Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

July 26, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Sues Mortgage Company Over Alleged Loan Officer Compensation Practices. On July 23, the CFPB filed a complaint against a Utah-based mortgage company and two of its officers for giving bonuses to loan officers who allegedly steered consumers into mortgages with higher interest rates. The complaint alleges that the company and its two officers violated the Federal Reserve Board's Loan Originator Compensation Rule by instituting a quarterly bonus program that paid more than 150 loan officers greater bonus compensation based on the terms and conditions of the loans they closed. The CFPB claims the program incentivized loan officers to steer consumers into loans with higher rates. According to the complaint, when the Loan Originator Compensation Rule took effect in April 2011, the company amended its program to eliminate any written reference to compensation based upon the terms or conditions of loans, making the program appear on its face to be a compliant compensation program. The CFPB alleges that although the company's regular compensation was no longer tied to loan terms or conditions, the managers continued to adjust the quarterly bonuses based upon the loan terms and conditions. The complaint further alleges the company violated Regulation Z's requirement that a creditor retain records of compensation paid to loan originators for two years by failing to record what portion of quarterly bonuses paid to loan originators were attributable to a given loan and by failing to maintain accurate and complete compensation agreements. The CFPB is seeking an injunction, restitution, civil money penalties for each bonus paid, and costs.

CFPB Publishes ECOA Baseline Review Modules. On July 23, the CFPB released its ECOA baseline review modules, which supplement the recently updated ECOA examination procedures. Completed baseline modules will be included in an institution's examination work papers and may be considered in conjunction with any fair lending statistical analysis to assess an institution's fair lending compliance and risks. The baseline review procedures provide examiners with a series of questions in six modules to assess the following: (i) fair lending supervisory history; (ii) fair lending compliance management system - management participation, policies and procedures, training, and

internal controls and monitoring; (iii) mortgage lending - policies and procedures for mortgage underwriting and pricing, including frequency of deviations, compensation structures, third-party involvement, and marketing practices; (iv) mortgage servicing - policies and procedures as they relate to fair lending; (v) auto lending - policies and procedures for direct and indirect auto lending, including information related to pricing, underwriting, referrals, origination, and third-party compensation; and (vi) other products - policies and procedures with respect to any additional products selected for review, e.g. secured and unsecured consumer lending, credit cards, add-on products, private student lending, payday lending, and small business lending. The CFPB states that its baseline review differs from its targeted review process, during which a supervised institution can be subject to an in-depth look at a specific area of fair lending risk, and is separate from the CFPB's HMDA review, which includes transactional testing for HMDA data accuracy.

Attorney, Legal Services Provider Challenge CFPB Authority. On July 22, a Connecticut bankruptcy attorney and a firm with whom the attorney contracts for legal support services filed a lawsuit charging the CFPB with "grossly overreaching its authority" in requesting "sensitive and privileged information" about thousands of consumers and challenging the constitutionality of the Bureau itself. The suit was filed in response to a CFPB investigation into the service provider's relationships with law firms that provide debt settlement assistance to consumers facing bankruptcy. The complaint asserts that the CFPB lacks authority to regulate the law firms supported by the service provider and that the information demanded by the CFPB - disclosed to lawyers by clients seeking advice regarding bankruptcy - is protected by the attorney-client privilege.

Housing Finance Reform Bills Advance in Congress. On July 24, the House Financial Services Committee approved a comprehensive housing finance reform bill, outlined recently by Committee Chairman Jeb Hensarling (R-TX). The Chairman has indicated that the bill could move to the House floor for consideration by the full body shortly after the August recess and that in the interim he will work to explain the bill to his conference and build support. The House bill differs in several substantial ways from a Senate proposal. For instance, the House bill provides for an overhaul of the Federal Housing Administration while the Senate Banking Committee intends to address the FHA separately from, and in advance of, the Senate's broader housing finance reform bill. The Senate Banking Committee held a hearing this week on its FHA legislation and intends to amend and vote on the bill next week.

Prudential Regulators Encourage Private Student Loan Workouts. On July 25, the FDIC, the OCC, and the Federal Reserve Board issued a joint statement to encourage financial institutions to "work constructively with private student loan borrowers experiencing financial difficulties." The statement explains that prudent workout arrangements are consistent with safe-and-sound lending practices and are generally in the long-term best interest of both the financial institution and the borrower. Specifically, under the Retail Credit Policy, which covers student loans, "extensions, deferrals, renewals, and rewrites of closed-end loans can be used to help borrowers overcome temporary financial difficulties." As such, the agencies promise not to criticize institutions for engaging in prudent workout arrangements with borrowers who have encountered financial problems, even if the restructured loans result in adverse credit classifications or troubled debt restructurings in accordance with accounting requirements under GAAP. Further, the regulators state that modification programs should provide borrowers with clear and easily accessible practical information about the available options, general eligibility criteria, and the process for requesting a modification.

Senate Committee on Aging Scrutinizes Short-Term, Small Dollar Loans. On July 24, the Senate Special Committee on Aging held a hearing titled "Payday Loans: Short-term Solution or Long-term Problem?" that included discussion of several short-term, small-dollar credit products. Although the Committee's jurisdiction is intended to cover policy issues related to older Americans,

the hearing reviewed small dollar products more generally. Numerous Senators, including committee Chairman Sen. Bill Nelson (D-FL) and Sen. Elizabeth Warren (D-MA) scrutinized bank deposit advance products and, building off the CFPB's testimony and earlier white paper, characterized them as payday loans that trap consumers in a cycle of debt. Sen. Nelson suggested that banks have an obligation to provide customers with alternatives and a range of options to meet their needs, while Sen. Donnelly (D-IN) and others repeatedly raised the concept of a 36% national usury cap. Committee members, with the help of a representative from Maine's financial regulator, tried to build a record in support of federal legislation to address alleged practices of online lenders, including charges that such lenders often avoid state licensing requirements to circumvent state usury caps. Committee members and witnesses also discussed the role of banks in assuring debits from customer accounts are compliant with state law.

