, and at the same time likely would have resulted in lower overall taxes payable to the state. The bill also allows the Georgia Department of Revenue to decide whether and how to regulate "buy here, pay here" dealers. If the Department does create such rules, it has discretion to provide those dealers a larger discount from the normal title tax. The bill took effect immediately.

U.K. OFT Takes Broad Action against Payday Lenders. On March 6, the U.K. Office of Fair Trading (OFT) announced that it will institute enforcement actions and seek to revoke the licenses of payday lenders that do not change certain business practices within 12 weeks. The action applies to the leading 50 payday lenders who account for 90 percent of the U.K. payday market. The OFT action comes in a final report on a broad payday lending investigation, which revealed widespread irresponsible lending and a failure to comply with the standards set out in the OFT's Irresponsible Lending Guidance. The OFT also proposed to refer the payday lending market to the Competition Commission to investigate competition in that market.

U.K. FSA Seeks Comments on New Consumer Credit Regulatory Regime. On March 6, the U.K. Financial Services Authority (FSA) issued a consultation paper (CP) to outline the regulatory regime for consumer credit markets after its regulatory powers transfer to the Financial Conduct Authority (FCA). The FCA is a new regulatory body that will succeed the FSA later this year, and will assume regulatory responsibility over the U.K.'s consumer credit and retail markets regulatory responsibilities. In addition to those markets, the FCA also will regulate conduct in wholesale markets, supervise the trading infrastructure that supports retail and wholesale markets, and prudentially regulate firms not regulated by the new Prudential Regulatory Authority. The CP outlines (i) the supervision of and reporting by covered firms, (ii) the interim permission for OFT license holders to continue operations, (iii) the supervision of credit advertising being subject to the Financial Services and Markets Act financial promotions regime, (iv) prudential requirements for debt management firms, (v) the Consumer Credit Act provisions that survive under the new FCA credit regime, and (vi) the sources of funding for the regime. Comments on the proposal are due by May 1, 2013.

Maryland's Highest Court Holds Auctions that Charge Admission Fee are Private Sales. On March 1, the Court of Appeals of Maryland, answering a question of law certified to it by the U.S. Court of Appeals for the Fourth Circuit, held that the sale of repossessed automobiles at an auction where individuals had to pay a refundable $1,000 cash deposit was a "private sale", and not a "public auction," under the provisions of Maryland's Creditor Grantor Closed End Credit Act (CLEC). *Gardner v. Ally Fin. Inc.*, Misc. No. 10, 2013 WL 765013 (Md. Mar. 1, 2013). The court determined, based on legislative history, that one purpose of 1987 amendments to the CLEC was to protect the debtor against "favored buyer private sales that are not . . . commercially reasonable." The court held that although the sale of the automobiles in this case was publicly advertised and open to the public for competitive bidding, the admission fee, which was charged to all participants, even those who merely wanted to observe the proceedings, "obscured transparency" and "shielded the process used to sell [the] cars from observation and, thus, could not constitute a 'public auction' under CLEC." Thus, the court held that the creditors were subject to the more stringent post-sale disclosure requirements required for "private sales" under the CLEC.

Federal Court Holds Credit Furnisher Must Show Proof of Investigation of Consumer Dispute under FCRA. On February 22, the U.S. District Court for the District of Arizona held that a furnisher

of credit information must present evidence regarding its investigation of a consumer's credit reporting dispute in order to satisfy the FCRA dispute resolution requirements. *Modica v. Am. Suzuki Fin. Servs.*, No. CV11-02183-PHX, 2013 WL 656495 (D. Ariz. Feb. 22, 2013). The plaintiff leased a vehicle from the defendant and did not return it at the end of the lease term. The defendant reported the account as "current/paying as agreed" after the plaintiff returned the vehicle. The plaintiff disputed this charge to the credit bureaus which contacted the defendant to notify them of the dispute and confirm the charge. The defendant eventually changed the report to show an unpaid balance with a charge-off, prompting the plaintiff to bring suit alleging breach of contract, violation of a state law regarding credit reporting, and violation of FCRA. In denying the defendant's motion for summary judgment as to the FCRA claim, the court noted that FCRA requires a furnisher of credit information to conduct a "reasonable investigation" upon receipt of a consumer dispute. The court found that the creditor did not engage in a reasonable investigation-the defendant was unable to explain discrepancies between what it submitted to the credit reporting agencies and a letter it submitted to the plaintiff which showed she had no past due payments. In fact, the defendant was unable to say what the credit investigation entailed, a fact that precluded its claim for summary judgment.

