Consumer Financial Services Newsletter

Winter 2013

Important Dates

CFSC Winter Meeting:
January 11-14, 2014
Park City, UT

Business Law Section Spring Meeting:
April 10-12, 2014
Los Angeles, CA

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Membership Minute

CFSC by the Numbers: 2013 YTD through November Total Members = 1,302. A 9% increase over 2012. Keep up the good work in spreading the word about joining the ABA's CFSC - encourage your clients and colleagues to check it out!

Business Law Section:

- Check out the BLS' redesigned Membership page. It focuses on Knowledge,

Leadership Message

Nikki Munro
Chair
Consumer Financial Services Committee

Dear CFSC Members:

Happy Holidays to the over 1300 members of the Consumer Financial Services Committee. I'd like to take this opportunity to welcome new members to the committee and welcome back members who have may have been less active until recently. It is an interesting time (to say the least) to be a consumer financial services lawyer, and I am sure you all have been very busy navigating the brave new world of consumer finance. The Consumer Financial Services Committee is here to help you do just that.

For those of you who don't know me, my name is Nikki Munro and I serve as Chair of the ABA Business Law Section's Consumer Financial Services Committee (CFSC). Together with my Vice Chairs Jim Brown, Julie Caggiano, and Andrew Smith, I invite you to participate in committee activities. The CFSC has a lot to offer, and by actively participating and encouraging your colleagues to participate, you can get the most out of your CFSC membership. Read More...

Meeting Promos/Postcards

Join us in Park City, Utah!

There's still time to register for the Consumer Financial Services Meeting in January. This meeting is an all-CLE substantive meeting featuring the latest developments in consumer financial services technology, litigation, enforcement, regulations and recent actions by federal and state regulators. Meetings will begin on Saturday, January 11th with the ever popular Beer and Basics program, and conclude Tuesday, January 14th at noon. For new attendees, don't miss the New Attendees Happy Hour on Monday, January 13th at 5:30pm. And of course, there are tickets available for the CFSC Committee Dinner on Sunday, January 12th sponsored this year by Buckley Sandler LLP and Hudson Cook LLP. For information on how to register, see registration information. A short schedule of the program is available on the CFSC website under Programs, Meetings and Events.

We hope to see you there! Don't forget your skis! The snow report is available here: http://www.canyonsresort.com/snow_report.html.

CFSC Constituents

Forces to Be Reckoned With: The CFSC's New Fellows and Ambassadors

By Adamma Obele Muise, Nelson Mullins Riley & Scarborough LLP

The ABA Business Law Section has - once again - accepted a stellar group of attorneys into its Fellows, Ambassadors, and Diplomats ("FAD") program. The Consumer Financial Services Committee ("CFSC") is fortunate to have several new FADs assigned to the Committee. The

Subcommittee Spotlight

Compliance Management Subcommittee

By Rachel Marin, Maurice & Needleman, P.C.

The Compliance Management Subcommittee focuses on relevant compliance management issues relating to consumer financial services law. The Subcommittee is Co-Chaired by Agnes Bundy Scanlan (Senior Advisor of Treliant Risk Advisors) and Ducie Le (Counsel at the Federal Reserve). Christine Poulon (Associate General Counsel at PayPal) serves as Vice Chair. The Subcommittee is also supported by three Young

Community and Experience. It also provides helpful "Links of Interest." See what it has to offer here.

- The new "Member Benefit Guide" discusses three ways to start taking advantage of your membership benefits and provides a closer look at a few of the most popular BLS member benefits, including *The Business Lawyer*, CLE Connection, substantive content, webinars, podcasts and discussion lists, and publishing.
- Don't forget about the BLS' "In The Know" program, which offers free CLE classes exclusively for BLS members. Find more info here.

CFSC Website: You can find links to helpful information on the website, including past meeting materials and non-CLE Webinars.

Get Involved in the CFSC: Want to get more involved in the CFSC? Feel free to contact Margaret Stolar (mstolar@dltlaw.com) or Carolyn Hann (chann@ftc.gov), CFSC Membership Chair and Vice-Chair, for information.

FAD program aims to promote and retain diverse attorneys within the ABA Business Law Section and legal profession by actively recruiting young lawyers, lawyers of color, and lawyers with disabilities as, respectively, Fellows, Ambassadors, and Diplomats.

FADs are selected from a competitive pool and are encouraged to actively participate in the ABA Business Law Section and their assigned substantive committee during their two-year term. Each FAD is also assigned a Committee and FAD mentor, who aids in each FADs' professional development and engagement. Read More...

Lawyer Liaisons: Mauricio Benavides (Compliance Examiner at the Consumer Financial Protection Bureau), Nicole Strickler (Partner with Messer & Stilp, LTD) and Rachel Marin (Associate with Maurice & Needleman, P.C.). Read More...

CFSC Legal Feature

360 Degrees: Regulating Payday Lending from All Angles

By Christopher Dye, Senior Compliance Counsel, Harland Financial Solutions

There's a scene in almost every old cop movie where the hero strongly suggests that the villain come out with his hands up because he's surrounded. That's probably what most financial service companies engaged in any aspect of payday lending are starting to feel like in today's regulatory environment.

As the Consumer Financial Protection Bureau (CFPB) concludes much of its rulemaking under the Dodd-Frank Act, and now that various state and federal bank regulators, state attorneys general and Congress have thoroughly sifted through the financial meltdown ashes, these entities are now actively scanning the horizon for the next big regulatory thing. Read More...

Does the Opinion in the Federal Reserve Board Swipe Fee Litigation Herald Stricter Scrutiny Under *Chevron*?

By Roberta G. Torian, Partner, Reed Smith LLP

This summer, consumer banking lawyers were all abuzz about the strong language used by Judge Richard J. Leon of the U.S. District Court for the District of Columbia in the matter of *NACS et al. v. Board of Governors of the Federal Reserve System.* What could have caused a federal judge to characterize positions taken by a highly-respected federal agency as, among other things, "utterly indefensible?" Judge Leon was very explicit in his rejection of the position taken by the

CFSC Pro Bono/Community Service

Service To Soldiers

By Amy J. Durant, Member, Bodman PLC

On September 7th & 8th four Bodman PLC attorneys, including Amy Durant who is a CFSC member, traveled to Camp Grayling in northern Michigan to prepare wills and powers of attorney for deploying service members. While many others in the state were watching the U of M - Notre Dame game, the four attorneys made the three hour trek to Grayling to give back to our service members. Another Bodman attorney, more conveniently located in the firm's Cheboygan office, traveled a much shorter distance and assisted deploying service members at Camp Grayling separately on November 6th.