FHFA Announces Settlement in Lead MBS Action. On July 25, the FHFA announced that a financial institution agreed to pay roughly $885 million to settle allegations that the offering documents it provided to Fannie Mae and Freddie Mac in connection with the sale of billions of dollars in residential MBS included materially false statements or omitted material information, resulting in massive losses to the enterprises. The institution will pay approximately $415 million to Fannie Mae and $470 million to Freddie Mac to resolve claims related to securities sold to the companies between 2004 and 2007. The settlement ends the lead case of 18 cases the FHFA filed in 2011. In April 2013, the Second Circuit held that the action, filed within three years after the FHFA was appointed conservator of Freddie Mac and Fannie Mae, was timely under the relevant sections of Housing and Economic Recovery Act, and that the FHFA has standing to bring the action.

DOJ Announces Five Indictments in Largest Known Data Breach Case. On July 25, the DOJ announced the indictment of five individuals accused of conspiring in a worldwide hacking and data breach scheme that targeted major corporate networks, stole more than 160 million credit card numbers and resulted in hundreds of millions of dollars in losses. The DOJ believes the defendants and others conspired to use a "SQL injection attack" to penetrate the computer networks of several of the largest payment processing companies, retailers and financial institutions in the world. Once started, the attacks could last months while the defendants worked to steal user names and passwords, means of identification, credit and debit card numbers and other corresponding personal identification information of cardholders, and subsequently sell the data to end-users who used the data to make fraudulent ATM withdrawals or credit card purchases. The DOJ's action was based on the findings of an extensive Secret Service investigation.

Senate Confirms Anthony West as Associate Attorney General. On July 25, the U.S. Senate confirmed Anthony West to serve as the DOJ's Associate Attorney General, a position he has held in an "acting" capacity since March 2012. In that role Mr. West advises and assists the Attorney General and the Deputy Attorney General in formulating and implementing departmental policies and programs related to a broad range of issues, including civil litigation, federal and local law enforcement, and public safety.Prior to March 2012, Mr. West served as the Assistant Attorney General for the Civil Division - the largest litigating division at the DOJ - where he emphasized the Civil Division's authority to bring civil and criminal actions to enforce the nation's consumer protection laws, and served in various positions on the Financial Fraud Enforcement Task Force.In addition, the DOJ's Civil Rights Division's home page indicates that Jocelyn Samuels is serving as Acting Assistant Attorney for the Civil Rights Division. Ms. Samuels previously served as Principal Deputy Assistant Attorney General for that division and as Senior Counselor to the Assistant Attorney General for Civil Rights. She replaces Thomas Perez who recently was confirmed to serve as Secretary of Labor.

NIST Releases Minor Updates to Digital Signature Standard. On July 23, the National Institute of Standards and Technology released a revised digital standard used to ensure the integrity of

electronic documents and the identity of the signer. The revised standard includes no major changes, but does update the standard to align it with other publications so that all NIST documents offer consistent guidance regarding the use of random number generators. Another revision concerns the use of prime number generators, which requires random initial values for searching for prime numbers.

STATE ISSUES

New York Financial Services Regulator Uses New Authority to Propose Debt Collection Regulations. On July 25, the New York Department of Financial Services (DFS) proposed new regulations related to third-party debt collection in that state. The proposal is the DFS' first use of the statutory "gap authority" that allows it to regulate and enforce rules against previously unregulated providers of financial products and services. The proposed regulations (i) establish initial disclosures that incorporate federal requirements and require collectors to provide details about the nature of the debt; (ii) set new disclosure requirements for time-barred debt; (iii) require collectors to provide specified verification of disputed debts; (iv) require collectors to provide written confirmation of a debt settlement; and (v) allow consumers to communicate with collectors via email. The DFS will accept comments on the proposal for 45 day following publication in the state register.

Virginia AG Sues Online Payday Lender to Enforce State Licensing Law. On July 18, Virginia Attorney General Ken Cuccinelli (AG) announced a lawsuit against an online lender for allegedly making illegal payday loans in the state. The AG explained that the Virginia State Corporation Commission requires every payday loan lender to obtain a license before conducting business in Virginia. The AG asserts that the lender did not obtain the required license. State law limits unlicensed lenders to charging no more 12% in annual interest on a loan. The AG alleges that the rates on the online lender's loans range from 438% annually for a 25-day loan to 1,369% annually for an eight-day loan. The AG stated that the company instructs customers to apply for loans through its website, and after the loan applications are approved, the company wires funds directly to the consumers' bank accounts in exchange for authorizing the company to directly debit loan payments from the customers' bank accounts. The suit seeks to enjoin the company from collecting interest over the 12% state limit, and seeks consumer reimbursement of certain interest paid and civil penalties in the amount of $2,500 for each violation.

Rhode Island Adopts Foreclosure Mediation. On July 15, Rhode Island enacted HB 5335 to create a temporary foreclosure mediation program. Effective September 1, 2013 through July 1, 2018, the new law requires mortgagees or their servicers or agents to provide borrowers who are not more than 120 days delinquent written notice that foreclosure cannot proceed without the borrower first having an opportunity to participate in a mediation conference. The law establishes the procedures and requirements for such conferences and prohibits a mortgagee from proceeding with a foreclosure action until the mediator certifies that, after good faith effort by the mortgagee, the parties could not reach agreement.

COURTS

New York District Court Holds FHA Disparate Impact Claims Against Mortgage Securitizer Timely, ECOA Claims Time-Barred. On July 25, the U.S. District Court for the Southern District of New York held that a putative class of African-American borrowers can pursue claims against a financial institution alleged to have financed and purchased so-called predatory subprime mortgage loans to be included in mortgage backed securities. Adkins v. Morgan Stanley, No. 12-7667, slip op.