SECURITIES

Second Circuit Reinstates MBS Suit, Easing Standing Hurdle for Investors. On March 1, the U.S. Court of Appeals for the Second Circuit held that an investor plaintiff may be able to assert claims on behalf of a class for securities in which it had not invested, and additionally found that the investor had alleged sufficient facts of abandoned mortgage underwriting standards to survive defendants' motion to dismiss. *N.J. Carpenters Health Fund v. The Royal Bank of Scot. Grp., PLC*, No. 12-1701, 2013 WL 765178 (2d Cir. Mar. 1, 2013). An investor claimed on behalf of a putative class that the offering documents for six mortgage-backed securities (MBS) materially misrepresented the standards used to underwrite the loans. The district court initially dismissed the case as to five of the trusts, holding that the investor could not bring claims on securities in which it had not invested. The investor amended its complaint and focused on the one trust in which it had invested. The district court then held that the allegations were not specific enough to the loans at issue, and that the risks were sufficiently disclosed and known at the time of the transaction. After the district court's rulings, the Second Circuit held in another case, *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012), that where an issuer had issued multiple securities under the same shelf registration statement, an investor who invested in at least some of those securities could, on behalf of a putative class, bring claims on securities in which it had not invested so long as all of the relevant claims involved "the same set of concerns." On appeal in the instant case, the Second Circuit held that in light of its decision in *NECA-IBEW*, the investor had standing to bring its claims as to all six of the original MBS. The court also held that the "allegations in the complaint-principally, that a disproportionately high number of the mortgages in a security defaulted, that rating agencies downgraded the security's ratings after changing their methodologies to account for lax underwriting, and that prior employees of the relevant underwriter had attested to systematic disregard of underwriting standards-state a plausible claim that the offering documents" violated the 1933 Securities Act. The court remanded the case for further proceedings.

CRIMINAL ENFORCEMENT

Regulators, Lawmakers Scrutinize BSA/AML Compliance and Enforcement. On March 7, the Senate Banking Committee held a hearing entitled "Patterns of Abuse: Assessing Bank Secrecy Act Compliance and Enforcement," which featured testimony from representatives of the Treasury

Department, the Comptroller of the Currency; and the Federal Reserve Board. During the hearing, Senators challenged the regulators on what they view as insufficient civil and criminal enforcement of the Bank Secrecy Act (BSA) and Anti-Money Laundering (AML) rules, and pressed the regulators to act more aggressively in bringing actions against banks. Senators also pressed lawmakers on comments made by Attorney General Holder at a hearing the day before where he expressed concern that some of the world's biggest banks have become "too big to jail" because a potential punishment could negatively impact the broader economy. With regard to possible regulatory and legislative changes, Comptroller of the Currency Thomas Curry stated that the OCC is drafting guidance for banks on BSA/AML compliance, in part, to make it easier for the OCC to remove bank officers who violate federal anti-money laundering laws. Curry said the OCC also would support expanded safe harbors for banks submitting and sharing Suspicious Activity Reports. Comptroller Curry's comments at the hearing follow remarks he made earlier in the week when he called on banks to devote more resources to BSA/AML compliance. Mr. Curry stressed that controls with regard to international activities - *e.g.*, foreign correspondent banking and remote deposit capture - need to be commensurate with risk. He also directed banks to focus on third-party relationships and payment processors. Finally, the Comptroller cautioned banks to understand risks presented by deployment of new technologies and payment activities, including prepaid access cards, mobile banking, and mobile wallets.

FinCEN Reminds Financial Institutions about E-Filing Reports. On March 7, FinCEN issued a notice reminding institutions that they must use FinCEN's new electronic reports to file most Bank Secrecy Act Reports, including Suspicious Activity Reports, Currency Transaction Reports, Registration of Money Services Business, and Designation of Exempt Person Reports. In February 2012, FinCEN issued a final notice requiring electronic filing of most reports by July 1, 2012. Shortly thereafter, FinCEN made available new formats for those reports, which all institutions must begin using by April 1, 2013. The new forms will support the agency's enforcement efforts. For example, FinCEN Director Jennifer Shasky Calvery explained recently that in 2012 more than 23 percent of SAR filers selected "other" as the type of suspicious activity. The new form expands the number of options for type of activity being reported from 21 to 70 and adds a text field, allowing filers to described activities more accurately. FinCEN warned that companies that fail to comply with the electronic filing mandate may be subject to civil money penalties.

FinCEN Proposes Third-Party Filing of FBAR Reports. On Mach 5, FinCEN published a notice and request for comment on proposed changes to the Foreign Bank and Financial Accounts Report (FBAR) to standardize it with other BSA electronically filed reports and allow for a third party preparer to file the report. FinCEN is seeking public comments by May 6, 2013.