Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

November 30, 2012

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FEDERAL ISSUES

CFPB Announces Remittance Transfer Rule Delay and Changes. On November 27, the CFPB issued a bulletin announcing that it intends to delay the effective date of the new remittance transfer rule finalized earlier this year and already once modified. Per Bulletin 2012-08, the CFPB plans to pursue a fast-track rulemaking next month to alter provisions of the final rule relating to (i) situations in which incorrect account numbers are provided by senders of remittance transfers, and (ii) the disclosure of certain foreign taxes and fees charged by financial institutions receiving remittance transfers. The rulemaking also will propose an extension of the February 7, 2013 effective date of the rule until 90 days after the CFPB finalizes the rulemaking. The CFPB's Bulletin follows pleas from industry groups and Members of Congress to change the rule and the implementation timeline. The CFPB action also follows an announcement this week by the Federal Home Loan Bank of New York (FHLBNY) that it plans to stop processing international wire transfers for its members on December 31, 2012, based on its concern that the CFPB rule would create potential risks that are too great for what the FHLBNY considers a non-core service.

CFPB Warns Specialty Consumer Reporting Agencies about FCRA Compliance. On November 29, the CFPB issued a bulletin to nationwide specialty consumer reporting agencies (NSCRAs) reminding such firms of their obligation under FCRA to facilitate the process by which consumers may obtain a free annual consumer report. The CFPB also announced that its enforcement team issued warning letters to several NSCRAs that may be violating FCRA, based on reviews conducted under the CFPB's new authority to examine certain CRAs. According to Bulletin 2012-09, the CFPB expects every NSCRA to (i) enable consumers to request a free annual consumer report by a toll-free telephone number that is published as specified, (ii) ensure that its streamlined process for obtaining a free annual consumer report has adequate capacity to accept requests, (iii) collect only as much personal information from a consumer requesting a free annual

consumer report as is reasonably necessary to identify the consumer properly, (iv) provide clear and easily understandable information and instructions to consumers, (v) comply with Regulation V when using or disclosing personally identifiable information collected from a consumer in connection with the consumer's request for any FCRA-required disclosure, and (vi) accept requests for free annual consumer reports from consumers who use methods other than the streamlined process or instruct such consumers on how to use the streamlined process. The sample warning letter released by the CFPB cites possible violations of the requirements outlined in the Bulletin and urges recipients to review practices and procedures to ensure compliance.

House Financial Services Subcommittees Hold Joint Hearing on Impact of Basel III Proposals. On November 29, two Subcommittees of the House Financial Services Committee held a joint hearing regarding the federal banking agency proposals to implement the Basel III international regulatory capital accords. As with a Senate hearing on the same topic last week, committee members focused bipartisan attention on the proposals' potential impact on community banks and insurance companies that are holders of depository institutions. The committee also explored the interplay between the Basel III proposals and the pending rules to set forth the "qualified mortgage" standard and the "qualified residential mortgage" standard. The regulators promised lawmakers that they would carefully consider the concerns of community bankers. The regulators did not provide a timeline for their final rulemaking.

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FinCEN, Federal Reserve Board Propose Changes to Certain Bank Secrecy Act Definitions. On November 29, FinCEN and the Federal Reserve Board announced that they are seeking comments on a proposed rule to amend the definitions of "funds transfer" and "transmittal of funds" set forth in the regulations implementing the Bank Secrecy Act. The proposed rule explains that the changes are designed to ensure that the current scope of the definitions is not expanded, following recent related amendments to the Electronic Fund Transfer Act. Comments on the proposed rule are due by January 25, 2013.

Key Stakeholders Comment on FHFA State-Level Guarantee Fee Pricing Proposal. Over the past week, key stakeholders submitted comments on the FHFA's proposal regarding state-level guarantee fees, which would allow Fannie Mae and Freddie Mac to charge higher upfront fees for single-family mortgages originated in Connecticut, Florida, Illinois, New Jersey, and New York. The FHFA argues that the higher fees are needed to offset higher default-related costs incurred by Fannie Mae and Freddie Mac in those states resulting in part from state and local foreclosure policies. Senators from four of those states sent a letter on November 21, 2012 asking the FHFA to abandon the proposal in its entirety, citing shortcomings in the proposal and negative impacts on borrowers in those states. The senators argued that the proposal would penalize borrowers in states with higher consumer protections and would undermine those protections and restrict