(S.D.N.Y. Jul. 25, 2013). The borrowers allege that the institution implemented policies and procedures that supported the subprime lending of a mortgage originator in the Detroit area so that the institution could purchase, pool, and securitize those loans. The borrowers claim those policies violated the FHA and the ECOA because they disproportionately impacted minority borrowers who were more likely to receive subprime loans, putting those borrowers at higher risk of default and foreclosure. In resolving the financial institution's motion to dismiss, the court held that the borrowers sufficiently alleged a disparate impact under the FHA and, although the lawsuit was filed more than five years after the originator stopped originating mortgages, the two-year statute of limitations on their FHA claims is tolled by the discovery rule. The court explained that the disparate impact of a facially neutral policy may not become immediately apparent, and "[g]iving full effect to the FHA's language and the policy behind the language requires a discovery rule recognizing that [the borrowers'] claim here did not accrue until they knew or had reason to know" that the policies were discriminatory. The court left open the possibility that the institution may prove at a later stage that public knowledge of the facts underlying the suit may be imputed to the borrowers to render their claims "discovered" at an earlier time. The court held that the borrowers' ECOA claims were not similarly timely because ECOA contains specific exceptions to its statute of limitations, and to apply a general discovery rule to ECOA claims would render those exceptions superfluous. Further, the court held that the ECOA claims are not timely pursuant to a continuing violations theory or equitable tolling. The court granted the motion to dismiss the ECOA claims and a state law claim, and denied the motion to dismiss the FHA claims.

California Appeals Court Holds Foreclosure Deficiency Judgment Protections Apply to Short Sales. On July 23, the California Court of Appeal, Fourth Appellate District, held in a case of first impression that a section of California law that prohibits a deficiency judgment following a foreclosure on a purchase money loan similarly protects borrowers in short sales. *Coker v. JP Morgan Chase Bank, N.A.*, No. D061720, 2013 WL 3816978 (Cal. Ct. App. Jul. 23, 2013). In this case, the lender approved a short sale subject to several conditions, including that the sale proceeds paid to the lender released the lender's security interest, but that the borrower still was responsible for any deficiency balance. After the sale closed, the lender sought to collect from the borrower the unsatisfied portion of the loan. The borrower filed suit claiming that state law and common law prevented the lender from collecting. On appeal, the court reversed the trial court's dismissal and held that a state law that has been applied to prohibit deficiency judgments following foreclosure sales also prohibits deficiency judgments following short sales. The court explained that there is nothing in the statute to modify or limit the term "sale" and no other requirement in the statute that a foreclosure must occur to trigger the deficiency judgment protections. Further, the court rejected the lender's argument that the borrower waived the protection by agreeing as a condition of the sale to be liable for any deficiency after the sale. The court reversed the trial court and remanded for further proceedings.

Magistrate Judge Finds Tribal Payday Lender Subject to FTC Act; Lender Agrees to Settle Some FTC Charges. On July 22, the FTC announced that it obtained a partial settlement of claims it filed last year against a Native American Tribe-affiliated payday lending operation that allegedly charged undisclosed and inflated fees, and collected on loans illegally by threatening borrowers with arrest and lawsuits. *FTC v. AMG Servs, Inc.* No. 12-536 (D. Nev.). The agreement does not include any monetary resolution of the claims, but (i) prohibits the defendants from certain collection practices, (ii) prohibits the defendants from conditioning the extension of credit on preauthorized electronic fund transfers, and (iii) requires the defendants to implement enhanced compliance policies that are subject to new reporting requirements. The settlement follows a report and recommendation issued last week by the magistrate judge assigned to the case in which he concluded that the FTC has authority under the FTC Act to regulate "Indian Tribes, Arms of Indian Tribes, employees of Arms of Indian Tribes and contractors of Arms of Indian Tribes" with regard to the payday lending activities at issue in the case. Relying on Ninth Circuit precedent, the magistrate

judge held that while the FTC Act does not expressly apply to Indian Tribes, it is a statute of general applicability with reach sufficient to cover the Tribal entities. Further, the magistrate judge concluded that "both TILA and EFTA provide the FTC the power to enforce the statutes *without regard* for any jurisdictional limitations contained in the FTC Act." The FTC will continue litigating other charges against the defendants, including allegations that they deceived consumers about the cost of their loans by charging undisclosed charges and inflated fees.

Florida District Court Orders Disgorgement of Profits from Unfair, Deceptive Online Payday Loan Referral Practices. On July 18, the U.S. District Court for the Middle District of Florida held that an online payday loan referral business engaged in unfair and deceptive billing practices and failed to provide adequate disclosures to its customers. *FTC v. Direct Benefits Group, LLC*, No. 11-1186, 2013 WL 3771322 (M.D. Fla. Jul. 18, 2013). The FTC alleged that the defendants violated the FTC Act by obtaining consumers' bank account information through payday loan referral websites and debiting their accounts without their consent. The FTC also alleged that the defendants failed to adequately disclose that, in addition to using consumers' financial information for a payday loan application, they would use it to charge them for enrollments in unrelated programs and services. During a bench trial, the parties presented evidence and arguments regarding the content and operation of the websites and whether consumers could enroll in the referral programs without taking affirmative steps to do so. The court agreed with the FTC's claims that the defendants' practices were deceptive and held that the "pop-up box" used to enroll consumers in the programs at issue was misleading. The court explained that the defendants' website and the online payday loan application form created the overall impression that they were intended for applying for payday loans and that the bank account information that applicants were asked to enter would be used for deposit of the payday loan-not so that the account could or would be debited for the purchase of an unrelated product or service. Further, the court held that the defendants' disclosures were not clear and conspicuous under the principles included in the FTC's ".com disclosures guidance." The court also held that the FTC established that the billing practices were unfair, and ordered the defendants to disgorge over $9.5 million and permanently cease the practices at issue.

Fourth Circuit Relies on E-Sign Act to Hold Electronic Agreement May Effect A Valid Transfer of Copyright. On July 17, the U.S. Court of Appeals for the Fourth Circuit held that under the E-Sign Act, an electronic transfer may satisfy the requirements for transfer of a copyright under the Copyright Act, even though the Copyright Act itself does not define the "writing" or "signature" required to effectuate a transfer. *Metro. Reg. Info. Sys., Inc. v. Am. Home Realty Network, Inc.* No. 12-2102, 2013 WL 3722365 (Jul. 17, 2013). In this case, the company that operates the online real estate listing service MLS sued a competitor real estate referral service, contending that the referral service collected and used information without authorization - including photographs of listed properties - that MLS compiled for its customers. In order to submit photos to the MLS, customers are required to click a button and agree to certain terms of use. The court agreed with the MLS operator that its customers' acceptance of the terms of use operated as a transfer of copyrights in any photograph provided to the MLS, and that as such the competitor service may have violated the Copyright Act through its unauthorized use of the materials. Noting the paucity of case law applying the E-Sign Act to instruments conveying copyrights, the court looked to cases in which circuit courts have applied the E-Sign Act to the Federal Arbitration Act's protections that pertain only to written arbitration agreements, including the Second Circuit's holding in *Specht v. Netscape Comms. Corp.*, 605 F.3d 17 (2nd Cir. 2002). Based on the analysis in those cases, the court explained that "[t]o invalidate copyright transfer agreements solely because they were made electronically would thwart the clear congressional intent embodied in the E-Sign Act." The court held that an electronic agreement may effect a valid transfer of copyright interests under the Copyright Act. As such, the court affirmed the district court's preliminary injunction prohibiting MLS's competitor from displaying the MLS photographs.

