Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

May 17, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Announces RESPA Action against Homebuilder. On May 17, the CFPB announced an enforcement action against a homebuilder the CFPB alleges violated Section 8(a) of RESPA through joint venture arrangements. According to the CFPB, the homebuilder created two joint ventures, one with a state bank and the other with a nonbank mortgage company. The CFPB consent order alleges the homebuilder referred mortgage customers to the joint ventures in exchange for payments from those ventures, and that such payments violate RESPA's prohibition on the acceptance of any fee, kickback, or thing of value in exchange for referral of customers for real estate settlement services. The homebuilder did not admit to the allegations, but agreed to disgorge over $100,000 and cease from performing any real estate settlement services, including mortgage origination. The CFPB investigation resulted from an FDIC referral. That agency issued an enforcement action in June 2012 against the state bank for related alleged activities.

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Senator Warren Pushes Federal Authorities on Bank Prosecutions. On May 14, Senator Elizabeth Warren (D-MA) sent a letter to Federal Reserve Board Chairman Ben Bernanke, Attorney General Eric Holder, and SEC Chairman Mary Jo White seeking additional information about the agencies' respective approach to enforcement actions. Specifically, the letter asks whether the agencies have conducted any internal research or analysis on trade-offs to the public between settling an enforcement action without admission of guilt and going forward with litigation to obtain an admission. The letter notes that the OCC recently informed Ms. Warren that it does not have any such internal research or analysis and reiterates Ms. Warren's concern that "if a regulator reveals itself to be unwilling to take large financial institutions all the way to trial . . . the regulator has a lot less leverage in settlement negotiations."

FTC Submits Financial Acts Enforcement Letter to CFPB. On May 14, the FTC released a letter it sent to the CFPB's assistant directors for fair lending and supervision examinations describing activities related to the FTC's administration and enforcement of the regulations implementing ECOA, EFTA, TILA, and the Consumer Leasing Act. The annual letter reviews the FTC's post-Dodd-Frank Act responsibilities with regard to these regulations and reports on enforcement actions taken with regard to each. For example, with regard to TILA, the letter reviews FTC enforcement actions involving non-mortgage credit advertisements, mortgage lending advertisements, and forensic audit scams, and describes the FTC's rulemaking and policy work related to the CFPB's mortgage rules and in the area of mobile payments.

FTC Sends COPPA Update Educational Letters. On May 15, the FTC announced that it sent

letters to businesses to help them comply with new requirements under the revised Children's Online Privacy Protection Act (COPPA) rule. The letters went to 90 businesses whose online services or mobile applications appear to collect personal information from children under 13, as defined by the revised rule. The letters differ depending on whether the business is domestic or foreign, and whether the business collects images or sounds of children, or collects persistent identifiers.

Freddie Mac Allows Early Streamlined Modifications; Fannie Mae Issues Streamlined Modification FAQs. On May 13, Freddie Mac announced in Bulletin Number 2013-7 that servicers can immediately begin offering modifications under the streamlined modifications initiative announced by the FHFA in March. The Bulletin states that servicers must generate the terms of each trial period plan using their own proprietary system or third-party system until Workout Prospector® becomes available July 15, 2013 to process the terms of a streamlined modification. The Bulletin also revises Freddie Mac's property valuation requirements for modifications of mortgages secured by manufactured homes and 2- to 4-unit properties, and eliminates the requirement that a property value be obtained for a long-term forbearance plan. On May 7, Fannie Mae published new Frequently Asked Questionsintended to help servicers understand and implement the requirements of Servicing Guide Announcement SVC-2013-05, which, beginning July 1, 2013, requires services to offer eligible borrowers who are at least 90 days delinquent on their mortgage a way to lower their monthly payments and modify their mortgage without requiring financial or hardship documentation. The FAQs relate to (i) solicitation, (ii) eligibility requirements/exclusions, (iii) workout hierarchy, (iv) valuations, and (v) servicer requirements.

