BURR • FORMAN

DODD-FRANK NEWS

March 2013

## Introduction

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 - -

### CFTC Jurisdiction Under the Commodity Exchange Act

*U.S. Commodity Futures Trading Commission v. Hunter Wise Commodities,* No. 12-81311-CIV, 2013 WL 718503 (S.D. Fla. Feb. 26, 2013).

The Commodity Futures Trading Commission ("CFTC") filed suit against holding companies, telemarketing firms, and others alleging violations of the Commodities Exchange Act ("CEA"). The CFTC moved for a preliminary injunction seeking to enjoin defendants from further violating the CEA, freeze their assets, require an accounting, appoint a receiver, and inspect the defendants' books and records.

The Court first analyzed whether the CFTC had jurisdiction to enforce its claims against the defendants. The Court noted that the CFTC was established to enforce the CEA and that the Dodd-Frank Act expanded the CFTC's jurisdiction by "grant[ing] the CFTC new authority over certain leveraged, margined, or financed commodity transactions with retail customers, including authority to prohibit fraud in connection with such transactions in interstate commerce." 2013 WL 718503, at *7. In determining whether the Act applied to the defendants' conduct, the Court found that the Dodd-Frank Act added Section 2(c)(2)(D), entitled "Retail commodity transactions," which provides that:

> this subparagraph shall apply to any agreement, contract, or transaction in any commodity that is --
>
> (I) entered into with, or offered to (even if it is not entered into with), a person that is not an eligible contract participant or eligible commercial entity; and
>
> (II) entered into, or offered (even if not entered into), on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.

*See* 7 U.S.C. § 2(c)(2)(D). Further, the Court found that retail commodity transactions are subject to various provisions of the CEA "as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery." *See id.* at § 2(c)(2)(D)(iii). The Court also found that Section 6(c) of the Act extended the CFTC's anti-fraud jurisdiction as described in 17 C.F.R. § 180.1. The Court determined that the Dodd-Frank amendment applied "because (1) the retail customers are not eligible contract participants, (2) the transactions at issue were financed, and (3) each Defendant was working in concert with one another throughout the course of the transaction." 2013 WL 718503, at *8.

The defendants argued that the CEA did not apply to them because the transactions fell within exceptions to the Dodd-Frank amendment. Certain of the defendants argued that under subsection (bb), the transactions were exempt because they were between dealers, they created an enforceable obligation to deliver, and they were in connection with their respective lines of business. Additionally, the defendants argued that actual delivery of the metal occurred. The Court rejected this argument stating that the transactions at issue were between retail customers and that delivery could not occur because the commodity holding company did not have metal to deliver. Finding that the defendants did not

fall within an exception under Section 2(c)(2)(D)(ii), the Court held that the CEA applied to the enforcement of the CFTC's claims.

Turning to whether the CFTC was entitled to a preliminary injunction, the Court noted that the CFTC was required to make a prima facie case "that the defendant has engaged, or is engaging, in illegal conduct, and that there is a likelihood of future violations." 2013 WL 718503, at *9 (citing *CFTC v. Hunt,* 591 F.2d 1211, 1220 (7th Cir. 1979)). Applying this standard, the Court found that the defendants were engaged in illegal conduct by "entering into, executing, or conducting an office or business in connection with financed retail commodity transactions that are not subject to a registered commodities market or exchange" and that none of the defendants had registered with the CFTC. *Id.* at *10. The Court also found that the CFTC demonstrated a likelihood of future violations because the defendants were engaged in a "careful and calculated system designed to maximize profits by taking advantage of ill-advised investors." *Id.* at *11. Consequently, the Court granted the CFTC's motion and issued an injunction.

## Dodd-Frank Amendment to the TILA

### *Qadeer v. Bank of America, N.A.,* No. 12-14310, 2013 WL 424776 (E.D. Mich. Feb. 4, 2013).

Plaintiffs Mohammed Qadeer and Riffat Malik brought an action against Bank of America, N.A. alleging violations of the Truth in Lending Act ("TILA"), the Dodd-Frank Act, and state law. Bank of America moved to dismiss Plaintiffs' complaint.