MISCELLANY

FINRA To Begin Sharing Additional MBS Information. On July 22, FINRA announced that it will begin to disseminate information for so-called specified pool transactions in agency pass-through mortgage-backed securities and SBA-backed securities, including transaction information such as the time of the trade, price and volume. Transactions must be reported to within two hours of execution (the reporting period is reduced to one hour after a six month implementation period), and are disseminated as soon as received. Combined with FINRA's action last year to begin disseminating transaction information for agency pass-through mortgage-backed securities traded "to-be-announced" (TBA), FINRA now will be sharing information for securities that represent over 90 percent of the par value traded in all asset- and mortgage-backed securities.

FIRM NEWS

Richard Gottlieb will speak on July 29, 2013 at ACI's Consumer Finance Class Actions & Litigation conference, which is taking place in Chicago, IL. He will be on the panel, "Consumer Finance Class Action Litigation, Arbitration, and Settlement Trends: New Cases, Emerging Theories of Liability, Certification and Arbitration Developments in the Wake of *Wal-Mart v. Dukes* and *AT&T Mobility v. Concepcion*, Offers of Full Relief and Innovations in Settlement Strategies."

Jonice Gray Tucker will speak at the Thomson Reuters workshop, Preparing for a CFPB Examination in Washington, DC on August 1, 2013.

Jonice Gray Tucker will moderate a Regulatory "Super Session" at the California Mortgage Bankers Association's Western States Loan Servicing Conference on August 4, 2013, in Las Vegas, Nevada. The panel will focus the changing regulatory landscape for mortgage servicers and practical tips for compliance.

Jonice Gray Tucker will moderate a panel at the American Bar Association Annual Meeting entitled: "Knowing is Half the Battle: The CFPB's Mortgage Rules, HUD's Disparate Impact Rule, and More." Speakers will include BuckleySandler partner Joseph Reilly, David Berenbaum (NCRC), Ken Markison (MBA), and David Stein (Promontory). The panel will be held on August 10, 2013, in San Francisco, CA.

Kirk Jensen will speak at the American Bar Association Annual Meeting on August 10, 2013 in San Francisco, CA. Mr. Jensen's panel is titled, "The CFPB's Amicus Program and Trends in Consumer Litigation."

BuckleySandler is a proud sponsor of The Five Star Institute's Compliance Caucus taking place September 9-10, 2013 in Dallas, TX. The firm will have two speakers at this year's event: On Tuesday, September 10, Andrea Mitchell will speak on the panel, "Understanding UDAAP and Emerging Regulations in Compliance," and Ben Olson will speak on the panel, "Get to Know CFPB and What's on the Agenda."

Jeffrey Naimon will speak at the Mortgage Bankers Association's Risk Management and Quality Assurance Forum in Phoenix, AZ, on September 11, 2013. His session entitled, "Regulatory Compliance Update", will analyze the Dodd-Frank Ability to Repay/QM rule requirements.

Richard Gottlieb will speak at ACI's Residential Mortgage Litigation and Regulatory Enforcement conference in Dallas, TX on September 27, 2013. He will participate in the panel, "Fair Lending: Managing and Defending Against Claims of Discriminatory Lending and Assessing the Status of

'Disparate Impact' in Lending Litigation and Enforcement," and will speak specifically on UDAAP interplay with fair lending enforcement.

Jeffrey Naimonwill participate in the American Bar Association's Consumer Financial Services Basics seminar on September 30, 2013. Mr. Naimon will speak on "Truth-in-Lending" and address key consumer financial services disclosure regulations and the future of disclosures as a regulatory technique.

James Shreve will speak at the International Association of Privacy Professionals Privacy Academy in Seattle, Washington on October 1, 2013. The session, "Is the Best Defense a Good Offense?," will discuss legal issues involved in employing active defense techniques in responding to cybersecurity incidents and risks.

James Shreve will be speaking at the Information Systems Security Association's International Conference in Nashville, Tennessee on October 10, 2013. The session, "Get Up to Date: 20 Security & Privacy Laws in 50 Minutes" will examine the primary privacy and data security laws impacting information security professionals.

Thomas Sporkin will participate on a panel on whistleblowers at the American Bar Association's Securities Fraud 2013 Conference in New Orleans, LA, October 24-25, 2013.

Margo Tank and David Whitaker will speak at The Electronic Signature and Record Association's E-Signatures 2013 Annual Conference, on November 14, 2013 in New York. Their panel is titled, "E-Sign 101 - Questions, Answers, and Best Practices."

Richard Gottlieb will speak at ACI's Bank and Non-Bank Forum on Mortgage Servicing Compliance taking place Thursday, November 21 - 22, 2013 in Washington, DC. His panel, "When Is a Residential Mortgage Loan Servicer Considered a Debt-Collector and Thus Potentially Subject to Liability for Violations of the FDCPA," will analyze federal and state laws relating to mortgage servicers and any potential inconsistencies, discuss the requirements for mortgage servicers who qualify as a debt collectors, and will examine how to avoid violations under the FDCPA when servicing mortgage loans.

FIRM PUBLICATIONS

Benjamin Klubes, Michelle Rogers, and Katherine Halliday published "HAMP Risk on the Rise: A Complicated Regulatory Scheme Under the Spotlight," on June 5, 2013 in Bloomberg Law.

Margo Tank and David Whitaker authored "Planning for Accessibility When Developing Financial Services Websites and Mobile Apps," which appeared in ABA's Consumer Financial Services Newsletter on June 20, 2013.