residential lending. The Attorneys General of Illinois, Connecticut, and New York similarly objected to the proposal in a November 26, 2012 letter. Also on November 26, 2012, the ABA submitted a letter in support of the increased fees in which it pointed out that the fees would be modest and argued that the fees would help to spur state and local policymakers to reform foreclosure processes. On the same day, the MBA submitted a letter seeking more information about the formula used by the FHFA to determine which states should be assessed the higher fees and urging the FHFA to (i) expand the proposal to reward states with lower default-related costs, (ii) change the format of the proposed pricing to more closely match industry practice, and (iii) alter its approach to compensatory fees charged to servicers for unavoidable foreclosure delays. The FHFA received numerous other comment letters.

SEC Chairman Announces Departure, President Obama Names Replacement. On November 26, SEC Chairman Mary Shapiro announced that she will step down from her position on December 14, 2012, after serving as Chairman for nearly four years. The SEC press release described her tenure as one during which she "strengthened, reformed, and revitalized the agency" while overseeing "a more rigorous enforcement and examination program" and implementing new rules. On the same day, President Obama designated SEC Commissioner Elisse Walter as Chairman.

Republican House Members Elect Representative Hensarling Financial Services Committee Chairman, Representative Waters Expected to Fill Ranking Member Position. On November 28, the Republican caucus of the House of Representatives elected Representative Jeb Hensarling (R-TX) Chairman of the House Financial Services Committee for the 113th Congress, which will convene next year. Mr. Hensarling has served as the vice-chair of the Committee under Representative Spencer Bachus (R-AL) who could not retain the position due to caucus-imposed term limits. In a statement, Mr. Hensarling expressed his commitment to "end[ing] the phenomenon of 'too big to fail' and reinstat[ing] market discipline," as well as reducing taxpayer risk and cutting the weight, volume, complexity, and uncertainty of federal regulations. Democrats reportedly are expected to elect Representative Maxine Waters (D-CA) to succeed retiring Representative Barney Frank (D-MA) as Ranking Member on the Committee.

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COURTS

Eleventh Circuit Holds Bank Security Procedure Insufficient to Provide Safe Harbor from Liability for Fraudulent Wire Transfer. On November 27, the U.S. Court of Appeals for the Eleventh Circuit held that a bank may be liable for an allegedly fraudulent in-person wire transfer because it failed to implement a commercially reasonable security procedure to verify the authenticity of the wire transfer order and to detect transmission or content errors. *Chavez v. Mercantil Commercebank N.A.*, No. 11-15804, 2012 WL 5907151 (11th Cir. Nov. 27, 2012). The plaintiff, a Venezuelan resident who opened an account at a Florida bank, elected a security procedure under the account's Funds Transfer Agreement that provided only that the bank require written authorization by him in order to process any orders for the account. The plaintiff sued the bank for lost funds, claiming that the bank allowed an unauthorized individual to initiate a fraudulent in-person wire transfer of funds out of the account. The district court granted summary judgment in favor of the bank, holding that state law creates a safe harbor that relieves banks of liability for fraudulent payment orders if the bank and the customer agree to a commercially reasonable security procedure and the bank follows that procedure in good faith. The appellate court held that the agreed-upon security procedure was not in fact a security procedure as defined by statute. The court explained that state law disavows security procedures that require only a comparison of a signature on a payment order with an authorized specimen signature of the customer. In this case, the security procedure required written authorization, but was silent as to how the bank was to verify that authorization, *i.e.*, it did not even require that the signature be compared to one on file. The court held that because the bank and the account holder did not agree to a security procedure, the bank could not seek safe harbor protection and reversed the district court's order. One judge dissented from the majority opinion and argued that the Funds Transfer Agreement encompassed both the required and discretionary security procedures, which, taken together, were commercially reasonable and followed in good faith, therefore affording the bank safe harbor protection.