Plaintiffs alleged that Bank of America violated TILA and Section 1413 of the Dodd-Frank Act by loaning money to borrowers without regard to their ability to make loan payments. The Court rejected this argument stating that the TILA does not require lenders to consider whether the borrower can repay the loan. While the Court acknowledged that the Home Ownership Equity Protection Act ("HOEPA") amended the TILA and requires lenders to consider ability to repay, the HOEPA did not apply to Plaintiffs' loan because the mortgage was a first lien on Plaintiffs' principal residence. The Court also found that Plaintiffs' TILA claim was time-barred under the one-year statute of limitations.

The Court also rejected Plaintiffs' argument that, pursuant to Section 1413 of the Dodd-Frank Act, their TILA claim can be raised a defense to a foreclosure proceeding in the form of recoupment. The Court stated that the recoupment defense can only be raised in an action to collect a debt and that the foreclosure action was not an action to collect a debt. Thus, the Court dismissed Plaintiffs' TILA and Dodd-Frank Act claims.

Addressing Plaintiffs' state law claims, the Court first determined that Plaintiffs failed to state a claim for a violation of Mich. Comp. Laws § 600.3205a, which requires a borrower who wants to request a loan modification to contact a housing counselor or the lender's agent within thirty days after receiving notice. Because Plaintiffs failed to allege that they contacted a housing counselor within thirty days after receiving notice under Section 600.3205a, the Court granted Bank of America's motion with respect to the Section 600.3205a claim. Additionally, the Court granted Bank of America's motion with respect to Plaintiffs' fraud based claims, finding that Plaintiffs failed to meet the pleading requirements of Federal Rule of Civil Procedure 9(b).

## Preemption

### *Selman v. CitiMortgage, Inc.,* No. 12-0441-WS-B, 2013 WL 838193 (S.D. Ala. Mar. 5, 2013).

Plaintiffs Sherry and Robert Selman filed suit against CitiMortgage, Inc. ("CitiMortgage"), Federal National Mortgage Association ("Fannie Mae"), and American Security Insurance Co. alleging violations of the Real Estate Settlement Procedures Act ("RESPA"), the Truth in Lending Act ("TILA"), the Fair Debt Collection Practices Act ("FDCPA"), and state law. Defendants moved to dismiss the Selmans' complaint.

In support of their motions to dismiss, CitiMortgage and Fannie Mae argued that the Selmans' claims were due to be dismissed to the extent they were based upon force-placed hazard insurance because such claims were preempted by the National Banking Act ("NBA"). Addressing CitiMortgage and Fannie Mae's argument, the Court relied on *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), and acknowledged that the NBA controls business activities of national banks. Further, the Court noted that the "NBA 'specifically authorizes federally chartered banks

to engage in real estate lending' and empowers them 'to exercise all such incidental powers as shall be necessary to carry on the business of banking.'" 2013 WL 838193, at *3 (quoting *Watters*, 550 U.S. at 6). The Court found that the NBA provides for broad regulation of national banks and stated that the NBA preempts state laws that restrict "the ability of a creditor to require or obtain private mortgage insurance, ***insurance for other collateral***, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices." *Id.* (quoting 12 C.F.R. § 34.4(a)(2)).

The Selmans argued that preemption was unavailable to CitiMortgage because the Dodd-Frank Act amended the NBA by eliminating preemption of state law for subsidiaries and affiliates of national banks. Rejecting this argument, the Court found that the Dodd-Frank Act provision did not apply retroactively and the events at issue in this lawsuit occurred before the effective date. Specifically, the Court relied on the Comptroller of the Currency's May 12, 2011 Interpretive Letter #1132, which stated the subject provision became effective on the transfer date of July 21, 2011. However, the Court acknowledged that the Dodd-Frank amendment changed CitiMortgage's status as a subsidiary with respect to preemption under the NBA. Because the Court found that the Dodd-Frank amendment did not apply retroactively, the Court granted the motions to dismiss, finding that the state-law claims were preempted by the NBA to the extent they relied on the placement of force-placed insurance.

## Say-On-Pay Voting

### *Raul v. Rynd,* --- F. Supp. 2d ---, 2013 WL 101290 (D. Del. Mar. 14, 2013).

Plaintiff Pincus Raul filed suit on behalf of Hercules Offshore, Inc. against the board of directors and others alleging breach of fiduciary duties for approving executive compensation after a negative say-on-pay vote. The defendants filed a motion to dismiss Raul's complaint for failure to make a pre-suit demand and for failure to state a claim.