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Indiana Revises Numerous Licensing, Consumer Credit, and Banking Provisions. On May 9, Indiana enacted HB 1081, which makes numerous changes to the state's consumer lending, licensing, and banking laws. Among those changes, the bill increases the threshold loan amounts under various definitions in the Uniform Consumer Credit Code, including "consumer credit sale," "consumer loan," and "consumer related loan." With regard to mortgageoriginator licensing, the bill (i) revises the surety bond requirements for creditors and entities exempt from licensing that employ a licensed mortgage loan originator, (ii) prohibits an unlicensed individual or an unlicensed organization to act as a closing agent in a first lien mortgage transaction, and (iii) empowers the Department of Financial Institutions (DFI) to investigate any licensee or person that the DFI suspects is operating without a license or in violation of the First Lien Mortgage Lending Act. The bill provides additional guidelines for filing an article of dissolution of a bank, trust company, or a building and loan association. It also makes changes to the certain powers of banks and trust companies. In addition, the bill make numerous amendments related to debt management companies, lead generators, and other consumer financial service providers, and revises requirements for money transmitter licensing by, for example, authorizing the DFI to designate the NMLS for licensing purposes.

Kansas Repeals Recently Updated Mortgage Interest Rate Cap. Recently, Kansas enacted SB 129, which repealed a provision in the mortgage interest rate law that set a floating cap on the interest rate charged for first real estate mortgage loans and contracts for deeds. The repeal also renders irrelevant another recent change to the same provisions. Specifically, on April 4, the state enacted a bill that increased the maximum annual interest rate for certain mortgages from 1.5 percentage points to no more than 3.5 percentage points above a Freddie Mac floating rate. While that change was pending approval by the governor, the legislature passed the repeal, as explained in the legislature's conference report. With the elimination of the specified interest rate cap, parties now are subject to provisions in current law, which provide the rate cannot exceed 15% per year.

COURTS

Third Circuit Joins DC Circuit in Invalidating NLRB Recess Appointment. On May 16, the U.S. Court of Appeals for the Third Circuit held that an appointment to the National Labor Relations Board (NLRB) made by President Obama in March 2010 during a purported Senate recess was unconstitutional and vacated orders of the NLRB as constituted with the improperly appointed

member. *NLRB v. New Vista Nursing & Rehab.*, No. 11-3440, 2013 WL 2099742 (3rd Cir. May 16, 2013). The NLRB member appointment at issue in this case precedes the appointments at issue in *Noel Canning*, which appointments were made during the same pro forma Senate session in which President Obama appointed CFPB Director Richard Cordray. The D.C. Circuit's opinion invalidating those appointments currently is on appeal to the Supreme Court. Here, as explained in the majority opinion and as in *Noel Canning*, thecentral question is the meaning of "the Recess of the Senate." The court concluded that"the Recess of the Senate" in the Recess Appointments Clause refers to only intersession breaks, held that the NLRB panel lacked the requisite number of members to exercise its authority because one panel member was invalidly appointed during an intrasession break, and vacated the Board's orders. In a dissenting opinion, one judge argued that the majority holding undoes an appointments process that has successfully operated for over 220 years, and the court instead should have held that "the Recess" refers to both intrasession and intersession recesses because the Senate can be unavailable to provide advice and consent during both. The Third Circuit did not address whether the President may only fill vacancies that arise or begin during such intersession recesses, as opposed to vacancies that happen to exist during such recesses.

New York State Trial Courts Issue Opposing Opinions on MBS Claims Statute of Limitations. This week, two New York trial court justices issued diverging opinions on when the statute of limitations begins to run on claims related to the repurchase obligations of securitizers under certain MBS pooling and servicing agreements. Both courts explained that under New York law a cause of action for a breach of contract accrues at the time of the breach, and that the statute of limitations for breach of contract is six years. But the courts diverged on the question of whether the clock for claims related to repurchase obligations begins to run from the date the representations for the allegedly faulty mortgages are made, or when the securitizer fails to meet its obligations to repurchase such loans. In one case, the court held that the clock on claims by trustees that the securitizer breached its contract by failing to repurchase began to run on the date the representations were made, i.e. the date the pooling and servicing agreement closed, and dismissed the trustee's suit because it was filed more than six years after the closing date. *Nomura Asset Acceptance Corp. Alt. Loan Trust, Series 2005-S4 v. Nomura Credit & Capital Inc.*, No. 653541/2011, slip op. (N.Y. Sup. Ct. May 10, 2013). In a second case, the court held the opposite: the statute of limitations did not begin to run until the securitizers improperly rejected the trustee's repurchase demand, i.e. the breach is the failure to comply, not the date of the representation. *Ace Securities Corp, Home Equity Loan Trust Series 2006-SL2 v. DB Structured Prods., Inc.*, No. 650980/2012, 2013 WL 1981345 (N.Y. Sup. Court, May 13, 2013). Based on that holding, the court found the complaint timely filed and denied the securitizer's motion to dismiss.