Camp Grayling, which just celebrated its 100 year anniversary, is the nation's largest joint training center, spanning 147,000 acres and three counties and often serves as the deployment center for Michigan's reserve service members. At the Camp, they participate in a Soldier Readiness Check.

As part of the Soldier Readiness Check process, deploying service members are offered the opportunity to have attorneys prepare estate planning documents for them. Amy and the other Bodman attorneys sat with JAG attorneys and met with soldiers, one by one, to determine their wishes and prepare appropriate documents as well as answer other legal questions. In the collegial atmosphere, the Bodman attorneys got to know the JAG attorneys and enjoyed chatting with, and even sharing cookies with, the service members they were serving. Read More...

Board of Governors of the Federal Reserve System (the "Board"). So what was this litigation all about? What did this opinion mean for *Chevron*? Read More...

Dear CFSC Members:

Happy Holidays to the over 1300 members of the Consumer Financial Services Committee. I'd like to take this opportunity to welcome new members to the committee and welcome back members who have may have been less active until recently. It is an interesting time (to say the least) to be a consumer financial services lawyer, and I am sure you all have been very busy navigating the brave new world of consumer finance. The Consumer Financial Services Committee is here to help you do just that.

For those of you who don't know me, my name is Nikki Munro and I serve as Chair of the ABA Business Law Section's Consumer Financial Services Committee (CFSC). Together with my Vice Chairs Jim Brown, Julie Caggiano, and Andrew Smith, I invite you to participate in committee activities. The CFSC has a lot to offer, and by actively participating and encouraging your colleagues to participate, you can get the most out of your CFSC membership.

There are many opportunities to help you get involved, but we think the best way to get involved is to join the over 300 committee members who attend one or more of the three CFSC off-site meetings a year.

Each January, we have a stand-alone meeting of just the CFSC. From Saturday evening through Tuesday afternoon, we provide over 12 hours of substantive CLE accredited programming lead by the country's brightest and most accomplished consumer financial services lawyers. The lawyers represent consumers, the industry, the government, the bench, and academia. We foster lively discussions on the most relevant topics in today's fast paced and constantly evolving world of consumer financial services law.

The winter meeting typically alternates between a ski venue and a golf venue. This year our CFSC stand-alone meeting will be at the Canyons in Park City, Utah from January 11th through January 14th. We have great things in store for you this meeting. In addition to substantive programming on the new TILA-RESPA combined disclosure, TCPA litigation, CFPB enforcement, and much more, we have a committee dinner that is a gondola ride up the mountain at the scenic Red Pine Lodge, a welcome reception at the Park Meadows Country Club, and a women's leadership breakfast. New attendees can join us for a new attendee happy hour, and young lawyers can get a head start on meeting topics at Beer and Basics on Saturday evening.

During the Spring, we meet with the ABA's Business Law Section. In addition to the substantive consumer financial services CLE programming, and the collegiality of the Winter Meeting, at this meeting, we often partner with other Business Law Section committees, such as Banking Law, Credit Unions and Cyberspace, to expand the educational and networking opportunities for CFSC lawyers. The Spring Meeting includes both substantive subcommittee meetings and three to four consumer financial services focused CLE programs. These CLE program are supplemented by the many CLE programs offered by other committees within the Business Law Section.

In early September 2014, we will meet again with just the Business Law section at the BLS annual meeting in downtown Chicago.

At all of our meetings, we strive to create panels made up of diverse lawyers with diverse practices and perspectives. We welcome new lawyers into our committee through participation in our young lawyer's subcommittee activities and panels, mentoring programs, and as young lawyer liaisons to subcommittee leadership. Our goal is to provide educational and participation opportunities to lawyers who have been practicing for many years and those just entering the practice.

In addition to the tremendous educational opportunities, the meetings also provide client and colleague development time, and fun activities. Whether you attend a committee dinner, golf with your colleagues and friends, or ski with your clients, you are sure to enjoy the time outside the conference room as much as your time inside of it.

To get the most out of your CFSC membership, come join us for a great education and good times with good friends. You will not regret it.

If you have any questions about the upcoming meetings, or would like to participate more in the committee, please feel free to call or email me.

Nikki Munro
Chair
Consumer Financial Services Committee
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<u>Forces to Be Reckoned With: The CFSC's New Fellows and Ambassadors</u>

By Adamma Obele Muise, Nelson Mullins Riley & Scarborough LLP

The ABA Business Law Section has – once again – accepted a stellar group of attorneys into its Fellows, Ambassadors, and Diplomats ("FAD") program. The Consumer Financial Services Committee ("CFSC") is fortunate to have several new FADs assigned to the Committee. The FAD program aims to promote and retain diverse attorneys within the ABA Business Law Section and legal profession by actively recruiting young lawyers, lawyers of color, and lawyers with disabilities as, respectively, Fellows, Ambassadors, and Diplomats.

FADs are selected from a competitive pool and are encouraged to actively participate in the ABA Business Law Section and their assigned substantive committee during their two-year term. Each FAD is also assigned a Committee and FAD mentor, who aids in each FADs' professional development and engagement.

The program has proven to be very successful in engaging and retaining attorneys that might not have otherwise participated in professional development activities or sought out leadership opportunities. Of the over 65 Fellows, 60 Ambassadors, and 5 Diplomats that have participated in the program, 75% are still active members and 40% hold leadership positions within the Section.

The CFSC is pleased to welcome four incoming FADs for the 2013-2015 term: Ambassador Manuel Alvarez, Ambassador Shara Chang, Ambassador Yolanda Gamboa, and Fellow Kevin Johnson.

Manuel Alvarez (Manny) Alvarez is an Enforcement Attorney with the Consumer Financial Protection Bureau ("CFPB"), where he investigates alleged violations of federal consumer financial laws and brings appropriate civil enforcement actions against entities that offer consumer financial products or services. Manny works to improve the average American consumer's experience in the financial services marketplace. Prior to joining the CFPB, Manny was a Deputy Attorney General in the Consumer Law Section of the California Attorney General's Office in Los Angeles, where he prosecuted violations of state unfair competition and false advertising laws, and where he helped secure a $6.5 million settlement against the former-COO and former-CEO of Countrywide Financial Corporation for their roles in the company's predatory lending practices. Before joining the AG's Office, Manny was a commercial litigation associate and represented institutions in breach of contract, unfair competition claims, and a variety of other matters. Manny, the current president of the San Francisco La Raza Lawyers Association and a member of the Board of Directors for the Barrister Club of the San Francisco Bar Association, hopes to encourage other diverse attorneys to participate in consumer financial services law. Manny earned his JD from UC Hastings College of the Law in 2007 and holds a BA, *cum laude*, from Cornell University.

