



## 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. Since its enactment, the Dodd-Frank Act has already had significant impact; yet, the great weight of this sprawling legislation is yet to be seen. Given the infancy of the Dodd-Frank's provisions, as well as the recent transfer of authority over administration of a number of federal financial laws to the newly created Bureau of Consumer Financial Protection, increased litigation seeking to clarify this new legislation is inevitable.

In an effort to stay apprised of these significant industry changes, Burr & Forman's Dodd-Frank Newsletter will serve as a monthly update of recent case law, news, and developments related to the Dodd-Frank Act.

## - - RECENT CASES - -

### Preemption

*Davis v. World Savings Bank, FSB*, No. 10-1761 (RMC), 2011 WL 3796170 (D. D.C. Aug. 29, 2011).

Plaintiff Derrick Davis brought a number of claims against World Savings Bank, FSB (n/k/a Wachovia Mortgage, FSB) after he defaulted on payment of his mortgage. Defendants moved to dismiss on several grounds, including preemption under the Homeowners' Loan Act ("HOLA").

In finding that Plaintiff's claims were preempted by HOLA, the Court noted the impact of the Dodd-Frank Act on preemption standards. Specifically,

the Dodd Frank Act provides that HOLA does not occupy the field in any area of state law, and that preemption is governed by the standards applicable to national banks. See 12 U.S.C. § 1465(a). Moreover, the OCC issued an Interim Rule on August 9, 2011, changing the preemption regulations applicable to national banks. See 76 Fed. Reg. 48950 (Aug. 9, 2011). Notwithstanding this fact, the Court noted that this new regulation was inapplicable to Plaintiff's claims, as it could not be applied retroactively absent express direction from Congress. Congress did not direct retroactive application of the new regulation, and the Dodd-Frank Act expressly provided that 12 U.S.C. § 1465 was not effective until July 21, 2011. Thus, the Court held that the preemption standards applicable when Plaintiff entered into his mortgage, rather than the amended standards, governed his claims against Defendants.

*U.S. Bank, N.A., v. Schipper*, No. 4:10-cv-00064-JEG, 2011 WL 4347892 (S.D. Iowa. Aug 29, 2011).

U.S. National Bank Association brought suit against two administrators of the Iowa Electronic Funds Transfer Act (the Iowa EFTA), which regulates the transmission of information between satellite terminals, including automatic teller machines and point-of-sale terminals, and financial institutions. The Iowa EFTA requires state banks to use state-approved "central routing units" to authorize ATM transactions with units not operated by the bank. U.S. Bank sought a declaration that the State of Iowa may not enforce certain provisions the EFTA against U.S. Bank or any financial institution doing business with U.S. Bank because such provisions are preempted by the National Bank Act. Specifically, U.S. Bank argued that the National Bank Act ("NBA") and OCC regulations provide it with authority to provide such services without state regulation.

On cross-motions for summary judgment, the Court agreed with U.S. Bank that the State’s argument was “defeated by the plain language of the NBA and the OCC regulations,” as the NBA authorizes national banks to “exercise . . . all . . . incidental powers necessary to carry on the business of banking.” *Id.* at \*5. Moreover, the Court recognized that OCC regulations clarify the power of national banks to offer “to other financial institutions any service [the national bank] may perform for itself.” *Id.* Thus, the Court found that the broad, plain language of the NBA and the OCC regulations “compel the conclusion that U.S. Bank is authorized by federal law to provide CRU services.” *Id.*

Notably, in reaching its decision, the Court dismissed the State’s argument that the Dodd-Frank Act amendment to the NBA “raised the standard” for NBA pre-emption. Specifically, the Court stated that the Dodd-Frank Act adopted the same preemption standard as the U.S. Supreme Court in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), requiring that a “State consumer financial law is preempted only if . . . in accordance with the legal standard for preemption in the decision of the Supreme Court . . . [in *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996)] . . . , the state consumer financial law prevents or significantly interferes with the exercise of the national bank of its powers.” *Id.* at \*5, n.1 (citing 12 U.S.C. § 25b(b) (1)(B)). Thus, the Court found that “the Dodd-Frank Act did not materially alter the standard for preemption” the Court was required to apply in the case.