U.S. Supreme Court Passes on Two Banking Cases. This week the Supreme Court denied petitions for a writ of certiorari in two banking-related appeals. In *Cummings v. Doughty*, No. 12-351, the petitioners, a bank and its CEO, asked the Supreme Court to determine whether the safe harbor established by the Annunzio-Wylie Anti-Money Laundering Act provides absolute (versus qualified)

immunity from claims that arise from the submission of a suspicious activity report (SAR). The petitioners were appealing a Louisiana state court holding, which the state appellate courts declined to review, that denied petitioners immunity under the Act after the CEO reported a bank president for possible suspicious activity. The bank president claimed that the petitioners lacked a good faith basis to report him and, therefore, could not receive absolute immunity. The petitioners argued that the First Circuit and the Second Circuit have held, based on the plain language of the Act, that financial institutions have absolute immunity from any cause of action relating to the submission of a SAR, while the Eleventh Circuit has held that the Act only grants qualified immunity. The Supreme Court declined to remedy the apparent circuit split.

In *Parks v. MBNA America Bank, N.A.*, No 12-359, the Supreme Court denied review of a California Supreme Court decision that held that the National Bank Act preempts state requirements that certain disclosures accompany preprinted or "convenience checks" provided by a credit card issuer to its cardholders. The plaintiff filed suit on behalf of a putative class after he used such checks and was assessed finance charges that were greater than those that he would have been assessed had he used his credit card instead. He alleged that California law requires certain disclosures to be provided with the checks, including those related to convenience checks. In June, the California Supreme Court held the specific disclosure obligations imposed by the state law at issue, including precise language and placement of the disclosures, exceeded any federal law requirements and is preempted as an obstacle to the broad grant of power given to national banks by the NBA to conduct the business of banking.

Ohio Supreme Court Upholds Dismissal of Class Action Challenging Bank's Interest Calculation Method. On November 21, the Ohio Supreme Court reinstated a lower court's grant of summary judgment to a bank defending a putative class action challenging its interest calculation method as described in its promissory note for a commercial loan. *JNT Properties, LLC v. KeyBank N.A.*, No. 2012-Ohio-5369, 2012 WL 5911063 (Ohio Nov. 21, 2012). The borrower alleged that the bank was in breach of contract by calculating interest using the 365/360 method, resulting in a higher effective rate than the rate stated in the promissory note. The bank maintained that the note clearly fixed the interest rate according to the 365/360 method. The trial court found in favor of the bank on summary judgment, but the appellate court reversed, concluding that the note was ambiguous and created a genuine issue of material fact as to which interest rate the note meant to impose. The Ohio Supreme Court reversed the appellate court and reinstated the trial court's grant of summary judgment in favor of the bank. It held that the note's "inartful use of the term 'annual interest rate,' which is clearly at variance with the next phrase setting the 365/360 method as the applicable method for computing interest," does not render the clause defining the interest calculation method ambiguous. The court reasoned that the note was not so confusing that a reasonable person would think that the rate would be calculated using something other than the 365/360 method, and held that the note made clear that the term being defined was not the annual interest rate, but rather the interest computation method.

Federal District Court Protects Law Firm Advice to Bank Directors Sought by FDIC as Receiver. On November 19, the U.S. District Court for the Northern District of Illinois held that the FDIC, as receiver for a failed bank, is not entitled to memoranda prepared by a law firm in connection with the firm's representation of two directors of the failed bank. *FDIC v. Belongia Shapiro & Franklin, LLP*, No. 12-2889, 2012 WL 5877559 (N.D. Ill. Nov. 19, 2012). The FDIC petitioned the court to enforce an administrative subpoena seeking legal opinions the firm provided to the bank in which the firm counseled the bank to pay the legal fees of bank personnel in three lawsuits. The court held that even though the FDIC stands in the shoes of the bank and generally holds any privilege the firm may assert, the firm was not required to turn over its legal advice provided to two of the bank's directors who faced an administrative enforcement action by the FDIC. The court reasoned that because the firm was providing advice to the directors and not to the bank,

the FDIC does not hold the attorney-client privilege. Further, the court explained that even though the firm provided advice to the bank before it represented the individual directors, such representation does not establish a joint-client or common interest exception to the privilege. Moreover, the bank's payment of the firm's fees does not entitle the bank to be privy to the firm's communications with the directors. The court did require the firm to produce materials regarding two other matters in which the firm provided advice to the bank.