Ohio Supreme Court Holds Mortgage Servicing Not Subject to Consumer Sales Practices Act. On May 14, the Ohio Supreme Court held in response to two certified questions from a federal district court that the Ohio Consumer Sales Practices Act (CSPA) generally does not apply to mortgage servicers and servicing. *Anderson v. Barclay's Capital Real Estate, Inc.*, No. 2013-Ohio-1933, 2013 WL 2097556 (Ohio May 14, 2013). Specifically, the court held that residential mortgage servicing is not a "consumer transaction" subject to the CSPA. The court reasoned that mortgage servicing is a contractual agreement between the mortgage servicer and the financial institution that owns both the note and mortgage, and is carried out in the absence of a contract between the borrower and the servicer. Therefore the transaction does not meet an essential element of the statutory definition because it is not a sale, lease, assignment, award by chance, or other transfer of a service to a consumer. The court also held that a residential mortgage servicer is not a "supplier" subject to the CSPA. The statute defines "supplier" to include a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer. Because mortgage servicers are not part of the residential mortgage transaction and do not seek to enter into consumer transactions with borrowers, they are not "suppliers" under the law.

Court Dismisses California AG's First Suit Against Mobile Application Provider Under Online Privacy Protection Act. On May 9, the Superior Court of California dismissed California Attorney General Kamala Harris' first suit against a company for allegedly failing to comply with the state's Online Privacy Protection Act. *California v. Delta Air Lines Inc.*, No. 12-526741, Order (Cal. Sup. Ct. May 9, 2013). The state alleged that since at least 2010, Delta Airlines operated a mobile application that allows customers to, for example, check-in online for an airplane flight, view reservations for air travel, or rebook cancelled or missed flights. The AG claimed that the Delta application collects substantial personally identifiable information without providing a privacy policy. The suit sought an injunction and penalties of up to $2,500 for each violation. Reportedly, the court determined that the suit was preempted by the federal Airline Deregulation Act, which prohibits states from regulating certain airline functions, including, according to Delta and the court, the mobile application at issue in this case. The suit against Delta was filed after the AG sent letters to Delta and numerous other mobile application developers and providers advising those entities of their alleged noncompliance with state privacy law, and forms part of a broader enforcement effort by the AG with regard to online and mobile privacy.

FIRM NEWS

Complimentary STAGE Network Webinar on Digital Privacy Featuring Maryland Attorney General Douglas F. Gansler

STAGE Network will host a webinar on May 21, 2013, from 1:00 - 3:15 PM ET, on digital privacy issues that will feature video of an interview with the current President of the National Association of Attorneys General, Maryland Attorney General Douglas F. Gansler. The interview will be followed by a panel discussion of related digital privacy issues. The panel session will be moderated by Jeremiah S. Buckley of BuckleySandler LLP and will include commentary from Doyle Bartlett of the Eris Group, LLC, Bradley J. Bondi of Cadwalader, Wickersham & Taft LLP, and Margo H.K. Tank and James T. Shreve of BuckleySandler LLP. Click here to register.