## SEC Whistleblower Protections

*Hudes v. Aetna Life Ins. Co.*, No. 10-1444 (JEB), 2011 WL 3805679 (D. D.C. Aug. 30, 2011).

Plaintiff Karen Hudes brought suit against her former employer, World Bank, alleging a number of violations of both state and federal law following her termination, including violations of the Dodd-Frank Act. While Plaintiff’s Dodd-Frank claims were unclear, the only specific provision of the Act cited in her complaint was Section 924(c), codified at 15 U.S.C. § 78u-7(c). This Section addresses the

Dodd-Frank’s “bounty program” through which whistleblowers may receive awards from the SEC for providing original information about violations to the Commission.

Given that Section 924(c) was the only provision of the Dodd-Frank Act cited by Plaintiff, the Court addressed its applicability to her claims, noting two specific requirements for recovery pursuant to the “bounty program.” First, pursuant to Section 924(b), the information provided to the SEC must be “original” and must have been provided by the whistleblower *after* July 21, 2010. Second, federal courts have no jurisdiction over claims for whistleblower awards, as any determination thereof is expressly in the discretion of the SEC. *See* 15 U.S.C. § 78u-6(f). Moreover, any appeals of such determinations are to be made directly to the appropriate U.S. Court of Appeals. *See id.*

The Court further noted that, to the extent Plaintiff relied on any unnamed portion of the Dodd-Frank not set forth in her complaint, “such a claim would face hurdles of retroactivity.” Accordingly, the Court dismissed Plaintiff’s Dodd-Frank Act claim against the Bank.

## Deposit Insurance Increase

*Mehraban v. F.D.I.C.*, No. CV 08-05964, 2011 WL 3812627 (C.D. Cal. Aug. 30, 2011).

After the Office of Thrift Supervisions closed IndyMac Bank, F.S.B. and appointed the FDIC as the bank’s receiver pursuant to 12 U.S.C. § 1921(c)(2)(A), the FDIC formed a new depository institution, Indymac Federal Bank, to which it transferred all of IndyMac’s insured deposits. The FDIC then made deposit insurance determinations for each account, and notified depositors of the determinations. Plaintiff Morris Mehraban filed suit and challenged the FDIC’s insurance determination regarding his accounts.

In addressing whether the FDIC’s determinations were proper, the Court considered Plaintiff’s entitlement to additional deposit insurance following the passage of the Dodd-Frank Act.

Section 335 of the Act retroactively increased the standard maximum deposit insurance amount from \$100,000 to \$250,000 for depositors in any institution for which the FDIC was appointed as receiver between January 1 and October 3, 2008.

The FDIC presented evidence indicating how it reached its deposit insurance determination with respect to Plaintiff's accounts. The evidence showed that the FDIC first calculated the amount of deposit insurance for which Plaintiff was eligible following the Dodd-Frank Act's increase, and then subtracted from that number any amounts Plaintiff had already received in the form of deposit insurance and advance dividends. Disputing this methodology, Plaintiff argued that the methodology penalized investors with account balances greater than \$250,000. Addressing Plaintiff's argument, the Court noted that the clear language of the Dodd-Frank Act requires that, in applying the \$250,000 deposit insurance amount to investors' accounts retroactively to January 1, 2008, the FDIC must subtract (i) deposit insurance previously paid to depositors by the FDIC, and (ii) amounts such as dividends previously paid to depositors by the FDIC receiver. Thus, the FDIC's calculations were in accord with the plain language of the Act, and the Court concluded that the FDIC's final deposit insurance determination was proper.

## - - NEWS & DEVELOPMENTS - -

### ***SEC Issues Report on Implementation of Restructuring Recommendations.***

The SEC recently issued a report to Congress outlining its actions taken to implement administrative and regulatory reform recommendations. As required by Section 967 of the Dodd-Frank Act, the SEC engaged an independent consultant to conduct a broad assessment of the SEC's internal operations, structure, and funding, as well as the agency's relationship with Self-Regulating Organizations. The consultant's study, issued in March 2011, provided 16 initiative recommendations designed to increase the SEC's efficiency and effectiveness.

Pursuant to Section 967(c) of the Act, the SEC is required to provide a progress report every six months following issuance of the consultant's report outlining its actions taken to implement the recommendations contained therein. This report, issued September 9, 2011, describes the SEC's implementation actions and progress for the first six month period running from March 2011 to September 2011.