Shara Chang, currently an associate at BuckleySandler LLP, advises her financial services clients on consumer financial services matters related to residential mortgage finance and fair and responsible banking. She enjoys learning about clients' businesses and challenges, and then crafting solutions that meet their needs. Shara, who appreciated the warm welcome she received from current committee members, looks forward to continuing the Committee's substantive work and taking on even greater leadership positions. She is the President of the Greater Washington Area Chapter, Women Lawyers Division of the National Bar Association. Shara is also an active volunteer at, and previously served on the Board of Directors of, My Girlfriend's House, Inc., a local non-profit organization that empowers at-risk young girls and women. Shara received her J.D. from Howard University in 2009 (*cum laude*), where she served as executive publications editor for the *Howard Law Journal*, and interned for the Honorable Anna Blackburne-Rigsby of the District of Columbia Court of Appeals. Shara received her M.A. in Economics from York University in 2006 and her B.Com. from Ryerson University in 2005.

Yolanda Gamboa, Assistant General Counsel, advises for Bank of America Corporation's Global Consumer and Small Business Banking Digital Banking Channel Operations. She supports product development teams by helping to ensure that digital consumer banking products satisfy governing laws and regulations. Yolanda enjoys working on cutting edge projects and figuring out how consumer laws, which may not have been written with digital channels in mind, impact the development of innovative products and services. Yolanda believes that diverse voices should influence consumer financial services law, and looks forward to substantively participating in and contributing to the CFSC's subcommittees. Before her present position, Yolanda clerked with the Honorable Julia Nowicki of the Illinois Chancery Division, where she drafted bench memoranda and opinions on insurance foreclosure, and a plethora of other consumer and commercial litigation matters. Yolanda, a Board Member of Mujeres Latinas en Acción, earned her Juris Doctor from the University of Chicago law School in 2000, and her B.A. in History from the University of Chicago in 1994.

Kevin Johnson is eager to do his part to get attorneys engaged while they're young and meet the needs of the diverse client pool that is the reality of consumer financial services law. Kevin has held leadership positions in banks and consumer financial service organization for the last 25 years and, is presently an attorney in the National Credit Union Administration ("NCUA")'s Administrative Law Division. In addition to providing guidance on privacy laws, Kevin handles matters relating to share insurance and charter conversions. Before his tenure in the Administrative Law Division, Kevin was a Trial Attorney in the NCUA's Enforcement and Litigation division, where he was part of a team that represented the agency in all litigation, administrative, and enforcement matters. Kevin is a former National Chair of the ABA Law Student Division, former Chair of the ABA Law Student Division's Advisory Committee, and recipient of the ABA Law Student Division Gold Key Award. A member of the Alabama Bar, Kevin earned a Juris Doctor from the University of Alabama School of Law (2011); Master of Science in Banking from Mercy College (2002); and a Bachelor of Arts in English from the University of South Carolina (1988).

<u>Compliance Management Subcommittee</u>

By Rachel Marin, Maurice & Needleman, P.C.

The Compliance Management Subcommittee focuses on relevant compliance management issues relating to consumer financial services law. The Subcommittee is Co-Chaired by Agnes Bundy Scanlan (Senior Advisor of Treliant Risk Advisors) and Ducie Le (Counsel at the Federal Reserve). Christine Poulon (Associate General Counsel at PayPal) serves as Vice Chair. The Subcommittee is also supported by three Young Lawyer Liaisons: Mauricio Benavides (Compliance Examiner at the Consumer Financial Protection Bureau), Nicole Strickler (Partner with Messer & Stilp, LTD) and Rachel Marin (Associate with Maurice & Needleman, P.C.).

Don’t miss the Compliance Management Subcommittee's program at the Winter Meeting on Tuesday January 14, 2014: “The Scary Side of Social Media: Social Engineering, Fraud, Alternative Credit Decisions and More.”

The Subcommittee co-sponsored three programs in 2013, which featured representatives from the CFPB, the FDIC, law firms, consulting companies, and corporations. The August 2013 program “Developing a Robust Compliance Management System - Assessing Your Risk and Resources” drew a large crowd. The Subcommittee co-sponsored the program with several other Business Law Section Committees, including Corporate Compliance (of which Agnes Bundy Scanlan is Chair), Banking Law, and Credit Unions. In January 2013 Ducie Le moderated a timely and informative panel titled “UDAAP in the Age of the CFPB” which was co-sponsored by the Federal and State Trade Practices Subcommittee. Content from previous panels can be accessed on the ABA website at: http://tinyurl.com/nxdvom3.

The Young Lawyer Liaisons recently authored a Series 101 article for the Young Lawyers Subcommittee titled “TCPA Update Summarizing New Rules Effective October 2013 And, Recent, Important Court Decisions.” The article can be found on the CFSC website at: http://tinyurl.com/l4o8tth. The Liaisons will be submitting another substantive Series 101 article in 2014.

360 Degrees: Regulating Payday Lending from All Angles

By Christopher Dye, Senior Compliance Counsel, Harland Financial Solutions

There's a scene in almost every old cop movie where the hero strongly suggests that the villain come out with his hands up because he's surrounded. That's probably what most financial service companies engaged in any aspect of payday lending are starting to feel like in today's regulatory environment.

As the Consumer Financial Protection Bureau (CFPB) concludes much of its rulemaking under the Dodd-Frank Act, and now that various state and federal bank regulators, state attorneys general and Congress have thoroughly sifted through the financial meltdown ashes, these entities are now actively scanning the horizon for the next big regulatory thing. It seems that they have found a historically easy target in payday lending. In the past, regulation of payday lending was generally left up to the states, while the federal banking agencies were comfortable issuing limited guidance for financial institutions. As we will see, recent activity in the payday lending space may indicate that there will be additional layers of regulation to contend with in the not so distant future. One thing that is clear is that any financial institution wishing to participate in the payday lending arena has much to consider regardless of the scope of their role or how direct their involvement may be.

The CFPB recently released a white paper describing the current state of affairs in both the payday lending space and the banks' accepted equivalent, deposit advance products[1](also known as short-term, small amount loans in the credit union space). After analyzing a bunch of data and working through means, medians and cohorts, the CFPB eventually concluded that "it's all bad". I won't go into the pros and cons of the statistical methodology employed in the study and the various criticisms thereof – you can find that discussion on the internet – but suffice it to say, the white paper isn't universally accepted as gospel. However, it does serve to put financial service providers, including banks, on notice as to what will be the next area of focus in the regulatory space.