BuckleySandler LLP is a proud sponsor of the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference in Boca Raton, Florida, taking place from May 19-22, 2013. The firm will have four Partners speaking at this year's event. Jonice Gray Tucker will speak on the panel "Litigation Forum 2: Fair Lending - Disparate Impact," taking place on Sunday, May 19. Jeff Naimon will also speak on Sunday, May 19on a panel titled "Deep Dive Workshop 4 and Litigation Forum 4: Ability to Repay - Qualified Mortgage Rule - Litigation Concerns." Andrew Sandler will speak on Monday, May 20,on the panel "Major Litigation and Enforcement Trends." Margo Tank will speak on the panel "Marshaling Technology to Comply" taking place on Wednesday, May 22.

James Parkinson will participate in a Strafford CLE webinar, "FCPA Risks for U.S. and Non-U.S. Execs," on June 4, 2013, 1:00 - 2:30 PM.

Andrea Mitchell will speak at an American Bankers Association Fair Lending Workshop on June 8, 2013 in Chicago, IL, offered in connection with the ABA Regulatory Compliance Conference. The Fair Lending Workshop will review current fair lending hot topics and how institutions can manage or mitigate fair lending obstacles and demonstrate compliance with fair lending laws and regulations.

Andrew Sandler will speak at the American Bankers Association's Regulatory Compliance Conference, June 11, 2013 in Chicago, IL. Mr. Sandler's topic is: "Fair and Responsible Banking: Beyond Mortgages".

Jonathan Cannon will speak at the National Settlement Services Summit in Cleveland, Ohio on June 12, 2013. Mr. Cannon's session is entitled "RESPA defined in 2013: What's new, what's the same and where do compliance issues lurk?"

John Redding will participate on a panel at the 15th AFSA State Government Affairs and Legal Issues Forum on June 13, 2013 in San Antonio, TX. Mr. Redding's panel, which will cover auto finance lending products and CFPB concerns on fair lending and dealer participation, also will include Rebecca Gelfond, Deputy Fair Lending Director, CFPB, Will Lund, Superintendent, Maine Bureau of Consumer Credit Protection, and Deborah Robertson, Managing Counsel, Toyota Financial Services.

FIRM PUBLICATIONS

Margo Tank, David Whitaker, and Ian Spear published, "Federal Regulators Issue Guidance on Social Media and Mobile Privacy," in Internet Law & Strategy on April 4, 2013.

Andrew Schilling, Ross Morrison, and Michelle Rogers published "Little-known Statute May Breathe New Life into False Claims Act Cases Against Financial Institutions," in Thomson Reuters Accelus on April 18, 2013.

Matthew Previn and Michelle Rogers published "A Financial Institution's Fraud on Itself Triggers FIRREA," in Law360, on April 26, 2013.

Margo Tank, Kate Aishton, and Andrew Grant published "NACHA's Guidelines for Bill Payments Via QR Codes," in the April 2013 issue of E-Finance and Payments Law and Policy.

Benjamin Saul, Valerie Hletko, Liana Prieto, and Shara Chang published the Fair Lending Litigation chapter in *Litigation Services Handbook: The Role of the Financial Expert*, 2013 Cumulative Supplement (5th Edition).

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).

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Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (310) 424-3900
Orange County: 3121 Michelson Drive, Suite 210, Irvine, CA 92612, (949)398-1360

We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes. Email infobytes@buckleysandler.com.

In addition, please feel free to email our attorneys. A list of attorneys can be found here.

For back issues of InfoBytes, please see: http://www.buckleysandler.com/infobytes/infobytes.