Jonice Gray Tucker and Valerie Hletko authored "CFPB's Vague New 'Responsible Conduct' Guidelines," which appeared on Law360 on June 28, 2013.

Margo Tank, Sara Emley, and David Whitaker published "A Brief Guide to Using Electronic Signatures in Securities Transactions" in the July-August 2013 issue of Practical Compliance and Risk Management for the Securities Industry.

Kirk Jensen and Valerie Hletko authored "More Scrutiny for Short-Term, Small-Dollar Lenders," which appeared on Law360 on July 8, 2013.

Jonice Gray Tucker and Amanda Raines authored "CFPB Investigations in Focus: Navigating CIDs," which appeared on Law360 on July 11, 2013.

Valerie Hletko authored "A Broader Application of Fair Debt Collection Principles," which was published on Law360 on July 12, 2013.

Margo Tank and Ian Spear authored "What Emerging Payment Providers Can Learn From Liberty Reserve and Mt. Gox." The article will appear in the August 1, 2013 issue of Payments Journal.

About BuckleySandler LLP (www.buckleysandler.com)

With nearly 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).

Please visit us at the following locations:

Washington: 1250 24th Street NW, Suite 700, Washington, DC 20037, (202) 349-8000
New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400
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.

MORTGAGES

CFPB Sues Mortgage Company Over Alleged Loan Officer Compensation Practices. On July 23, the CFPB filed a complaint against a Utah-based mortgage company and two of its officers for giving bonuses to loan officers who allegedly steered consumers into mortgages with higher interest rates. The complaint alleges that the company and its two officers violated the Federal Reserve Board's Loan Originator Compensation Rule by instituting a quarterly bonus program that paid more than 150 loan officers greater bonus compensation based on the terms and conditions of the loans they closed. The CFPB claims the program incentivized loan officers to steer consumers into loans with higher rates. According to the complaint, when the Loan Originator Compensation Rule took effect in April 2011, the company amended its program to eliminate any written reference to compensation based upon the terms or conditions of loans, making the program appear on its face to be a compliant compensation program. The CFPB alleges that although the company's regular

compensation was no longer tied to loan terms or conditions, the managers continued to adjust the quarterly bonuses based upon the loan terms and conditions. The complaint further alleges the company violated Regulation Z's requirement that a creditor retain records of compensation paid to loan originators for two years by failing to record what portion of quarterly bonuses paid to loan originators were attributable to a given loan and by failing to maintain accurate and complete compensation agreements. The CFPB is seeking an injunction, restitution, civil money penalties for each bonus paid, and costs.

CFPB Publishes ECOA Baseline Review Modules. On July 23, the CFPB released its ECOA baseline review modules, which supplement the recently updated ECOA examination procedures. Completed baseline modules will be included in an institution's examination work papers and may be considered in conjunction with any fair lending statistical analysis to assess an institution's fair lending compliance and risks. The baseline review procedures provide examiners with a series of questions in six modules to assess the following: (i) fair lending supervisory history; (ii) fair lending compliance management system - management participation, policies and procedures, training, and internal controls and monitoring; (iii) mortgage lending - policies and procedures for mortgage underwriting and pricing, including frequency of deviations, compensation structures, third-party involvement, and marketing practices; (iv) mortgage servicing - policies and procedures as they relate to fair lending; (v) auto lending - policies and procedures for direct and indirect auto lending, including information related to pricing, underwriting, referrals, origination, and third-party compensation; and (vi) other products - policies and procedures with respect to any additional products selected for review, e.g. secured and unsecured consumer lending, credit cards, add-on products, private student lending, payday lending, and small business lending. The CFPB states that its baseline review differs from its targeted review process, during which a supervised institution can be subject to an in-depth look at a specific area of fair lending risk, and is separate from the CFPB's HMDA review, which includes transactional testing for HMDA data accuracy.

Housing Finance Reform Bills Advance in Congress. On July 24, the House Financial Services Committee approved a comprehensive housing finance reform bill, outlined recently by Committee Chairman Jeb Hensarling (R-TX). The Chairman has indicated that the bill could move to the House floor for consideration by the full body shortly after the August recess and that in the interim he will work to explain the bill to his conference and build support. The House bill differs in several substantial ways from a Senate proposal. For instance, the House bill provides for an overhaul of the Federal Housing Administration while the Senate Banking Committee intends to address the FHA separately from, and in advance of, the Senate's broader housing finance reform bill. The Senate Banking Committee held a hearing this week on its FHA legislation and intends to amend and vote on the bill next week.

FHFA Announces Settlement in Lead MBS Action. On July 25, the FHFA announced that a financial institution agreed to pay roughly $885 million to settle allegations that the offering documents it provided to Fannie Mae and Freddie Mac in connection with the sale of billions of dollars in residential MBS included materially false statements or omitted material information, resulting in massive losses to the enterprises. The institution will pay approximately $415 million to Fannie Mae and $470 million to Freddie Mac to resolve claims related to securities sold to the companies between 2004 and 2007. The settlement ends the lead case of 18 cases the FHFA filed in 2011. In April 2013, the Second Circuit held that the action, filed within three years after the FHFA was appointed conservator of Freddie Mac and Fannie Mae, was timely under the relevant sections of Housing and Economic Recovery Act, and that the FHFA has standing to bring the action.

New York District Court Holds FHA Disparate Impact Claims Against Mortgage Securitizer Timely, ECOA Claims Time-Barred. On July 25, the U.S. District Court for the Southern District of New York held that a putative class of African-American borrowers can pursue claims against a

financial institution alleged to have financed and purchased so-called predatory subprime mortgage loans to be included in mortgage backed securities. Adkins v. Morgan Stanley, No. 12-7667, slip op. (S.D.N.Y. Jul. 25, 2013). The borrowers allege that the institution implemented policies and procedures that supported the subprime lending of a mortgage originator in the Detroit area so that the institution could purchase, pool, and securitize those loans. The borrowers claim those policies violated the FHA and the ECOA because they disproportionately impacted minority borrowers who were more likely to receive subprime loans, putting those borrowers at higher risk of default and foreclosure. In resolving the financial institution's motion to dismiss, the court held that the borrowers sufficiently alleged a disparate impact under the FHA and, although the lawsuit was filed more than five years after the originator stopped originating mortgages, the two-year statute of limitations on their FHA claims is tolled by the discovery rule. The court explained that the disparate impact of a facially neutral policy may not become immediately apparent, and "[g]iving full effect to the FHA's language and the policy behind the language requires a discovery rule recognizing that [the borrowers'] claim here did not accrue until they knew or had reason to know" that the policies were discriminatory. The court left open the possibility that the institution may prove at a later stage that public knowledge of the facts underlying the suit may be imputed to the borrowers to render their claims "discovered" at an earlier time. The court held that the borrowers' ECOA claims were not similarly timely because ECOA contains specific exceptions to its statute of limitations, and to apply a general discovery rule to ECOA claims would render those exceptions superfluous. Further, the court held that the ECOA claims are not timely pursuant to a continuing violations theory or equitable tolling. The court granted the motion to dismiss the ECOA claims and a state law claim, and denied the motion to dismiss the FHA claims.