Bank Agrees to Settle Suit Over Cyber Security Procedures. On November 19, a bank sued by a commercial account holder to recover funds lost after cyber attackers gained electronic access to its account and made a series of unauthorized withdrawals reportedly agreed to pay the customer for the unrecovered funds, in connection with the dismissal of the suit. *Patco Const. Co. Inc. v. Peoples United Bank*, No. 9-503, Stipulation of Dismissal (D. Me. Nov. 19, 2012). In July, the First Circuit held that the bank's collective security failures, when compared to the security measures employed by other financial institutions and the bank's capacity to implement more robust protections, rendered its security procedures commercially unreasonable. In doing so, the First Circuit became the first federal appellate court to address the issue of bank liability for the loss of customer funds resulting from a breach of a bank's cyber security. It reversed a district court ruling in favor of the bank and remanded for further proceedings. On remand, the bank agreed to pay in full for the lost funds.

MISCELLANY

European Parliament Moves Towards Common Rules for Card Payments. On November 20, the European Parliament adopted a nonbinding resolution calling for the development of common rules and standards for personal credit and debit card payments. The resolution explains that such rules would bring the card payment market "closer to its full potential and efficiency." The Members of Parliament called on the European Commission to develop the legislative proposals needed to extend the current single Euro payments area (SEPA) regulation, which governs euro credit and direct debit transactions among banks, to the market for card, internet and mobile payments, but cautioned that lawmakers should avoid regulating the internet and mobile payment market too heavily, so as not to hinder its growth and innovation. The resolution also claims that current fees for handling card payments are high relative to the costs they need to cover, but does not call for caps. Finally, the resolution states that minimum security requirements for card, internet and mobile payments should be the same in all EU member states.

FIRM NEWS

Complimentary Webinar - The CFPB: Investigations and Enforcement Actions in Focus
BuckleySandler LLP will host a webinar on Thursday, December 6, 2012 from 2:00-3:15 PM ET, to discuss the CFPB's rules governing investigations, enforcement actions, and adjudications. BuckleySandler attorneys Jeff Naimon, Jonice Gray Tucker, and Lori Sommerfield also will discuss themes prevalent in the first three public enforcement actions undertaken by the CFPB, all of which were predicated, in part, on allegations of unfair and deceptive practices.

This webinar will be of particular interest to in-house legal, compliance, and risk management personnel at banks and other financial services providers subject to CFPB oversight. Please no outside law firms, government agency personnel, consulting firms, or media. After registering and being approved, you will receive a confirmation email containing instructions for joining the webinar.

Click here to register.

Valerie Hletko will participate in PLI's Banking Law Institute 2012, on December 5, 2012, in New York, NY. Ms. Hletko's panel is entitled "Major Non-Consumer Litigation/Enforcement and Consumer Financial Protection Supervision and Enforcement." Panelists, including Kent Markus of the CFPB, will review topics ranging from mortgage servicing enforcement to anti-money laundering enforcement.

Andrew Sandler will be a faculty member at the 6th Annual Leading Law Firms Conference on December 7, 2012. Mr. Sandler will join other lawyer leaders and senior business executives to discuss critical questions and leadership issues facing law firms in 2013.

Jonice Gray Tucker will speak at the American Bar Association's Consumer Financial Services Committee Winter Meeting on January 6, 2013 in Naples, Florida. The panel on which she is participating will address CFPB examinations and enforcement actions.

Joseph Reilly will speak at the American Bar Association's Consumer Financial Services Committee Winter Meeting on January 8, 2013 in Naples, Florida. Mr. Reilly will participate on a panel entitled "The Ability-to-Repay / Qualified Mortgage Rule: The Saga Continues."

David Krakoff will be an instructor for the Second Annual NACDL White Collar Criminal Defense College at Stetson. He will participate in a panel presentation entitled "Overview of Handling a White Collar Case" on January 10, 2013.

David Krakoff will speak at ACI's Inaugural Summit on White Collar Litigation being held January 22-23, 2013, in New York, NY. Mr. Krakoff will participate in the January 22 session entitled "The FCPA Year In Review: Assessing the Biggest Cases of the Year and What Litigators Need to Take Away to Best Protect Their Clients."

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.

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.

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.