The Court noted that Section 951 of the Dodd-Frank Act requires publicly traded companies to ask shareholders to approve executive compensation in a non-binding say-on-pay shareholder vote. *See* 15 U.S.C. § 78n-1. The Dodd-Frank Act also requires a separate resolution to determine whether the vote should occur every one, two, or three years. The Court noted that the Dodd-Frank Act:

> explicitly provides that say-on-pay votes "shall not be binding" on a company or its board of directors, and 'may not be construed' in any of the following ways: (1) "as overruling a decision" by the company or its board of directors; (2) "to create or imply any change to the fiduciary duties' of the company or its board of directors; (3) "to create or imply any additional fiduciary duties" for the company or its board of directors;" or (4) "to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation."

2013 WL 101290, at *2 (quoting 15 U.S.C. § 78n-1(c)).

At the outset, the Court said that Raul's claims were based on flawed premises. Specifically, the Court found that Raul misconstrued the effect of a negative say-on-pay vote and mischaracterized the compensation plan. The Court then addressed Raul's failure to make a pre-suit demand. Raul claimed that a demand would be futile because each of the directors was named in the lawsuit, approved the executive compensation, and was interested in the outcome of the lawsuit. Rejecting this argument, the Court stated that Delaware law presumes that a board of directors is disinterested and independent, and that Raul failed to rebut this presumption by engaging in a "director-by-director" analysis to show that the majority of the board was incapable of objectively evaluating a demand. Further, the Court said that Raul misconstrued the effect of a negative say-on-pay vote under the Dodd-Frank Act and the Dodd-Frank Act does not obligate the board to reevaluate its executive compensation plan. Accordingly, the Court found that Raul failed to show that demand was futile due to the board of directors' facing a "substantial likelihood of liability." The Court stated that Raul's failure to make a pre-suit demand warranted dismissal of his complaint in its entirety, but went on to find that Raul failed to state a claim upon which relief could be granted. Thus, the Court granted the defendants' motion to dismiss.

## Pre-Dispute Arbitration Agreements

### *Yegin v. BBVA Compass,* No. 2:12-cv-03882-AKK, 2013 WL 622565 (N.D. Ala. Feb. 19, 2013).

Plaintiff Lisa Yegin filed suit against her former employer, BBVA Compass ("Compass"), alleging violations of the Dodd-Frank Act, Title VII of the Civil Rights Act of 1964, and Section 1981 of the Civil Rights Act of 1866. Compass moved to dismiss Yegin's complaint and compel the remaining claims to arbitration. Yegin conceded that her Dodd-Frank Act and Section 1981 claims failed because she did not exhaust her administrative remedies, and the Court granted Compass's motion to dismiss with respect to these claims.

In support of its motion to compel arbitration of Yegin's remaining claims, Compass argued that Yegin's employment contract required her to arbitrate her claims. Despite the fact that Yegin conceded that her Dodd-Frank Act claim failed, she argued that Section 1514A of the Dodd-Frank Act invalidated her pre-dispute arbitration agreement. The Court relied on the holding in *Holmes v. Air Liquide, LLC*, No. 12-20129, 2012 WL 5914863, at *2 (5th Cir. Nov. 26, 2012), which provides that "where a plaintiff does not have any claims arising under the Dodd-Frank Act, invalidating an arbitration agreement in its entirety due to its broad language is unreasonable." 2013 WL 622565, at *2. Accordingly, the Court compelled Yegin's remaining claims to arbitration.

### *Rodriguez v. Charles Schwab Corp.,* No. 12-cv-2277 JTF-TMP, 2013 WL 911959 (W.D. Tenn. Jan. 29, 2013).

The U.S. District Court for the Western District of Tennessee held that the Dodd-Frank Act did not render a pre-dispute arbitration agreement unenforceable for retaliatory discharge claims arising under state law.

Plaintiff Ivan Rodriguez filed suit against his former employer, Charles Schwab Corporation ("Charles Schwab") alleging retaliatory discharge under Tenn. Code Ann. § 50-1-34. Charles Schwab moved to dismiss the case or stay the proceedings pending arbitration.