California Appeals Court Holds Foreclosure Deficiency Judgment Protections Apply to Short Sales. On July 23, the California Court of Appeal, Fourth Appellate District, held in a case of first impression that a section of California law that prohibits a deficiency judgment following a foreclosure on a purchase money loan similarly protects borrowers in short sales. *Coker v. JP Morgan Chase Bank, N.A.*, No. D061720, 2013 WL 3816978 (Cal. Ct. App. Jul. 23, 2013). In this case, the lender approved a short sale subject to several conditions, including that the sale proceeds paid to the lender released the lender's security interest, but that the borrower still was responsible for any deficiency balance. After the sale closed, the lender sought to collect from the borrower the unsatisfied portion of the loan. The borrower filed suit claiming that state law and common law prevented the lender from collecting. On appeal, the court reversed the trial court's dismissal and held that a state law that has been applied to prohibit deficiency judgments following foreclosure sales also prohibits deficiency judgments following short sales. The court explained that there is nothing in the statute to modify or limit the term "sale" and no other requirement in the statute that a foreclosure must occur to trigger the deficiency judgment protections. Further, the court rejected the lender's argument that the borrower waived the protection by agreeing as a condition of the sale to be liable for any deficiency after the sale. The court reversed the trial court and remanded for further proceedings.

Rhode Island Adopts Foreclosure Mediation. On July 15, Rhode Island enacted HB 5335 to create a temporary foreclosure mediation program. Effective September 1, 2013 through July 1, 2018, the new law requires mortgagees or their servicers or agents to provide borrowers who are not more than 120 days delinquent written notice that foreclosure cannot proceed without the borrower first having an opportunity to participate in a mediation conference. The law establishes the procedures and requirements for such conferences and prohibits a mortgagee from proceeding with a foreclosure action until the mediator certifies that, after good faith effort by the mortgagee, the parties could not reach agreement.

BANKING

Senate Committee on Aging Scrutinizes Short-Term, Small Dollar Loans. On July 24, the Senate Special Committee on Aging held a hearing titled "Payday Loans: Short-term Solution or Long-term Problem?" that included discussion of several short-term, small-dollar credit products. Although the Committee's jurisdiction is intended to cover policy issues related to older Americans, the hearing reviewed small dollar products more generally. Numerous Senators, including committee Chairman Sen. Bill Nelson (D-FL) and Sen. Elizabeth Warren (D-MA) scrutinized bank deposit advance products and, building off the CFPB's testimony and earlier white paper, characterized them as payday loans that trap consumers in a cycle of debt. Sen. Nelson suggested that banks have an obligation to provide customers with alternatives and a range of options to meet their needs, while Sen. Donnelly (D-IN) and others repeatedly raised the concept of a 36% national usury cap. Committee members, with the help of a representative from Maine's financial regulator, tried to build a record in support of federal legislation to address alleged practices of online lenders, including charges that such lenders often avoid state licensing requirements to circumvent state usury caps. Committee members and witnesses also discussed the role of banks in assuring debits from customer accounts are compliant with state law.

CONSUMER FINANCE

Prudential Regulators Encourage Private Student Loan Workouts. On July 25, the FDIC, the OCC, and the Federal Reserve Board issued a joint statement to encourage financial institutions to "work constructively with private student loan borrowers experiencing financial difficulties." The statement explains that prudent workout arrangements are consistent with safe-and-sound lending practices and are generally in the long-term best interest of both the financial institution and the borrower. Specifically, under the Retail Credit Policy, which covers student loans, "extensions, deferrals, renewals, and rewrites of closed-end loans can be used to help borrowers overcome temporary financial difficulties." As such, the agencies promise not to criticize institutions for engaging in prudent workout arrangements with borrowers who have encountered financial problems, even if the restructured loans result in adverse credit classifications or troubled debt restructurings in accordance with accounting requirements under GAAP. Further, the regulators state that modification programs should provide borrowers with clear and easily accessible practical information about the available options, general eligibility criteria, and the process for requesting a modification.

Senate Committee on Aging Scrutinizes Short-Term, Small Dollar Loans. On July 24, the Senate Special Committee on Aging held a hearing titled "Payday Loans: Short-term Solution or Long-term Problem?" that included discussion of several short-term, small-dollar credit products. Although the Committee's jurisdiction is intended to cover policy issues related to older Americans, the hearing reviewed small dollar products more generally. Numerous Senators, including committee Chairman Sen. Bill Nelson (D-FL) and Sen. Elizabeth Warren (D-MA) scrutinized bank deposit advance products and, building off the CFPB's testimony and earlier white paper, characterized them as payday loans that trap consumers in a cycle of debt. Sen. Nelson suggested that banks have an obligation to provide customers with alternatives and a range of options to meet their needs, while Sen. Donnelly (D-IN) and others repeatedly raised the concept of a 36% national usury cap. Committee members, with the help of a representative from Maine's financial regulator, tried to build a record in support of federal legislation to address alleged practices of online lenders, including charges that such lenders often avoid state licensing requirements to circumvent state usury caps. Committee members and witnesses also discussed the role of banks in assuring debits from customer accounts are compliant with state law.