FIRM PUBLICATIONS

Jonice Gray Tucker and Jeff Naimon wrote "Liability for Servicers: Localities Jump in the Game,"

which appears in *Mortgage Servicing News*' October 2012 issue.

Jonice Gray Tucker and Lori Sommerfield authored "Consumer Complaint Management: Meeting Regulatory Expectations," which was published in the October 2012 edition of *The Review of Banking & Financial Services*.

Andrea Mitchell and Lori Sommerfield authored "'Red Flags' For Fair Lending Risk - How Banks Can Identify and Resolve Them" for the American Association of Bank Directors.

Kirk Jensen, Donna Wilson, and Sasha Leonhardt published "'You Can't Handle the Truth' Fact, Fiction and the Servicemembers Civil Relief Act" in the October 22, 2012 issue of Westlaw Journal's Bank & Lender Liability.

Elizabeth McGinn and Kristopher Knabe wrote "Ethical Issues in the Digital Age: Navigating E-Discovery Challenges" on November 1, 2012 for the American Bar Association.

Benjamin Klubes, Matthew Previn, Michelle Rogers, and Ann Wiles published "How the DOJ is Adapting in the War on Financial Fraud" in the November 9, 2012 issue of Law360.

Clinton Rockwell and Daniel Ladd published "SAFE, or Out? Who's In, Who's Not under the SAFE Act" in the November 20, 2012 issue of Consumer Financial Services Law Report.

About BuckleySandler LLP (www.buckleysandler.com)

With over 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.

InfoBytes is not intended as legal advice to any person or firm. It is provided as a client service and information herein is drawn from various public sources, including other publications.

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Republican House Members Elect Representative Hensarling Financial Services Committee Chairman, Representative Waters Expected to Fill Ranking Member Position. On November 28, the Republican caucus of the House of Representatives elected Representative Jeb Hensarling (R-TX) Chairman of the House Financial Services Committee for the 113th Congress, which will convene next year. Mr. Hensarling has served as the vice-chair of the Committee under Representative Spencer Bachus (R-AL) who could not retain the position due to caucus-imposed term limits. In a statement, Mr. Hensarling expressed his commitment to "end[ing] the phenomenon of 'too big to fail' and reinstat[ing] market discipline," as well as reducing taxpayer risk and cutting the weight, volume, complexity, and uncertainty of federal regulations. Democrats reportedly are expected to elect Representative Maxine Waters (D-CA) to succeed retiring Representative Barney Frank (D-MA) as Ranking Member on the Committee.

FinCEN, Federal Reserve Board Propose Changes to Certain Bank Secrecy Act Definitions. On November 29, FinCEN and the Federal Reserve Board announced that they are seeking comments on a proposed rule to amend the definitions of "funds transfer" and "transmittal of funds" set forth in the regulations implementing the Bank Secrecy Act. The proposed rule explains that the changes are designed to ensure that the current scope of the definitions is not expanded, following recent related amendments to the Electronic Fund Transfer Act. Comments on the proposed rule are due by January 25, 2013.

Eleventh Circuit Holds Bank Security Procedure Insufficient to Provide Safe Harbor from Liability for Fraudulent Wire Transfer. On November 27, the U.S. Court of Appeals for the Eleventh Circuit held that a bank may be liable for an allegedly fraudulent in-person wire transfer because it failed to implement a commercially reasonable security procedure to verify the authenticity of the wire transfer order and to detect transmission or content errors. *Chavez v. Mercantil Commercebank N.A.*, No. 11-15804, 2012 WL 5907151 (11th Cir. Nov. 27, 2012). The plaintiff, a Venezuelan resident who opened an account at a Florida bank, elected a security procedure under the account's Funds Transfer Agreement that provided only that the bank require written authorization by him in order to process any orders for the account. The plaintiff sued the bank for lost funds, claiming that the bank allowed an unauthorized individual to initiate a fraudulent in-person wire transfer of funds out of the account. The district court granted summary judgment in favor of the bank, holding that state law creates a safe harbor that relieves banks of liability for fraudulent payment orders if the bank and the customer agree to a commercially reasonable security procedure and the bank follows that procedure in good faith. The appellate court held that the agreed-upon security procedure was not in fact a security procedure as defined by statute. The court explained that state law disavows security procedures that require only a comparison of a signature on a payment order with an authorized specimen signature of the customer. In this case, the security procedure required written authorization, but was silent as to how the bank was to verify that authorization, *i.e.*, it did not even require that the signature be compared to one on file. The court held that because the bank and the account holder did not agree to a security procedure, the bank could not seek safe harbor protection and reversed the district court's order. One judge dissented from the majority opinion and argued that the Funds Transfer Agreement encompassed both the required and discretionary security procedures, which, taken together, were commercially reasonable and followed in good faith, therefore affording the bank safe harbor protection.