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

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BANKING

Federal Reserve Board, Illinois Regulator Issue Joint Enforcement Action Against U.S. Subsidiaries of Foreign Bank, OCC Issues Parallel Action. On May 17, the Federal Reserve Board released an April 29, 2013 written agreement between the Federal Reserve Board, an Illinois state regulator, a foreign bank, and its U.S. bank holding company subsidiary (the Holding Company) regarding certain Bank Secrecy Act/Anti-Money Laundering (BSA/AML) deficiencies at the foreign bank's Chicago branch (the Branch) and an OCC regulated subsidiary of the Holding Company. The OCC took parallel action on the same date against the Holding Company's Chicago bank subsidiary. The Federal Reserve Board agreement requires that the Holding Company conduct a comprehensive review of its BSA/AML compliance program within 60 days, and within 90 days submit a report of its findings and recommendations, a written enhanced program, and a written plan to strengthen board oversight. Also within 90 days, the Branch must submit a written plan to improve its BSA/AML compliance, and the foreign bank, the Holding Company, and the Branch must submit an enhanced customer due diligence program. The OCC agreement requires that the Chicago bank's board establish a compliance committee and within 90 days submit a compliance action plan. Within 30 days, the bank's board must review its current engagement with an independent consultant, and within 90 days (i) develop a staffing plan for its internal BSA compliance department, (ii) conduct an MIS assessment, (iii) develop customer due diligence controls, and (iv) develop written suspicious activity policies and procedures. Both agreements require quarterly reporting, and neither includes a monetary penalty.

Senator Warren Pushes Federal Authorities on Bank Prosecutions. On May 14, Senator Elizabeth Warren (D-MA) sent a letter to Federal Reserve Board Chairman Ben Bernanke, Attorney General Eric Holder, and SEC Chairman Mary Jo White seeking additional information about the agencies' respective approach to enforcement actions. Specifically, the letter asks whether the agencies have conducted any internal research or analysis on trade-offs to the public between settling an enforcement action without admission of guilt and going forward with litigation to obtain an admission. The letter notes that the OCC recently informed Ms. Warren that it does not have any such internal research or analysis and reiterates Ms. Warren's concern that "if a regulator reveals itself to be unwilling to take large financial institutions all the way to trial . . . the regulator has a lot less leverage in settlement negotiations."

CONSUMER FINANCE

Third Circuit Joins DC Circuit in Invalidating NLRB Recess Appointment. On May 16, the U.S. Court of Appeals for the Third Circuit held that an appointment to the National Labor Relations Board (NLRB) made by President Obama in March 2010 during a purported Senate recess was unconstitutional and vacated orders of the NLRB as constituted with the improperly appointed member. *NLRB v. New Vista Nursing & Rehab.*, No. 11-3440, 2013 WL 2099742 (3rd Cir. May 16, 2013). The NLRB member appointment at issue in this case precedes the appointments at issue in *Noel Canning*, which appointments were made during the same pro forma Senate session in which President Obama appointed CFPB Director Richard Cordray. The D.C. Circuit's opinion invalidating those appointments currently is on appeal to the Supreme Court. Here, as explained in the majority opinion and as in *Noel Canning*, thecentral question is the meaning of "the Recess of the Senate." The court concluded that"the Recess of the Senate" in the Recess Appointments Clause refers to only intersession breaks, held that the NLRB panel lacked the requisite number of members to exercise its authority because one panel member was invalidly appointed during an intrasession break, and vacated the Board's orders. In a dissenting opinion, one judge argued that the majority holding undoes an appointments process that has successfully operated for over 220 years, and the court instead should have held that "the Recess" refers to both intrasession and intersession recesses because the Senate can be unavailable to provide advice and consent during both. The Third Circuit did not address whether the President may only fill vacancies that arise or begin during such intersession recesses, as opposed to vacancies that happen to exist during such recesses.

FTC Submits Financial Acts Enforcement Letter to CFPB. On May 14, the FTC released a letter it sent to the CFPB's assistant directors for fair lending and supervision examinations describing activities related to the FTC's administration and enforcement of the regulations implementing ECOA, EFTA, TILA, and the Consumer Leasing Act. The annual letter reviews the FTC's post-Dodd-Frank Act responsibilities with regard to these regulations and reports on enforcement actions taken with regard to each. For example, with regard to TILA, the letter reviews FTC enforcement actions involving non-mortgage credit advertisements, mortgage lending advertisements, and forensic audit scams, and describes the FTC's rulemaking and policy work related to the CFPB's mortgage rules and in the area of mobile payments.