CFPB Publishes ECOA Baseline Review Modules. On July 23, the CFPB released its ECOA baseline review modules, which supplement the recently updated ECOA examination procedures. Completed baseline modules will be included in an institution's examination work papers and may be considered in conjunction with any fair lending statistical analysis to assess an institution's fair lending compliance and risks. The baseline review procedures provide examiners with a series of questions in six modules to assess the following: (i) fair lending supervisory history; (ii) fair lending compliance management system - management participation, policies and procedures, training, and internal controls and monitoring; (iii) mortgage lending - policies and procedures for mortgage underwriting and pricing, including frequency of deviations, compensation structures, third-party involvement, and marketing practices; (iv) mortgage servicing - policies and procedures as they relate to fair lending; (v) auto lending - policies and procedures for direct and indirect auto lending, including information related to pricing, underwriting, referrals, origination, and third-party compensation; and (vi) other products - policies and procedures with respect to any additional products selected for review, e.g. secured and unsecured consumer lending, credit cards, add-on products, private student lending, payday lending, and small business lending. The CFPB states that its baseline review differs from its targeted review process, during which a supervised institution can be subject to an in-depth look at a specific area of fair lending risk, and is separate from the CFPB's HMDA review, which includes transactional testing for HMDA data accuracy.

Attorney, Legal Services Provider Challenge CFPB Authority. On July 22, a Connecticut bankruptcy attorney and a firm with whom the attorney contracts for legal support services filed a lawsuit charging the CFPB with "grossly overreaching its authority" in requesting "sensitive and privileged information" about thousands of consumers and challenging the constitutionality of the Bureau itself. The suit was filed in response to a CFPB investigation into the service provider's relationships with law firms that provide debt settlement assistance to consumers facing bankruptcy. The complaint asserts that the CFPB lacks authority to regulate the law firms supported by the service provider and that the information demanded by the CFPB - disclosed to lawyers by clients seeking advice regarding bankruptcy - is protected by the attorney-client privilege.

New York Financial Services Regulator Uses New Authority to Propose Debt Collection Regulations. On July 25, the New York Department of Financial Services (DFS) proposed new regulations related to third-party debt collection in that state. The proposal is the DFS' first use of the statutory "gap authority" that allows it to regulate and enforce rules against previously unregulated providers of financial products and services. The proposed regulations (i) establish initial disclosures that incorporate federal requirements and require collectors to provide details about the nature of the debt; (ii) set new disclosure requirements for time-barred debt; (iii) require collectors to provide specified verification of disputed debts; (iv) require collectors to provide written confirmation of a debt settlement; and (v) allow consumers to communicate with collectors via email. The DFS will accept comments on the proposal for 45 day following publication in the state register.

Virginia AG Sues Online Payday Lender to Enforce State Licensing Law. On July 18, Virginia Attorney General Ken Cuccinelli (AG) announced a lawsuit against an online lender for allegedly making illegal payday loans in the state. The AG explained that the Virginia State Corporation Commission requires every payday loan lender to obtain a license before conducting business in Virginia. The AG asserts that the lender did not obtain the required license. State law limits unlicensed lenders to charging no more 12% in annual interest on a loan. The AG alleges that the rates on the online lender's loans range from 438% annually for a 25-day loan to 1,369% annually for an eight-day loan. The AG stated that the company instructs customers to apply for loans through its website, and after the loan applications are approved, the company wires funds directly to the consumers' bank accounts in exchange for authorizing the company to directly debit loan payments from the customers' bank accounts. The suit seeks to enjoin the company from collecting

interest over the 12% state limit, and seeks consumer reimbursement of certain interest paid and civil penalties in the amount of $2,500 for each violation.

Magistrate Judge Finds Tribal Payday Lender Subject to FTC Act; Lender Agrees to Settle Some FTC Charges. On July 22, the FTC announced that it obtained a partial settlement of claims it filed last year against a Native American Tribe-affiliated payday lending operation that allegedly charged undisclosed and inflated fees, and collected on loans illegally by threatening borrowers with arrest and lawsuits. *FTC v. AMG Servs, Inc.* No. 12-536 (D. Nev.). The agreement does not include any monetary resolution of the claims, but (i) prohibits the defendants from certain collection practices, (ii) prohibits the defendants from conditioning the extension of credit on preauthorized electronic fund transfers, and (iii) requires the defendants to implement enhanced compliance policies that are subject to new reporting requirements. The settlement follows a report and recommendation issued last week by the magistrate judge assigned to the case in which he concluded that the FTC has authority under the FTC Act to regulate "Indian Tribes, Arms of Indian Tribes, employees of Arms of Indian Tribes and contractors of Arms of Indian Tribes" with regard to the payday lending activities at issue in the case. Relying on Ninth Circuit precedent, the magistrate judge held that while the FTC Act does not expressly apply to Indian Tribes, it is a statute of general applicability with reach sufficient to cover the Tribal entities. Further, the magistrate judge concluded that "both TILA and EFTA provide the FTC the power to enforce the statutes *without regard* for any jurisdictional limitations contained in the FTC Act." The FTC will continue litigating other charges against the defendants, including allegations that they deceived consumers about the cost of their loans by charging undisclosed charges and inflated fees.

Florida District Court Orders Disgorgement of Profits from Unfair, Deceptive Online Payday Loan Referral Practices. On July 18, the U.S. District Court for the Middle District of Florida held that an online payday loan referral business engaged in unfair and deceptive billing practices and failed to provide adequate disclosures to its customers. *FTC v. Direct Benefits Group, LLC*, No. 11-1186, 2013 WL 3771322 (M.D. Fla. Jul. 18, 2013). The FTC alleged that the defendants violated the FTC Act by obtaining consumers' bank account information through payday loan referral websites and debiting their accounts without their consent. The FTC also alleged that the defendants failed to adequately disclose that, in addition to using consumers' financial information for a payday loan application, they would use it to charge them for enrollments in unrelated programs and services. During a bench trial, the parties presented evidence and arguments regarding the content and operation of the websites and whether consumers could enroll in the referral programs without taking affirmative steps to do so. The court agreed with the FTC's claims that the defendants' practices were deceptive and held that the "pop-up box" used to enroll consumers in the programs at issue was misleading. The court explained that the defendants' website and the online payday loan application form created the overall impression that they were intended for applying for payday loans and that the bank account information that applicants were asked to enter would be used for deposit of the payday loan-not so that the account could or would be debited for the purchase of an unrelated product or service. Further, the court held that the defendants' disclosures were not clear and conspicuous under the principles included in the FTC's ".com disclosures guidance." The court also held that the FTC established that the billing practices were unfair, and ordered the defendants to disgorge over $9.5 million and permanently cease the practices at issue.