Prudential regulators generally agree on the basic features of a "payday loan".[2] They tend to be small dollar, short term, unsecured loans that are priced at a fixed dollar fee with little to no underwriting done prior to consummation. Typically, repayment is made using a pre-authorized electronic debit from the borrower's account or a post-dated check. Additionally, based on the above loan features, most of these types of loans result in high APRs. For example, a 14-day loan in the amount of $350 carrying a flat fee of $15 results in an APR of 322%. Often (subject to state law) payday loans allow the borrower to roll the existing debt over for an additional flat fee. These rollover features, high fees and APRs, and lack of underwriting make these types of loans prime targets for regulators. That focus, however, can manifest itself in a wide variety of ways.

<u>Consumer Protection Regulations:</u>

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[1] Payday Loans and Deposit Advance Products, A White Paper of Initial Data Findings, April 24, 2013.

[2] For purposes of this article, deposit advance loans are included as pay day loans.

Consumer protection regulations that touch on payday lending are numerous and varied. The following list is a sampling, but is not exhaustive:

- Various state law usury limitations[3] and deferred deposit loan statutes
- Truth in Lending Act (TILA) APR disclosure requirements in marketing materials[4]
- TILA closing disclosure requirements, including APR and finance charge Fed Box disclosures[5]
- Electronic Funds Transfer Act (EFTA) disclosure requirements[6]
- EFTA prohibitions on requiring repayment of loans to be made via "preauthorized electronic funds transfers"[7]
- Equal Credit Opportunity Act (ECOA) prohibition on discrimination in credit transactions[8]
- Interest rate caps for loans made to covered servicemembers under the Talent-Nelson Military Lending Act of 2007[9]
- ECOA[10] and FCRA[11] adverse action requirements
- Prohibition on unfair, deceptive and abusive acts or practices (UDAAP) under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[12]

The above is an extremely brief summary of a few of the consumer protection issues facing payday lenders. However, the most troubling of these may be UDAAP issues. Prior to the Dodd-Frank Act, UDAP authority rested primarily with the Federal Trade Commission and was limited to unfair or deceptive acts or practices. Thus the majority of the regulatory guidance is couched in those historical terms. That guidance is still instructive and can be found littered throughout FDIC and OCC guidance documents. It's clear that the FDIC, the OCC and the Federal Reserve Board all consider churning (repeatedly rolling loans over due to inability to pay and for the generation of additional fees) to be predatory lending activity, but the point at which rollovers become churning is less clear.[13] State laws sometimes dictate the allowable number of rollovers and associated repayment terms, but in the absence of that, the analysis is not straightforward. Additionally, the OCC in separate guidance has explicitly stated that failure to properly disclose loan costs, failure to ascertain whether the borrower can repay the loan, unlimited and costly renewals, and the use of intimidation or threats in collection

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[3] "Federal law authorizes federal and state-chartered insured depository institutions making loans to out-of-state borrowers to 'export' favorable interest rates provided under the laws of the state where the bank is located". FDIC Guidelines for Payday Lending, FIL-14-2005.
[4] 12 C.F.R. 1026.16(b)(2) for open-end loan requirements, 12 C.F.R. 1026.24(c) for closed-end requirements.
[5] 12 C.F.R. 1026.18.
[6] 12 C.F.R. 1005.7, 1005.8 and 1005.9.
[7] 12 C.F.R. 1005.10(e).
[8] 12 C.F.R. 1002.4.
[9] 10 U.S.C.A. 987, limiting creditors to charging interest rates resulting in an APR no higher than 36% for covered servicemembers.
[10] 12 C.F.R. 1002.9(a)(1).
[11] FCRA Section 615(a).
[12] 12 U.S.C.A. 5481, 5531 & 5536(a).
[13] Subprime Lending Guidance signed jointly by the OCC, the Board, the FDIC and the OTS (January 31, 2011).

efforts to all be examples of abusive practices.[14] In that same guidance, the OCC stated that the following practices address some of those potentials for abuse:

- Strict limitations on rollovers
- Strict limitations on the number of loans available in a year
- Substantial waiting periods between loans
- Rescission rights in the first 24 hours
- Prohibition on fees to cash a check used to repay the loan
- Clear and understandable cost disclosures.[15]

Although the acronym UDAAP doesn't encompass predatory practices specifically, it's noteworthy that throughout the guidance referenced here, predatory and abusive are used fairly interchangeably when describing payday lending products and practices. Because the CFPB has ongoing UDAAP enforcement authority, it's worth nothing that in the whitepaper the CFPB mentions that its findings "raise substantial consumer protection concerns" about payday lending and in the same paragraph reminds readers that "[t]he CFPB is also authorized to 'prescribe rules… identifying as unlawful unfair, deceptive or abusive acts or practices in connection with… the offering of a consumer financial product or service'".[16]

<u>Safety and Soundness:</u>
Obviously, if a financial institution is making payday loans directly to the public, failure to comply with consumer protection regulations will pose a severe risk to safety and soundness. However, in the payday lending space, financial institutions often partner with third parties who in turn deliver those products to borrowers.[17] In this context safety and soundness concerns are present even if an institution is not directly contracting with the consumer.[18] While most financial institutions are familiar with third-party relationship evaluation and monitoring requirements, institutions should also be aware that both the OCC and the FDIC have asserted the right to directly examine third parties making payday loans.[19] The FDIC guidance states that an examination of that sort would typically include a review of compensation and staffing practices; marketing and pricing policies; management information systems; and compliance with bank policy, applicable law, and regulations.[20] Third party reviews should also

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[14] OCC Advisory Letter – Payday Lending, AL 2000-10
[15] *Id*.
[16] *Id*. at 1.
[17] In these types of arrangements, "the institution typically enters into an agreement in which the institution funds payday loans originated through the third party…" or they may "involve the sale to the third party of the loans or servicing rights…" or the third party may provide services "including collections, advertising and soliciting applications". FDIC Guidelines for Payday Lending, FIL-14-2005.
[18] FDIC Proposed guidance on Deposit Advance Products, proposed April 25th, 2013 stating that "Deposit advance lending presents significant consumer protection and safety and soundness concerns, irrespective of whether the products are issued by a bank directly or by 3rd parties".
[19] OCC Advisory Letter, AL 2000-10 Payday Lending (November 27, 2000) and FDIC Guidelines for Payday Lending, FIL-14-2005.
[20] FDIC Guidelines for Payday Lending, FIL-14-2005.

include credit risk and capital adequacy considerations as discussed further below.[21] To ensure compliance with these safety and soundness requirements, institutions "should conduct on-site transaction testing and other audits of third-party vendors with whom it has arrangements to offer payday loans to ensure compliance."[22]