Addressing Charles Schwab's motion, the Court had to determine (1) whether the parties agreed to arbitrate; (2) the scope of the arbitration agreement; (3) whether Congress intended the alleged federal statutory claims to be nonarbitrable; and (4) whether to stay any remaining claims pending arbitration. First, the Court found that Rodriguez signed a Form U-4 as required by the Financial Industry Regulatory Act ("FINRA"), which required him to arbitrate his claims. Second, the Court found that although Rodriguez alleged that he intended to disclose Charles Schwab's violations of the Dodd-Frank Act, he did not bring any federal claims. The Court also rejected Rodriguez's argument that the Dodd-Frank Act amended FINRA Rule 13201, which provides: "A dispute arising under a whistleblower statute that prohibits the use of pre-dispute arbitration agreements is not required to be arbitrated under the Code. Such a dispute may be arbitrated only if the parties have agreed to arbitrate after the dispute arose." *See* FINRA Rule 13201(b). The Court found that because Rodriguez did not bring any Sarbanes-Oxley whistleblower claims, he could not rely on the Dodd-Frank amendment that invalidates predispute arbitration agreements of Sarbanes-Oxley whistleblower claims. *See* 18 U.S.C. § 1514A(e)(2). Accordingly, the Court dismissed Rodriguez's complaint and compelled Rodriguez's claims to arbitration.

## Whistleblower Protection Under the Dodd-Frank Act

### *Hix v. FedEx Corporation,* No. 3:12-CV-03050, 2013 WL 820391 (W.D. Ark. Mar. 5, 2013).

Plaintiff Bryan Hix filed suit against FedEx Corporation ("FedEx Corp."), FedEx Freight, Inc. ("FedEx Freight"), and FedEx Corporate Services, Inc. alleging violations of the Sarbanes-Oxley Corporate and Criminal Fraud Accountability Act ("Sarbanes-Oxley"), the Dodd-Frank Act, and state law. FedEx Corp. and FedEx Freight moved to dismiss Hix's complaint.

In support of their motion, FedEx Corp. and FedEx Freight argued that Hix was not an employee of either company at the time of the termination of his employment. The Court noted that Sarbanes-Oxley protects employees who provide certain information against companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 or that file reports pursuant to Section 15(d) of the Securities Exchange Act of 1934. *See* 18 U.S.C. § 1514A(a). The Court stated that to establish a

prima facie case for retaliation, Hix must show that: "(1) [he] engaged in a protected activity; (2) the *employer* knew or suspected . . . the protected activity; (3) [he] suffered an unfavorable *personnel action*; and (4) the protected activity was a contributing factor in the unfavorable personnel action." 2013 WL 820391, at *2 (quoting *Miller v. Stifel, Nicolaus & Co.*, 812 F. Supp. 2d 975, 982 (D. Minn. Sept, 20, 2011)).

Finding that Hix had to show that he had an employer-employee relationship with FedEx Corp. and FedEx Freight, the Court first addressed Hix's employment status with regard to FedEx Corp. The Court applied the "alter ego/level of control" test, which provides that a parent company may be found to employ employees of its subsidiaries if (1) the parent company dominates the subsidiary's operations such that the two entities are one, or (2) the parent company controls the subsidiary's decisions and is therefore linked to alleged discriminatory action. The Court granted Hix the opportunity to prove that FedEx Corp. exercised sufficient control over FedEx Freight and FedEx Corporate Services.

Turning to Hix's employment status with regard to FedEx Freight, the Court noted that the U.S. Court of Appeals for the Eighth Circuit had not addressed whether a sister company can be liable under the "alter ego" test. The Court noted, however, that the court in *Missouri Pacific R. Co. v. Mackey*, 760 S.W.2d 59 (Ark. 1988), extended liability to a sister company under the "single enterprise" rule, which allows the court to determine that two separate companies should respond as a single corporation. The Court concluded that Hix should be allowed to establish FedEx Freight's liability under the "single enterprise" rule and denied FedEx Freight's motion to dismiss.