SECURITIES

FHFA Announces Settlement in Lead MBS Action. On July 25, the FHFA announced that a financial institution agreed to pay roughly $885 million to settle allegations that the offering documents it provided to Fannie Mae and Freddie Mac in connection with the sale of billions of dollars in residential MBS included materially false statements or omitted material information,

resulting in massive losses to the enterprises. The institution will pay approximately $415 million to Fannie Mae and $470 million to Freddie Mac to resolve claims related to securities sold to the companies between 2004 and 2007. The settlement ends the lead case of 18 cases the FHFA filed in 2011. In April 2013, the Second Circuit held that the action, filed within three years after the FHFA was appointed conservator of Freddie Mac and Fannie Mae, was timely under the relevant sections of Housing and Economic Recovery Act, and that the FHFA has standing to bring the action.

FINRA To Begin Sharing Additional MBS Information. On July 22, FINRA announced that it will begin to disseminate information for so-called specified pool transactions in agency pass-through mortgage-backed securities and SBA-backed securities, including transaction information such as the time of the trade, price and volume. Transactions must be reported to within two hours of execution (the reporting period is reduced to one hour after a six month implementation period), and are disseminated as soon as received. Combined with FINRA's action last year to begin disseminating transaction information for agency pass-through mortgage-backed securities traded "to-be-announced" (TBA), FINRA now will be sharing information for securities that represent over 90 percent of the par value traded in all asset- and mortgage-backed securities.

E-COMMERCE

Fourth Circuit Relies on E-Sign Act to Hold Electronic Agreement May Effect A Valid Transfer of Copyright. On July 17, the U.S. Court of Appeals for the Fourth Circuit held that under the E-Sign Act, an electronic transfer may satisfy the requirements for transfer of a copyright under the Copyright Act, even though the Copyright Act itself does not define the "writing" or "signature" required to effectuate a transfer. *Metro. Reg. Info. Sys., Inc. v. Am. Home Realty Network, Inc.* No. 12-2102, 2013 WL 3722365 (Jul. 17, 2013). In this case, the company that operates the online real estate listing service MLS sued a competitor real estate referral service, contending that the referral service collected and used information without authorization - including photographs of listed properties - that MLS compiled for its customers. In order to submit photos to the MLS, customers are required to click a button and agree to certain terms of use. The court agreed with the MLS operator that its customers' acceptance of the terms of use operated as a transfer of copyrights in any photograph provided to the MLS, and that as such the competitor service may have violated the Copyright Act through its unauthorized use of the materials. Noting the paucity of case law applying the E-Sign Act to instruments conveying copyrights, the court looked to cases in which circuit courts have applied the E-Sign Act to the Federal Arbitration Act's protections that pertain only to written arbitration agreements, including the Second Circuit's holding in *Specht v. Netscape Comms. Corp.*, 605 F.3d 17 (2nd Cir. 2002). Based on the analysis in those cases, the court explained that "[t]o invalidate copyright transfer agreements solely because they were made electronically would thwart the clear congressional intent embodied in the E-Sign Act." The court held that an electronic agreement may effect a valid transfer of copyright interests under the Copyright Act. As such, the court affirmed the district court's preliminary injunction prohibiting MLS's competitor from displaying the MLS photographs.

NIST Releases Minor Updates to Digital Signature Standard. On July 23, the National Institute of Standards and Technology released a revised digital standard used to ensure the integrity of electronic documents and the identity of the signer. The revised standard includes no major changes, but does update the standard to align it with other publications so that all NIST documents offer consistent guidance regarding the use of random number generators. Another revision concerns the use of prime number generators, which requires random initial values for searching for prime numbers.

Florida District Court Orders Disgorgement of Profits from Unfair, Deceptive Online Payday

Loan Referral Practices. On July 18, the U.S. District Court for the Middle District of Florida held that an online payday loan referral business engaged in unfair and deceptive billing practices and failed to provide adequate disclosures to its customers. *FTC v. Direct Benefits Group, LLC*, No. 11-1186, 2013 WL 3771322 (M.D. Fla. Jul. 18, 2013). The FTC alleged that the defendants violated the FTC Act by obtaining consumers' bank account information through payday loan referral websites and debiting their accounts without their consent. The FTC also alleged that the defendants failed to adequately disclose that, in addition to using consumers' financial information for a payday loan application, they would use it to charge them for enrollments in unrelated programs and services. During a bench trial, the parties presented evidence and arguments regarding the content and operation of the websites and whether consumers could enroll in the referral programs without taking affirmative steps to do so. The court agreed with the FTC's claims that the defendants' practices were deceptive and held that the "pop-up box" used to enroll consumers in the programs at issue was misleading. The court explained that the defendants' website and the online payday loan application form created the overall impression that they were intended for applying for payday loans and that the bank account information that applicants were asked to enter would be used for deposit of the payday loan-not so that the account could or would be debited for the purchase of an unrelated product or service. Further, the court held that the defendants' disclosures were not clear and conspicuous under the principles included in the FTC's ".com disclosures guidance." The court also held that the FTC established that the billing practices were unfair, and ordered the defendants to disgorge over $9.5 million and permanently cease the practices at issue.

PRIVACY/DATA SECURITY

DOJ Announces Five Indictments in Largest Known Data Breach Case. On July 25, the DOJ announced the indictment of five individuals accused of conspiring in a worldwide hacking and data breach scheme that targeted major corporate networks, stole more than 160 million credit card numbers and resulted in hundreds of millions of dollars in losses. The DOJ believes the defendants and others conspired to use a "SQL injection attack" to penetrate the computer networks of several of the largest payment processing companies, retailers and financial institutions in the world. Once started, the attacks could last months while the defendants worked to steal user names and passwords, means of identification, credit and debit card numbers and other corresponding personal identification information of cardholders, and subsequently sell the data to end-users who used the data to make fraudulent ATM withdrawals or credit card purchases. The DOJ's action was based on the findings of an extensive Secret Service investigation.