Capital adequacy and credit risk considerations are nothing new to financial institutions, but there are some unique issues presented by payday lending activities. The FDIC has established minimal capital requirements but those capital requirements apply generally to lower-risk loan portfolios. As we've see, banking regulators clearly consider payday lending to be a higher-risk product. Thus, the FDIC has stated that "examiners should reasonably expect, as a starting point, that an institution would hold capital against subprime portfolios in an amount that is one-and-a-half to three times greater than what is appropriate for non-subprime assets".[23] That may seem high, but the FDIC states that "payday lending is among the highest risk subsets of subprime lending, and significantly higher levels of capital than the starting point should be required".[24]

Institutions should also be mindful of guidance that explains acceptable practices for determining the adequacy of the allowance for loan losses. Examiners are tasked with ensuring that allowable loan losses are sufficient to account for realistic credit losses. Examiners should place an emphasis on the collectability of fees and principal amounts in addition to the fact that despite the short-term nature of the initial debt, because these loans allow for rollovers or renewals, examiners should ensure that those features are taken into account.[25] Since there really aren't a lot of hard and fast rules, institutions should show their work and ensure that examiners see a thoughtful analysis leading to a realistic determination of adequate loss reserves with respect to both payday loans themselves and credit facilities for third-party payday lenders.

Loan losses aren't the only credit risk practice affected by the rollover/renewal feature present in most payday loans. The Uniform Retail Credit Classification and Account Management Policy dictates guidelines for extensions, deferrals, renewals, or re-writes of closed-end accounts.[26] Institutions should establish the controlling standards mentioned in that policy and adhere to those standards when faced with a potential extension, deferral, renewal or rewrite. Some of those standards mitigate the predatory nature of payday loans according to various regulators and should thus be considered. They include the following, which, as mentioned earlier, may or may not also be dictated by state law:

- Limiting the number and frequency of extensions, deferrals, renewals, and rewrites;

[21] *Id*. (stating that "third-party reviews should also include testing individual loans for compliance with underwriting and loan administration guidelines, appropriate treatment of loans under delinquency, and re-aging and cure programs.).
[22] *Id*. at 19.
[23] *Id* at 20.
[24] *Id*.
[25] *Id*.
[26] Financial Institution Letter, Uniform Retail Credit Classification and Account Management Policy, FIL-40-2000 (June 29, 2000).

- Prohibiting additional advances to finance unpaid interest and fees and simultaneous loans to the same consumer;
- Ensuring that comprehensive effective risk management, reporting, and internal controls are established and maintained;
- Establishing appropriate cooling off or waiting periods between the time a payday loan is repaid and another application is made;
- Establishing the maximum number of loans per customer that are allowed within one calendar year or other designated time period;
- Providing that no more than one payday loan is outstanding at a time to any one borrower;
- Ensuring that payday loans are not provided to customers who have had payday loans outstanding at any lender for a total of three months during the previous 12 months.[27]

Finally, no safety and soundness discussion would be complete without mentioning reputational concerns. Banking regulators are concerned that high fees and other payday loan characteristics associated with payday lending programs may lead the public to believe that the institution is engaged in abusive lending practices which could cause a loss of community support and business.[28] Additionally, the OCC makes it clear that this risk doesn't go away if the customer-facing work in the transaction is done by a third party.[29] Banks should establish policies and procedures to monitor these and other risks exacerbated by the nature of payday lending.[30]

Automated Clearing House (ACH)/ Electronic Funds Transfer (EFT) Issues

On August 5, 2013, a three page letter issued by the New York State Department of Financial Services (NY DFS) to institutions chartered in the state of New York made a lot of banks and the National Automated Clearing House Association (NACHA) perplexed and nervous. The letter ostensibly asks for future cooperation and answers to questions regarding the use of the ACH network to make electronic payments in connection with payday loans. In reality, it could serve as an attempt to deputize Receiving Depository Financial Institutions (RDFIs) into ensuring that the ACH network does not "allow illegal loans to flow through New York without sufficient mechanisms to prevent or block these debits or credits as they occur". To understand the current and established role of RDFIs in this context, it's helpful to review guidance released before this letter by NACHA on March 14, 2013.

Historically, Originating Depository Financial Institutions (ODFIs) have been the gatekeepers of the ACH Network.[31] This comes from the practicality of the situation. The ODFI is the institution that is in the position to know the most amount of information about any given ACH transaction and thus is responsible for the valid authorization of every ACH debit processed in its name.[32] The RDFI role is simply to receive the electronic debit and process it unless they are notified of any issues with that

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[27] *Id* at 20.
[28] *Id* at 14.
[29] *Id*.
[30] *Id*.
[31] 2013 NACHA Operating Rules, Section 2.1.
[32] 2013 NACHA Operating Rules, Section 2.4.1.1(a).

debit. RDFIs have no relationship with the originator of the electronic debit and "have no basis to know whether any specific transaction has been properly authorized and relates to a bona fide, legal transaction".[33] The alarm caused by the NY DFS letter stemmed from a suggestion that "changes to the ACH network may be necessary" if RDFIs are not in a position to stop the flow of illegal online payday lending payment processing. The NY DFS letter went on to state that "banks have proven to be – even if unintentionally – an essential cog in the vicious machinery that these purveyors of predatory loans use to do an end-run around New York law". The California Department of Business Oversight, followed up with a similar, although less hyperbolic, letter for California chartered institutions on October 7, 2013 focused more on reminding ODFIs of their responsibilities under NACHA operation rules.

It's unclear as to how these letters will affect impacted institutions in the future. For their part, NACHA is holding firm on the established roles of RDFIs. On August 9, 2013, NACHA released additional guidance in direct response to the DFS letter.[34] The guidance gives suggested responses that both ODFIs and RDFIs should provide in response to the requests issued by the NY DFS. Of course even if RDFIs follow NACHA's interpretation of their role in this context, it will only serve to directly address risks posed by NACHA enforcement, but not for other risks like reputational safety and soundness.

Enough Already?

Clearly, institutions have a lot to consider when engaging in payday lending either directly or through third parties. Based on the white paper issued by the CFPB, we can assume that either future rulemaking is on the way or that the CFPB will rely on UDAAP and other enforcement actions in this arena. In fact, as recently as November, the CFPB took action against Cash America International Inc. for robo-signing, illegally overcharging servicemembers and impeding the CFPB's examination. Additionally, legislation titled the Stopping Abuse and Fraud in Electronic Lending Act of 2013 (SAFE Lending Act) is making its way through Congress. The SAFE Lending Act would eliminate exportation rights making banks comply with the law of the state in which the consumer resides with respect to annual percentage rates, interest, fees, charges, and such other similar or related matters.[35] Despite the current political environment, this could be one of those bills that may receive bi-partisan support due to the perceived consumer protection angle so it's probably worth monitoring. Regardless, if you are currently participating in the payday lending space or deciding whether you want to enter it, you have a lot to think about, not the least of which is that distant concept – profitability.