To view the full report, visit the following link:

<http://sec.gov/news/studies/2011/secorgreformreport-df967.pdf>.

### ***CFPB Issues Policy on Ex Parte Presentations in Rulemaking Proceedings.***

In an effort to promote its goals of "openness and transparency," the Bureau of Consumer Financial Protection ("CFPB") recently adopted a policy governing *ex parte* presentations in rulemaking proceedings. The policy reflects the CFPB's goal to "provide for open development of rules and to encourage full public participation in rulemaking actions." Thus, the policy encourages CFPB decision-making personnel to involve the public directly in rulemaking decisions, and further requires public disclosure of all *ex parte* presentations made to CFPB staff concerning a pending rule. The *ex parte* policy comes into play as soon as the CFPB has published a proposed rule in the Federal Register or on the CFPB's website, or when it publishes an interim final rule with a request for comment.

To see the full policy, visit the following link:

[http://www.consumerfinance.gov/wp-content/uploads/2011/08/Bulletin\\_20110819\\_ExPartePresentationsRulemakingProceedings.pdf](http://www.consumerfinance.gov/wp-content/uploads/2011/08/Bulletin_20110819_ExPartePresentationsRulemakingProceedings.pdf).

### ***Federal Reserve Issues Compliance Guide for Debit Interchange Rule.***

The Federal Reserve has issued a Small Entity Compliance Guide pertaining to its final debit interchange rule. The guide explains what is

required by Section 920 of the Electronic Funds Transfer Act, created by Section 1075 of the Dodd-Frank, and outlines what the rule requires of issuers subject to the new interchange fee standard. The guide further explains which issuers are exempt from the standards, when the standards take effect, and when issuers must comply with the prohibition on network exclusivity, among other topics.

For the full text of the Compliance Guide, visit the following link: <http://www.federalreserve.gov/bankinfo/regiicg.htm>.

### ***Cordray Testifies Preference for Supervisory Action over Litigation.***

During a Senate Banking Committee hearing on September 6, 2011, Director of the CFPB Richard Cordray discussed his background in consumer finance and his vision for the CFPB moving forward. Cordray emphasized the variety of tools available to the CFPB, other than law enforcement, to use as a means for pursuing and enforcing consumer protection initiatives. Cordray further expressed his belief that the CFPB's supervisory tools offer "the prospect of resolving compliance issues more quickly and effectively without resorting to litigation."

For the full text of Mr. Cordray's Statement, visit the following link: <http://www.treasury.gov/press-center/press-releases/Pages/tg1288.aspx>.

### ***CFPB Analyzing Financial Products Tailored for Servicemembers.***

Section 1013(e)(1) of the Dodd-Frank Act requires the Bureau to take specific actions pertaining to financial products and services offered to servicemembers and their families. Consistent with this requirement, the CFPB Office of Servicemember Affairs has issued a request for public input concerning financial products and services tailored to servicemembers and their families. The information provided will help the Office develop its knowledge base of the

consumer financial products and services utilized by servicemembers, which in turn will inform the Office as it moves forward with specific measures geared toward servicemembers and their families. The CFPB seeks input from consumers, financial service providers, organizations, and other members of the public.

For the full text of the Request for Information, see Request for Information on Consumer Financial Products and Services Offered to Servicemembers, 76 Fed. Reg. 54998 (September 6, 2011), or visit the following link: <http://www.gpo.gov/fdsys/pkg/FR-2011-09-06/pdf/2011-22595.pdf>.

### ***Date Gives Speech on Lessons Learned from the Financial Crisis.***

Raj Date, Special Advisory to the Secretary of the Treasury for the CFPB, gave a speech on September 15, 2011, addressing lessons learned from the recent financial crisis and the need for the CFPB. Specifically, Date discussed "the mortgage meltdown" and what he considers "three consumer markets that impact a lot of Americans: credit cards, student lending, and checking accounts." Date outlined the CFPB's approach to these markets, emphasizing goals of consumer knowledge, common-sense rules, and consistency.

To see the full text of Date's speech, visit the following link: <http://www.consumerfinance.gov/speech/lessons-learned-from-the-financial-crisis-the-need-for-the-cfpb/>.

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