Indiana Revises Numerous Licensing, Consumer Credit, and Banking Provisions. On May 9, Indiana enacted HB 1081, which makes numerous changes to the state's consumer lending, licensing, and banking laws. Among those changes, the bill increases the threshold loan amounts under various definitions in the Uniform Consumer Credit Code, including "consumer credit sale," "consumer loan," and "consumer related loan." With regard to mortgageoriginator licensing, the bill (i) revises the surety bond requirements for creditors and entities exempt from licensing that employ a licensed mortgage loan originator, (ii) prohibits an unlicensed individual or an unlicensed

organization to act as a closing agent in a first lien mortgage transaction, and (iii) empowers the Department of Financial Institutions (DFI) to investigate any licensee or person that the DFI suspects is operating without a license or in violation of the First Lien Mortgage Lending Act. The bill provides additional guidelines for filing an article of dissolution of a bank, trust company, or a building and loan association. It also makes changes to the certain powers of banks and trust companies. In addition, the bill make numerous amendments related to debt management companies, lead generators, and other consumer financial service providers, and revises requirements for money transmitter licensing by, for example, authorizing the DFI to designate the NMLS for licensing purposes.

SECURITIES

New York State Trial Courts Issue Opposing Opinions on MBS Claims Statute of Limitations. This week, two New York trial court justices issued diverging opinions on when the statute of limitations begins to run on claims related to the repurchase obligations of securitizers under certain MBS pooling and servicing agreements. Both courts explained that under New York law a cause of action for a breach of contract accrues at the time of the breach, and that the statute of limitations for breach of contract is six years. But the courts diverged on the question of whether the clock for claims related to repurchase obligations begins to run from the date the representations for the allegedly faulty mortgages are made, or when the securitizer fails to meet its obligations to repurchase such loans. In one case, the court held that the clock on claims by trustees that the securitizer breached its contract by failing to repurchase began to run on the date the representations were made, i.e. the date the pooling and servicing agreement closed, and dismissed the trustee's suit because it was filed more than six years after the closing date. *Nomura Asset Acceptance Corp. Alt. Loan Trust, Series 2005-S4 v. Nomura Credit & Capital Inc.*, No. 653541/2011, slip op. (N.Y. Sup. Ct. May 10, 2013). In a second case, the court held the opposite: the statute of limitations did not begin to run until the securitizers improperly rejected the trustee's repurchase demand, i.e. the breach is the failure to comply, not the date of the representation. *Ace Securities Corp, Home Equity Loan Trust Series 2006-SL2 v. DB Structured Prods., Inc.*, No. 650980/2012, 2013 WL 1981345 (N.Y. Sup. Court, May 13, 2013). Based on that holding, the court found the complaint timely filed and denied the securitizer's motion to dismiss.

PRIVACY/DATA SECURITY

FTC Sends COPPA Update Educational Letters. On May 15, the FTC announced that it sent letters to businesses to help them comply with new requirements under the revised Children's Online Privacy Protection Act (COPPA) rule. The letters went to 90 businesses whose online services or mobile applications appear to collect personal information from children under 13, as defined by the revised rule. The letters differ depending on whether the business is domestic or foreign, and whether the business collects images or sounds of children, or collects persistent identifiers.

Court Dismisses California AG's First Suit Against Mobile Application Provider Under Online Privacy Protection Act. On May 9, the Superior Court of California dismissed California Attorney General Kamala Harris' first suit against a company for allegedly failing to comply with the state's Online Privacy Protection Act. *California v. Delta Air Lines Inc.*, No. 12-526741, Order (Cal. Sup. Ct. May 9, 2013). The state alleged that since at least 2010, Delta Airlines operated a mobile application that allows customers to, for example, check-in online for an airplane flight, view reservations for air travel, or rebook cancelled or missed flights. The AG claimed that the Delta application collects substantial personally identifiable information without providing a privacy policy.

The suit sought an injunction and penalties of up to $2,500 for each violation. Reportedly, the court determined that the suit was preempted by the federal Airline Deregulation Act, which prohibits states from regulating certain airline functions, including, according to Delta and the court, the mobile application at issue in this case. The suit against Delta was filed after the AG sent letters to Delta and numerous other mobile application developers and providers advising those entities of their alleged noncompliance with state privacy law, and forms part of a broader enforcement effort by the AG with regard to online and mobile privacy.