UPDATE: As of the date of submission of this article, the FDIC and the OCC both finalized guidance on deposit advance products that significantly impact this type of lending. While that guidance deserves a complete analysis outside of this article, you can review the OCC guidance here[36] and the FDIC guidance here[37].

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[33] ACH Operations Bulletin #2-2013, High-Risk Originators and Questionable Debit Activity (March 14, 2013).
[34] Guidance for RDFIs Regarding Online Payday Lending (August 9, 2013).
[35] SB 172, SAFE Lending Act of 2013.
[36] http://www.occ.gov/news-issuances/news-releases/2013/nr-ia-2013-182a.pdf
[37] http://www.fdic.gov/news/news/press/2013/pr13105a.pdf

Does the Opinion in the Federal Reserve Board Swipe Fee Litigation Herald Stricter Scrutiny Under *Chevron*?

By Roberta G. Torian, Partner, Reed Smith LLP

This summer, consumer banking lawyers were all abuzz about the strong language used by Judge Richard J. Leon of the U.S. District Court for the District of Columbia in the matter of *NACS et al. v. Board of Governors of the Federal Reserve System.*[1] What could have caused a federal judge to characterize positions taken by a highly-respected federal agency as, among other things, "utterly indefensible?"[2] Judge Leon was very explicit in his rejection of the position taken by the Board of Governors of the Federal Reserve System (the "Board"). So what was this litigation all about? What did this opinion mean for *Chevron*?[3]

Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act[4] ("Dodd-Frank") was enacted by Congress to achieve widespread regulatory reform of the financial services industry in the United States. Title X of Dodd-Frank created the Bureau of Consumer Financial Protection. In Title X at § 1075, there is a provision titled "Reasonable Fees and Rules for Payment Card Transactions". [5] This section amended the Electronic Funds Transfer Act[6] by creating a new section 920.[7] Section 920 authorized Board to prescribe regulations "regarding any interchange transaction fee[8] that initially may receive a charge with respect to electronic debit transactions [9] to implement to this subsection and to prevent circumvention or evasion of this subsection."[10] Section 920 also required that the amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction "be reasonable and proportional to the cost incurred by the issuer with respect to the transaction." The Durbin Amendment also directed the Board to proscribe regulations that would require card networks to provide merchants with more options for acquiring, clearing and processing debit card transactions. [11]

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[1] 2013 WL 3943489 (D.D.C. Jul. 31, 2013).
[2] *Id.* at *18.
[3] *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (hereinafter "Chevron").
[4] Pub. L.111-203.
[5] Card issuers that have less than $10 billion in assets including their affiliates are not subject to the interchange fee caps. 15 USC § 1693o-2(a)(6)(A).
[6] 15 USC 1693o-2.
[7] This provision is referred to as the "Durbin Amendment" or "Durbin" for the provision's author and sponsor, Senator Richard Durbin of Illinois.
[8] The term "interchange transaction fee" means any fee established, charged or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic debit transaction. 15 USC § 1693o-2(c)(8).
[9] Debit card "means any card, or other payment coder device, issued or approved for use through a payment card network to debit an account, regardless of whether authorization is based on signature, personalized identification number (PIN), or other means, and regardless of whether the issuer holds the account and includes any general-use prepaid card…" 12 CFR 235.2(f)(1) and (2).
[10] Dodd-Frank § 1075(a)(2).
[11] *Id.*

Debit cards now play a prominent role in the U.S. payments system. Debit card payments have grown more than any other form of electronic payment over the past decade, increasing to 37.9 billion transactions in 2009. Debit cards are used in 35 percent of noncash payment transactions, and have eclipsed checks as the most frequently used noncash payment method. Almost half of total third-party debits to deposit accounts are made using debit cards, compared to approximately 30 percent made by checks. Debit cards are accepted at about 8 million merchant locations in the United States.[12]

The Litigation

The Board ultimately did regulations implementing the Durbin Amendment.[13] In response to the publication of the Final Rule, the NACS Litigation was filed against the Board by retailers, merchant trade groups, and the sponsor of the legislative provision, Senator Durbin of Illinois. The plaintiffs asked Judge Richard Leon for a declaratory judgment that the Final Rules "are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law."[14] The Board response claimed that the litigation lacked merit and that it was entitled to judgment as a matter of law.[15]

The NACS Litigation followed another case brought by merchants regarding interchange fees. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 05-ND-1720-JG-JO (E.D.N.Y) (MDL 1720) ("Antitrust Litigation"). In that case, the plaintiffs sought relief against Visa, Inc. and MasterCard International, Inc. ("Visa" and "MasterCard," respectively) alleging that the card networks had conspired to set interchange fees in violation of the federal antitrust laws. The merchants also claimed that they had overpaid for interchange fees and because the interchange fees had allegedly been established in violation of federal antitrust laws, they were entitled to monetary damages. In addition, the merchants claimed that the card networks "no surcharge" rules were prohibiting them from receiving compensation for the cost of the interchange fees. Further, the merchants challenged the "all outlets" rules which required them to accept Visa and MasterCard cards in all of their stores on identical terms. Finally, they sought the ability to negotiate collectively with the card networks over interchange fees. The Antitrust Litigation resulted in a proposed settlement which addresses all of these issues and will award $6.05 billion in monetary damages to all members of the class. The settlement is still pending.

One could speculate as to whether the Antitrust Litigation prompted Judge Leon to observe: "In addition, Visa's and MasterCard's "Honor All Cards" rules force merchants that accept their networks' ubiquitous credit cards, also to accept their signature debit cards with their corresponding high signature transaction fees."[16] The use of the term "high signature transaction fees" could have been considered a harbinger of views sympathetic to the merchants.

The Regulatory Mandate

[12] 76 FR 43395.
[13] 76 FR 43394 et seq. (codified at 12 C.F.R. §§ 235.1-235.10) ("Final Rule").
[14] NACS Litigation, 2013 WL 3943489 at * 9.
[15] *Id.* at *10, internal citations omitted.
[16] *Id.* at *4.

During the pendency of the Antitrust Litigation, the Dodd-Frank law was passed which included the Durbin Amendment. The Durbin Amendment directed the Board to prescribe regulations “to establish standards for assessing whether the amount of any interchange transaction fee … is reasonable and proportional to the cost incurred by the issuer with respect to the transaction.” In doing so, the Board was required to:

(i) consider the functional similarity between electronic debit transactions and checking transactions;[17]

(ii) distinguish between the incremental cost incurred by an issuer for authorization clearance or settlement (“ACS”) versus other costs incurred by an issuer that are not specifically tied to an individual debit transaction.