Finally, the Court found that Section 929A of the Dodd-Frank Act amended Sarbanes-Oxley to "include[e] any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such [parent] company after the Securities Exchange Act of 1934." *See* Pub. L. No. 111-203, § 929A, 124 Stat. 376 (2010). The Court stated that if the parent company includes the subsidiary's financial information in its consolidated financial statement, then a plaintiff may have a cause of action against the parent company. Accordingly, the Court denied the defendants' motion to dismiss.

## - - NEWS & DEVELOPMENTS - -

### CFPB Issues Final Rule Amending Regulation E of EFTA

On March 20, 2013, the CFPB issued a final rule amending Regulation E of the Electronic Fund Transfer Act ("EFTA") and its Official Interpretation.

In December 2012, Congress amended the EFTA to eliminate the requirement that a fee notice be posted on or at automated teller machines ("ATMs"). Congress had found that the requirement did not benefit consumers and created significant costs for ATM operators. The final rule amends Regulation E in accordance with this amendment to the EFTA.

To read the final rule, visit: http://files.consumerfinance.gov/f/201303_cfpb_Final-Rule-Amendment-to-Reg-E-re-ATM-Disclosures.pdf

### Agencies Issue Guidance on Leveraged Lending

On March 21, 2013, the Federal Reserve Board, FDIC, and OCC issued updated guidance on leveraged lending. The guidance, which replaces supervisory guidance issued in April 2001, covers transactions in which the borrower has a significantly higher degree of financial leverage than the industry norm.

Although leveraged lending declined during the financial crisis, it has since increased, while underwriting practices have simultaneously become less prudent. In issuing the updated guidance, the agencies have recognized the importance of banks providing safe leveraged financing to creditworthy borrowers.

The guidance focuses on areas such as establishing a risk-management framework, developing underwriting and valuation standards, managing exposure, tracking analytics, and performing stress testing. It applies to institutions supervised by agencies that engage in leveraged lending activities, and thus will not affect many community banks.

To read the guidance, visit: http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20130321a1.pdf

## CFPB Reveals Discriminatory Auto Lending Practices

On March 21, 2013, the CFPB released a bulletin which disclosed that certain auto loan providers have engaged in racially discriminatory pricing.

According to the CFPB, much of this discrimination arises in situations where lenders give auto dealers broad discretion in adding a dealer markup to the loan interest rate. Research shows that African Americans and Hispanics are among those primarily affected.

The CFPB has recommended that auto lenders take actions to ensure that they comply with fair lending laws with respect to dealer markup and compensation, such as imposing controls on dealer markup, monitoring the effects of dealer markup, and eliminating dealer discretion altogether.

To read the bulletin, visit: http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf

## CFPB Releases Annual Report on FDCPA

On March 20, 2013, the CFPB released its 2013 annual report on the Fair Debt Collection Practices Act ("FDCPA"). The report details the CFPB's supervision program over debt collection, summarizes consumer complaints on debt collection, and describes recent developments in enforcement, education, outreach, research, and policy initiatives.

The CFPB states that it will continue to develop its debt collection program over 2013 and work with the FTC to protect consumers from unfair, deceptive, and abusive debt collection practices.

To read the report, visit: http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf

## House Agriculture Committee Approves Dodd-Frank Legislation

On March 20, 2013, the House Agriculture Committee approved seven proposals to amend Title VII of the Dodd-Frank Act.

The bills include H.R. 634, the Business Risk Mitigation and Price Stabilization Act; H.R. 677, the Inter-Affiliate Swap Clarification Act; H.R. 742, the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2013; H.R. 992, the Swaps Regulatory Improvement Act; H.R. 1038, the Public Power Risk Management Act; H.R. 1256, the Swap Jurisdiction Certainty Act; and H.R. 1003, which would require the CFTC to engage in cost-benefit analysis.

To learn more, visit: http://agriculture.house.gov/press-release/ag-committee-approves-bipartisan-legislation-tweak-dodd-frank-act

## Federal Reserve Approves Capital Plans of Major Financial Institutions

On March 14, 2013, the Federal Reserve announced that it approved capital plans of fourteen financial institutions, and conditionally approved two other institutions, under the Comprehensive Capital Analysis and Review ("CCAR").