U.S. Supreme Court Passes on Two Banking Cases. This week the Supreme Court denied petitions for a writ of certiorari in two banking-related appeals. In *Cummings v. Doughty*, No. 12-351, the petitioners, a bank and its CEO, asked the Supreme Court to determine whether the safe harbor established by the Annunzio-Wylie Anti-Money Laundering Act provides absolute (versus qualified)

immunity from claims that arise from the submission of a suspicious activity report (SAR). The petitioners were appealing a Louisiana state court holding, which the state appellate courts declined to review, that denied petitioners immunity under the Act after the CEO reported a bank president for possible suspicious activity. The bank president claimed that the petitioners lacked a good faith basis to report him and, therefore, could not receive absolute immunity. The petitioners argued that the First Circuit and the Second Circuit have held, based on the plain language of the Act, that financial institutions have absolute immunity from any cause of action relating to the submission of a SAR, while the Eleventh Circuit has held that the Act only grants qualified immunity. The Supreme Court declined to remedy the apparent circuit split.

In *Parks v. MBNA America Bank, N.A.*, No 12-359, the Supreme Court denied review of a California Supreme Court decision that held that the National Bank Act preempts state requirements that certain disclosures accompany preprinted or "convenience checks" provided by a credit card issuer to its cardholders. The plaintiff filed suit on behalf of a putative class after he used such checks and was assessed finance charges that were greater than those that he would have been assessed had he used his credit card instead. He alleged that California law requires certain disclosures to be provided with the checks, including those related to convenience checks. In June, the California Supreme Court held the specific disclosure obligations imposed by the state law at issue, including precise language and placement of the disclosures, exceeded any federal law requirements and is preempted as an obstacle to the broad grant of power given to national banks by the NBA to conduct the business of banking.

Ohio Supreme Court Upholds Dismissal of Class Action Challenging Bank's Interest Calculation Method. On November 21, the Ohio Supreme Court reinstated a lower court's grant of summary judgment to a bank defending a putative class action challenging its interest calculation method as described in its promissory note for a commercial loan. *JNT Properties, LLC v. KeyBank N.A.*, No. 2012-Ohio-5369, 2012 WL 5911063 (Ohio Nov. 21, 2012). The borrower alleged that the bank was in breach of contract by calculating interest using the 365/360 method, resulting in a higher effective rate than the rate stated in the promissory note. The bank maintained that the note clearly fixed the interest rate according to the 365/360 method. The trial court found in favor of the bank on summary judgment, but the appellate court reversed, concluding that the note was ambiguous and created a genuine issue of material fact as to which interest rate the note meant to impose. The Ohio Supreme Court reversed the appellate court and reinstated the trial court's grant of summary judgment in favor of the bank. It held that the note's "inartful use of the term 'annual interest rate,' which is clearly at variance with the next phrase setting the 365/360 method as the applicable method for computing interest," does not render the clause defining the interest calculation method ambiguous. The court reasoned that the note was not so confusing that a reasonable person would think that the rate would be calculated using something other than the 365/360 method, and held that the note made clear that the term being defined was not the annual interest rate, but rather the interest computation method.