The Board was permitted to allow issuers[18] to adjust the interchange fee received or charged if -

> (i) such adjustment is reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud in relation to electronic debit transactions involving that issuer; and
>
> (ii) the issuer complies with the fraud-related standards established by the Board under subparagraph (B), which standards shall—
>
> (I) be designed to ensure that any fraud-related adjustment of the issuer is limited to the amount described in clause (i) and takes into account any fraud-related reimbursements (including amounts from charge-backs) received from consumers, merchants, or payment card networks in relation to electronic debit transactions involving the issuer; and
>
> (II) require issuers to take effective steps to reduce the occurrence of, and costs from, fraud in relation to electronic debit transactions, including through the development and implementation of cost-effective fraud prevention technology. [19]

In addition to directing the Board to regulate interchange fees, the Durbin Amendment directed the Board to create rules related to network non-exclusivity for routing debit transactions. This meant that the Board was to create rules that would prevent the networks from prohibiting merchants from routing debit transactions through competing networks. The statute directed the Board to promulgate regulations that issuers and networks “shall not directly or through any agent…restrict the number of payment card networks on which an electronic debit transaction may be processed” to one such network or two or more affiliated networks or “inhibit the ability

[17] The Court did not discuss this aspect of the regulatory mandate, therefore it is not addressed in this article.
[18] An issuer “means any person that authorizes the use of a debit card to perform an electronic debit transaction.” 15 §USC 1693o-2(a).
[19] 15 USC 1693o_2(a)(4)and (5).

of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions"[20]

Prior to issuing its first Notice of Proposed Rulemaking, the Board met with debit card issuers, payment card networks, merchant acquirers, consumer groups and industry trade associations to discuss factors to be considered in carrying out its mandate to establish the regulations required by the Durbin Amendment.

The Board requested comment on two alternatives. Alternative 1 would permit an issuer to comply with the interchange cap by calculating its allowable costs and assuring that it did receive fees in excess of the allowable costs. The allowable costs would be the sum of all electronic debit transactions over a calendar year divided by the number of transactions on which the issuer received or paid an interchange transaction fee. Under this alternative, an issuer could comply with the cap if its fees did not exceed the safe harbor of seven cents. In the absence of electing to comply with the safe harbor, the issuer's fees could not exceed twelve cents per transactions. The second alternative on which the Board requested comment was to allow issuers to comply with the cap without calculating their allowable costs so long as the fee did not exceed twelve cents per transaction.[21] The Board noted that, in addition to establishing the structure and level of interchange fees and other fees required to support the network operations, the card networks also specified operating rules that governed the relationships between network participants.[22]

The Final Rule published on July 20, 2011 became effective October 1, 2011. It authorized interchange fees higher than those proposed in Alternatives 1 and 2. In the final rule, the Board stated "an issuer may not receive or charge an interchange transaction fee in excess of the sum of a 21-cent base component and five basis points of the transaction's value (the ad valorem component).

The Court acknowledged that it had to determine the appropriateness of the Final Rule by using "the two-step framework under *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)."[23]

The Court stated that "A *Chevron* analysis first requires the reviewing Court to determine "whether Congress has directly spoken to the precise question at issue"[24] At the end of that determination "If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[25] In the event the Court determines that the statute is silent or ambiguous on the issue under consideration, the Court must then apply step two which is to defer to "any agency interpretation that is based on a permissible construction of the statute."[26] The Court concluded that: the

[20] 15 USC § 1693o-2(b)(1)(A)-(B).
[21] 76 FR *43401.
[22] 76 FR *3396.
[23] NACS Litigation, 2013 WL 3943489 at *10
[24] *Id.* at *10, internal citations omitted.
[25] *Id.*, internal citations omitted.
[26] *Id.*, internal citations omitted.

board's interpretation of the interchange fee standard is foreclosed by the law and must be invalidated under *Chevron*'s "first step"[27] ; and with respect to network exclusivity, the Court concluded "the final network exclusivity regulation therefore cannot stand under *Chevron* step one."[28]

So how did the Court reach this conclusion in view of the extensive research and analysis conducted by the Board prior to promulgating the regulations?[29]

Interchange Fees

The interchange fee standard is based on certain "allowable costs to effect an electronic debit transaction."[30] The Board devised the standard using data collected through a survey of issuers and comments from various parties.[31] Those costs include costs related to the authorization, clearance and settlement ("ACS") of debit card transactions, which were specifically mentioned in the Durbin Amendment and these additional fees: network connectivity, software, hardware, equipment, and associated labor; network processing fees; and transaction monitoring."[32] The fee also included the five basis points add-on for fraud prevention.[33]

The Court strenuously objected to this approach. Judge Leon's view was that the statutory language which states that the ACS costs shall be considered and that other costs shall not be considered expressed Congress's "clear intent" that "other costs" must be excluded. The Court stated that the "plain import of Congress's word choice … was intended to subsume *all* costs not explicitly addressed in the first permissible category of costs."[34] The Board had argued that Congress directed it not to consider other costs that were not specific to a particular electronic debit transaction and cited 15 USC § 1693o-2(a)(4)(B)(ii) to mean that only costs "not specific to a particular transaction" are barred from consideration, an argument which the Court found "wholly unpersuasive."[35] In addition to relying upon Merriam Webster's Collegiate Dictionary, the Court also cited the comments of Sen. Durbin in which he stated "Paragraph (a)(4) [of the Amendment] makes clear that the *cost* to be considered by the board in conducting its reasonable and proportional analysis is the incremental cost incurred by the issuer for its role in the authorization, clearance, or settlement of a particular electronic debit transaction, *as opposed to other costs incurred by an issuer which are not specific to the authorization, clearance, or settlement of a particular electronic debit transaction*.[36]

[27] *Id*. at*20.
[28] *Id.* at *25.
[29] The Court cited the comments of Sen. Durbin in which he described the board's information gathering process as "notable for its transparency and thoroughness." NACS Litigation, 2013 WL 3943489 at *6, n. 12.
[30] 12 CFR § 235.3(b).
[31] 76 FR *43397, citing updated "2009 Interchange Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions," *available at* http://www.federalreserve.gov/paymentsystems/files/debitfees_costs.pdf
[32] 76 FR *43404.
[33] 15 USC § 1693o-2(a)(5).
[34] NACS Litigation, 2013 WL 3943489 at *13.
[35] *Id.* at *14.
[36] *Id.* at *14, citing 156 Cong. Rec. S5, 925 (daily ed. July 15, 2010) (emphasis added).