In CCAR, the Federal Reserve evaluates the capital adequacy and planning processes of large bank holding companies based on both qualitative and quantitative factors. Now in its third year, CCAR serves as a regular way to assess the capacity of large bank holding companies. The Federal Reserve can object to a plan, and can require an institution to prepare a new plan at any time.

To read the report, visit: http://www.federalreserve.gov/newsevents/press/bcreg/ccar-2013-results-20130314.pdf

## Senate Introduces Jumpstart GSE Reform Act

On March 14, 2013, a bipartisan group of senators introduced the Jumpstart GSE Reform Act, a legislative effort aimed at prohibiting any increase in guarantee fees charged by Fannie Mae or Freddie Mac from offsetting other government spending. The bill would also prohibit the Treasury's sale of preferred shares absent congressional approval.

According to the bill's proponents, if the government were allowed to spend "g-fee" revenue on other programs, it would be nearly impossible to reform Fannie Mae or Freddie Mac. Moreover, allowing the Treasury to sell preferred shares at its discretion would incentivize the Treasury to act in the best interest of private shareholders rather than taxpayers.

To read the bill, visit: http://www.corker.senate.gov/public/_cache/files/fb2b5280-ab98-4ef1-ac5d-37ed49bada1e/03-14-13%20Jumpstart%20GSE%20Reform%20Act.pdf

## CFPB to Hold Field Hearing on Consumer Complaint Database

On March 28, 2013 at 11am CST, the CFPB will hold a field hearing on the CFPB's Office of Consumer Response Consumer Complaint Database.

The event is open to the public and will feature remarks from the CFPB Director, consumer groups, industry players, and the public. To RSVP, email cfpb.events@cfpb.gov with your full name and organizational affiliation.

To read the CFPB's announcement, visit: http://www.consumerfinance.gov/blog/save-the-date-join-us-for-a-field-hearing-in-des-moines/

## Fannie Mae, Freddie Mac, and Federal Home Loan Banks Face Considerable Risk of Loss

According to a white paper released by the Federal Housing Finance Agency's inspector general, Fannie Mae, Freddie Mac, and the Federal Home Loan Banks face considerable risk of higher losses if interest rates continue to climb.

The white paper noted that even 1 percentage point increase could cause nearly $2 billion in losses. The losses could be even higher, the paper noted, if Fannie Mae and Freddie Mac do not begin effectively using risk-management strategies.

To read the white paper, visit: http://www.fhfaoig.gov/Content/Files/WPR-2013-01.pdf

## OCC Requests Comments on Bank Stress Test Proposal

On March 11, 2013, the OCC published a Notice soliciting comments on a proposed new regulatory reporting requirement for national banks and federal savings associations entitled "Company-Run Annual Stress Test Reporting Template and Documentation for Covered Institutions with Total Consolidated Assets of $10 Billion to $50 Billion under the Dodd-Frank Wall Street Reform and Consumer Protection Act."

Comments must be submitted no later than May 10, 2013.

To read the Notice, visit: http://www.gpo.gov/fdsys/pkg/FR-2013-03-11/pdf/2013-05448.pdf

## Federal Reserve Does Not Plan to Change Debit Card Fee Limit

On March 5, 2013, the Federal Reserve released a report entitled "2011 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions," in which it stated that it did not intend to change the maximum debit transaction interchange fee currently set at 21 cents.

The report indicated that 67% of covered issuers had average interchange fees below 21 cents in 2011. The report also noted that the estimated debit card fraud losses in 2011 were $1.38 billion, a decrease compared to losses in 2009.

To read the report, visit: http://www.federalreserve.gov/paymentsystems/files/debitfees_costs_2011.pdf

## Freddie Mac Reports Profits in 2012

On February 28, 2013, Freddie Mac released its fourth-quarter and full-year 2012 financial results. Freddie Mac's press release indicates that the company enjoyed profits of $11 billion in 2012. This marks the first year that Freddie Mac saw annual profits since 2006.

To view the press release, visit: http://www.freddiemac.com/investors/er/pdf/2012er-4q12_release.pdf

## Federal Reserve Extends Comment Period on Foreign Bank Prudential Standards

The Federal Reserve has extended the comment period on a proposed rule to implement the Dodd-Frank Act's enhanced prudential standards and early remediation requirements for foreign banks and covered foreign non-bank companies.