Federal District Court Protects Law Firm Advice to Bank Directors Sought by FDIC as Receiver. On November 19, the U.S. District Court for the Northern District of Illinois held that the FDIC, as receiver for a failed bank, is not entitled to memoranda prepared by a law firm in connection with the firm's representation of two directors of the failed bank. *FDIC v. Belongia Shapiro & Franklin, LLP*, No. 12-2889, 2012 WL 5877559 (N.D. Ill. Nov. 19, 2012). The FDIC petitioned the court to enforce an administrative subpoena seeking legal opinions the firm provided to the bank in which the firm counseled the bank to pay the legal fees of bank personnel in three lawsuits. The court held that even though the FDIC stands in the shoes of the bank and generally holds any privilege the firm may assert, the firm was not required to turn over its legal advice provided to two of the bank's directors who faced an administrative enforcement action by the FDIC. The court reasoned that because the firm was providing advice to the directors and not to the bank,

the FDIC does not hold the attorney-client privilege. Further, the court explained that even though the firm provided advice to the bank before it represented the individual directors, such representation does not establish a joint-client or common interest exception to the privilege. Moreover, the bank's payment of the firm's fees does not entitle the bank to be privy to the firm's communications with the directors. The court did require the firm to produce materials regarding two other matters in which the firm provided advice to the bank.

CONSUMER FINANCE

CFPB Warns Specialty Consumer Reporting Agencies about FCRA Compliance. On November 29, the CFPB issued a bulletin to nationwide specialty consumer reporting agencies (NSCRAs) reminding such firms of their obligation under FCRA to facilitate the process by which consumers may obtain a free annual consumer report. The CFPB also announced that its enforcement team issued warning letters to several NSCRAs that may be violating FCRA, based on reviews conducted under the CFPB's new authority to examine certain CRAs. According to Bulletin 2012-09, the CFPB expects every NSCRA to (i) enable consumers to request a free annual consumer report by a toll-free telephone number that is published as specified, (ii) ensure that its streamlined process for obtaining a free annual consumer report has adequate capacity to accept requests, (iii) collect only as much personal information from a consumer requesting a free annual consumer report as is reasonably necessary to identify the consumer properly, (iv) provide clear and easily understandable information and instructions to consumers, (v) comply with Regulation V when using or disclosing personally identifiable information collected from a consumer in connection with the consumer's request for any FCRA-required disclosure, and (vi) accept requests for free annual consumer reports from consumers who use methods other than the streamlined process or instruct such consumers on how to use the streamlined process. The sample warning letter released by the CFPB cites possible violations of the requirements outlined in the Bulletin and urges recipients to review practices and procedures to ensure compliance.

SECURITIES

SEC Chairman Announces Departure, President Obama Names Replacement. On November 26, SEC Chairman Mary Shapiro announced that she will step down from her position on December 14, 2012, after serving as Chairman for nearly four years. The SEC press release described her tenure as one during which she "strengthened, reformed, and revitalized the agency" while overseeing "a more rigorous enforcement and examination program" and implementing new rules. On the same day, President Obama designated SEC Commissioner Elisse Walter as Chairman.

PRIVACY/DATA SECURITY

Bank Agrees to Settle Suit Over Cyber Security Procedures. On November 19, a bank sued by a commercial account holder to recover funds lost after cyber attackers gained electronic access to its account and made a series of unauthorized withdrawals reportedly agreed to pay the customer for the unrecovered funds, in connection with the dismissal of the suit. *Patco Const. Co. Inc. v. Peoples United Bank*, No. 9-503, Stipulation of Dismissal (D. Me. Nov. 19, 2012). In July, the First Circuit held that the bank's collective security failures, when compared to the security measures employed by other financial institutions and the bank's capacity to implement more robust protections, rendered its security procedures commercially unreasonable. In doing so, the First Circuit became the first federal appellate court to address the issue of bank liability for the loss of customer funds resulting from a breach of a bank's cyber security. It reversed a district court ruling in favor of the bank and remanded for further proceedings. On remand, the bank agreed to pay in

full for the lost funds.

PAYMENTS

European Parliament Moves Towards Common Rules for Card Payments. On November 20, the European Parliament adopted a nonbinding resolution calling for the development of common rules and standards for personal credit and debit card payments. The resolution explains that such rules would bring the card payment market "closer to its full potential and efficiency." The Members of Parliament called on the European Commission to develop the legislative proposals needed to extend the current single Euro payments area (SEPA) regulation, which governs euro credit and direct debit transactions among banks, to the market for card, internet and mobile payments, but cautioned that lawmakers should avoid regulating the internet and mobile payment market too heavily, so as not to hinder its growth and innovation. The resolution also claims that current fees for handling card payments are high relative to the costs they need to cover, but does not call for caps. Finally, the resolution states that minimum security requirements for card, internet and mobile payments should be the same in all EU member states.

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