The Court concluded that Sen. Durbin's statements, read in conjunction with the statute, confirmed that Congress intended to divide the costs into two categories, those that can and those that cannot be considered in setting the interchange fee standard. The Court's view was that the Board was not authorized to include other costs such as hardware and software when determining the minimum interchange fee.

In reviewing the Board's argument that the failure of the Durbin Amendment to define the terms "incremental cost" or "authorization, clearance, or settlement" or to delineate what types of costs are "not specific to a particular electronic debit transaction" made those terms ambiguous, the Court's reaction was "not quite! If I were to accept the board's argument, then every term in the statute would have to be specifically defined or otherwise be deemed ambiguous. The result makes no sense and, more importantly, it is not the law."[37]

The Court also strongly objected to the inclusion in the calculation of the minimum interchange fee of the costs of fraud losses. Judge Leon observed that the statute directed the Board "to make allowance for costs incurred by the issuer in preventing fraud by an adjustment to the fee amount received or charged by the issuer under the interchange fee standard.[38] The Court noted however that that fee was subject to compliance with fraud prevention standards that required issuers to take effective steps to reduce the occurrences and costs from fraud. The Court concluded that this language, as well as further comments by Sen. Durbin, "are clear with regard to what costs the Board may consider in setting the interchange fee standard: incremental ACS costs of individual transactions incurred by issuers may be considered. That's it!"[39]

Possibly to assure that the parties understood his position with respect to the inclusion of additional costs in the interchange fee calculation, Judge Leon opined that "In short, the Board's interpretation is utterly indefensible."[40] The conclusion of the Court was that "the board's interpretation of the interchange fee standard is foreclosed by the law and must be invalidated under *Chevron*'s first step."[41]

<u>Network Exclusivity</u>

The Court also adopted the merchants' position on the network exclusivity rule. Under dispute was the question of whether the Durbin Amendment required merchants to be given a choice of two different networks for processing debit card transactions – one for PIN and one for signature transactions – or whether Durbin required merchants to be given the choice of two networks for each type of transaction, i.e. two for debit and two for signature transactions.

The Final Rule provides that merchants shall have a choice of two unaffiliated networks for each transaction:

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[37] NACS Litigation, 2013 WL 3943489 at *15.
[38] 15 USC § 16930-2(a)(5)(A)(1).
[39] NACS Litigation, 2013 WL 3943489 at *17.
[40] *Id.* at *18.
[41] *Id.* at * 20.

> An issuer satisfies the requirements of paragraph (a) (1) of this section only if the issuer allows an electronic debit transaction to be processed on at least two unaffiliated payment card networks.[42]

The Final Rule also prohibits networks from imposing routing restrictions on merchants,[43] thus permitting merchants to route debit transactions through the network of their choice.

The merchants' position was that Durbin required the networks to give merchants a choice of two networks for PIN and two for signature debit card transactions.

The Court strongly supported the merchants and soundly rejected the Board's position. The Court relied upon the provision in the Durbin Amendment which provided that networks and issuers:

> shall not ... restrict the number of payment card networks [to process] 'a transaction in which a person uses [any card ... issued or approved for use through a payment card network to debit an asset account ... whether authorization is based on signature, PIN, or other means]' " to less than two unaffiliated networks. The plain text of the statute thus supports the conclusion that Congress intended for each transaction to be routed over at least two competing networks for each authorization method.[44]

With respect to the provision in the Final Rule on network exclusivity the Court opined that:

> …it defies both the letter and purpose of the Durbin Amendment to read the statute as allowing networks and issuers to continue restricting the number of networks on which an electronic debit transaction may be processed to fewer than two per transaction.[45]

Apparently applying the first prong of the *Chevron* test to the Final Rule's provision on network exclusivity, the Court stated that

> The Board's interpretation of subsection (b)(1)(A) cannot be reconciled with the plain meaning or spirit of the statute because it still allows networks and issuers to make only one network available for many transactions.[46]

The Court finally concluded that: "The final network non-exclusivity regulation therefore cannot stand under *Chevron* step one."[47]

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[42] 12 CFR § 235.7(a)(2).
[43] 12 CFR § 235.7(b).
[44] NACS Litigation, 2013 WL 3943489 at *22.
[45] *Id.* at *23.
[46] *Id.*
[47] *Id.* at *25.

The Court vacated the interchange transaction fee,[48] however, on September 20, 2013 it issued an order granting the Board's motion to stay the Order pending appeal.

This concluded Judge Leon's complete rejection of the Final Rule.

Conclusion

Did the Board really misread Congressional intent so grievously? After its extensive studies and review of thousands of comments[49] could the Board's rule writing have gone as awry as the Court indicates? Was this a case of a Court misapplying *Chevron* and failing to reach step two, giving due deference to an administrative agency? Clearly the Board and the plaintiffs set out their competing theories of the case and the merchants won the first round.

If the Board appeals, we will see whether the Circuit Court of Appeals reaches the same conclusion under *Chevron*. Stay tuned.

[48] NACS Litigation, 2013 WL 3943489 at *26.
[49] 76 FR 433395.

Service To Soldiers
By Amy J. Durant, Member, Bodman PLC

On September 7th & 8th four Bodman PLC attorneys, including Amy Durant who is a CFSC member, traveled to Camp Grayling in northern Michigan to prepare wills and powers of attorney for deploying service members. While many others in the state were watching the U of M – Notre Dame game, the four attorneys made the three hour trek to Grayling to give back to our service members. Another Bodman attorney, more conveniently located in the firm's Cheboygan office, traveled a much shorter distance and assisted deploying service members at Camp Grayling separately on November 6th.

Camp Grayling, which just celebrated its 100 year anniversary, is the nation's largest joint training center, spanning 147,000 acres and three counties and often serves as the deployment center for Michigan's reserve service members. At the Camp, they participate in a Soldier Readiness Check.

As part of the Soldier Readiness Check process, deploying service members are offered the opportunity to have attorneys prepare estate planning documents for them. Amy and the other Bodman attorneys sat with JAG attorneys and met with soldiers, one by one, to determine their wishes and prepare appropriate documents as well as answer other legal questions. In the collegial atmosphere, the Bodman attorneys got to know the JAG attorneys and enjoyed chatting with, and even sharing cookies with, the service members they were serving.

All of the Bodman attorneys agreed that the experience was worthwhile and very humbling. The gratitude that the service members expressed to the attorneys for their time was amazing, especially given the service member's pending deployments in service to the country.