The standards address issues such as liquidity, risk management, and stress testing. Comments are now due by April 30, 2013.

To learn more, visit: http://regreformtracker.aba.com/2013/02/federal-reserve-extends-comment-period.html?utm_source=regreformtracker&utm_medium=ABA+Dodd-Frank+Tracker

## CFPB Outlines Plan for Implementation of New Mortgage Rules

On February 13, 2013, the CFPB announced its plan for ensuring mortgage industry compliance with new consumer protection rules that were issued in January 2013. Among these rules were the Ability-to-Repay rule and rules addressing appraisals, escrow accounts, and high-cost mortgages.

The CFPB has stated that, in order to assist the mortgage industry in complying with these new rules, it will coordinate with other federal agencies, release guides, issue official interpretive guidance, and educate consumers on the new rules.

To read the press release, visit: http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-lays-out-implementation-plan-for-new-mortgage-rules/

## CFPB to Scrutinize Loan Transferring Practices

On February 11, 2013, the CFPB issued a bulletin reminding mortgage lenders and servicers of their legal obligations related to loan transferring.

Numerous federal laws, including the Real Estate Settlement Procedures Act, the Fair Credit Reporting Act, and the Fair Debt Collection Practices Act, impose duties on mortgage servicers related to transferring. Moreover, in January 2013, the CFPB issued new mortgage servicing rules requiring loan servicers to maintain certain loan transferring policies and procedures.

The bulletin indicates that the CFPB will be scrutinizing how a servicer has prepared for transfer of servicing, how the new servicer handles paperwork it receives, and what policies a servicer has to prevent harm to a borrower's loss mitigation efforts.

To read the bulletin, visit: http://files.consumerfinance.gov/f/201302_cfpb_bulletin-on-servicing-transfers.pdf

## FTC Issues Study on U.S. Credit Reporting Industry

The FTC has released a study on the U.S. credit reporting industry. The study revealed that one in four consumers had an error on their credit report that might affect their credit score.

The study also showed that four out of five consumers who filed disputes experienced a modification to their credit report, and that more than ten percent of these consumers saw a change to their credit score.

For more information, visit: http://www.ftc.gov/opa/2013/02/creditreport.shtm

## HUD Issues Standard on Discriminatory Effects in Housing

On February 15, 2013, the U.S. Department of Housing and Urban Development ("HUD") issued a final rule formalizing the national standard for determining whether a practice is discriminatory in violation of the Fair Housing Act.

The Executive Summary of the final rule notes that, for four decades, courts have engaged in case-by-case application of HUD's "discriminatory effects" standard, creating uncertainty in how a party's conduct will be evaluated. The rule, which establishes a three-part burden-shifting test, provides clarity and predictability for entities covered by the Fair Housing Act.

HUD Secretary Shaun Donovan commented that the final rule demonstrates HUD's commitment to enforcing the Fair Housing Act in a uniform manner.

To read the final rule, visit: http://portal.hud.gov/hudportal/documents/huddoc?id=discriminatoryeffectrule.pdf

## CFPB Issues Final Rule on Loan Originator Compensation

The CFPB has issued final rules aimed at eliminating mortgage lenders' incentives to steer borrowers toward risky, high-cost loans.

In particular, the final rules: prohibit lenders from offering incentives to brokers for steering consumers into a high-cost loan; prohibit a loan originator from being compensated by both the consumer and a third party; set qualification and screening standards for loan originators, such as character and fitness requirements, criminal background checks, and training requirements; and generally prohibit mandatory arbitration provisions.

Except for the mandatory arbitration prohibition, which will take effect in June 2013, the final rules will take effect in January 2014.

To read a summary of the final rules, visit: http://files.consumerfinance.gov/f/201301_cfpb_loan-originator-compensation-rule_summary.pdf

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About Jordan: Jordan practices in the firm's Financial Services Litigation practice group. She received her J.D. from Vanderbilt University, where she was the Senior Technology Editor of the *Vanderbilt Journal of Entertainment and Technology Law*. Jordan received her B.A., *magna cum laude,* in Mathematics-Economics from Furman University.

*No representation is made that the quality of services to be performed is greater than the quality of legal services performed by other lawyers.*

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