January 18, 2013

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FEDERAL ISSUES

CFPB Issues Mortgage Servicing Standards. On January 17, the CFPB issued final rules amending Regulation Z (TILA) and Regulation X (RESPA) to implement certain mortgage servicing standards set forth by the Dodd-Frank Act and to address other issues identified by the CFPB. The rule amending Regulation Z includes changes to (i) periodic billing statement requirements, (ii) notices about adjustable rate mortgage interest rate adjustments, and (iii) rules on payment crediting and payoff statements. The rule amending Regulation X addresses (i) force-placed insurance requirements, (ii) error resolution and information request procedures, (iii) information management policies and procedures, (iv) standards for early intervention with delinquent borrowers, (v) rules for contact with delinquent borrowers, and (vi) enhanced loss mitigation procedures. While many of the rules implement changes required by the Dodd-Frank Act, other proposed requirements incorporate requirements similar to those placed on servicers as part of the national mortgage servicing settlement earlier this year, or corrective actions taken in 2011 by the prudential regulators. The new standards go into effect on January 10, 2014. The Act provides certain exemptions for servicers that service 5,000 or fewer mortgage loans and service only mortgage loans that they or an affiliate originated or own. BuckleySandler will provide additional analysis of key issues in the rules once we complete our review of them.

CFPB Plans Release of Mortgage Loan Originator Rule. On January 18, the CFPB announced that it will release a final rule regarding mortgage loan originator compensation and qualifications on Sunday, January 20. According to its press release, the rule will (i) prohibit steering incentives, (ii) prohibit "dual compensation," and (iii) set qualification and screening standards for loan originators, but it will not require, as proposed, that mortgage loan originators make available a loan option with no upfront discount points or origination fees, if they were making available one with upfront discount points or origination fees. The press release states that while the majority of the loan originator rule will take effect in January 2014, certain provisions related to mandatory arbitration restrictions will take effect in June 2013. BuckleySandler will review the rule once it is released and provide additional analysis.

Federal Agencies Issue Final Appraisal Rules. On January 18, the Federal Reserve Board, the OCC, the FDIC, the NCUA, the FHFA, and the CFPB issued a final rule to implement Dodd-Frank Act amendments to TILA that require creditors to meet certain appraisal conditions before making a higher-risk loan. The rule uses the term "higher-priced mortgage loan," which covers: (i) a loan for which the APR exceeds the average prime offer rate (an average market rate) by 1.5 percent for a first-lien loan, (ii) 2.5 percent for a first-lien jumbo loan, and (iii) 3.5 percent for a subordinate-lien loan. For such loans, the final rule requires that a creditor obtain a written appraisal from a certified or licensed appraiser that is based on a physical property visit of the interior of the property. During the application process, the creditor must issue a disclosure stating (i) the purpose of the appraisal, (ii) that the creditor will provide the applicant a copy of any written appraisal, and (iii) that the applicant may choose to have a separate appraisal conducted at his or her own expense. The creditor must provide the borrower with a free copy of any written appraisals at least three business days before closing. Additional appraisal requirements apply under certain circumstances. As did the proposed rule, and consistent with the statute, the final rule exempts loans that are considered "qualified mortgages," as recently defined by the CFPB, as well as reverse mortgages, loans secured by manufactured homes, and certain other loans.

On the same day, the CFPB issued a related rule to implement a Dodd-Frank Act provision that adds similar appraisal requirements to ECOA. The final rule generally mirrors the rule as proposed and requires that for any loan to be secured by a first lien on a dwelling, a creditor must (i) notify applicants within three business days of receiving an application of their right to receive a free copy of written appraisals and valuations and (ii) provide applicants a free copy of all written appraisals and valuations promptly after receiving them, but in no case later than three business days prior to closing on the mortgage. The rule prohibits creditors from charging additional fees for providing a copy of written appraisals and valuations, and allows applicants to waive the three day requirement, provided a copy of all written appraisals and valuations are provided at or prior to closing. Together, the revisions to TILA and ECOA, as implemented by these rules, require creditors to provide two appraisal disclosures to consumers applying for a higher-risk loan secured by a first lien on a borrower's principal dwelling. The rules take effect January 18, 2014.

DOJ Announces Redlining Enforcement Action against Community Bank. On January 15, the Department of Justice (DOJ) announced that it reached a settlement with a Michigan community bank regarding alleged redlining practices. In its complaint, the DOJ charged that between 2006 and 2009, the bank served the credit needs of white neighborhoods in the Saginaw and Flint, Michigan metropolitan areas to a significantly greater extent than it served the credit needs of majority African-American neighborhoods. Under the terms of the consent order, the bank is required to open a loan production office in an African-American neighborhood in Saginaw, invest $75,000 in a special financing program to increase the amount of credit the bank extends to majority African-American neighborhoods in and around Saginaw, invest $75,000 in partnerships with organizations that provide credit, financial, homeownership, and/or foreclosure prevention services to the residents of those neighborhoods, and invest $15,000 in outreach that promotes the bank's products and services to potential customers in those neighborhoods.

Federal Reserve Board Announces Additional Monetary Settlements in Lieu of Independent Foreclosure Review. On January 16, the Federal Reserve Board announced that two additional mortgage servicers subject to consent orders issued in April 2011 agreed in principle to a monetary resolution of allegations that the firms engaged in improper mortgage servicing and foreclosure practices. As described, the agreements in principle mirror those obtained by the Federal Reserve Board and the OCC from 10 other servicers, which were announced last week. Together the two firms will provide $232 million in direct payments to more than 220,000 borrowers whose homes were in foreclosure during 2009 and 2010. The companies also will provide $325 million in other assistance, such as loan modifications and forgiveness of deficiency judgments. On January 18, the Federal Reserve Board and the OCC announced an agreement in principle with another servicer that will provide $96 million in direct payments to more than 112,000 borrowers, and $153 million in other assistance. Under all three agreements, borrowers will be contacted by the end of March about their exact payout, which could range from hundreds of dollars to $125,000, depending upon the type of alleged servicing error.

Federal Regulators Announce BSA/AML and Derivatives Trading Enforcement Actions Against Large Bank. On January 14, the Federal Reserve Board and the OCC issued two consent orders against a large international bank and its trust company over alleged deficiencies in its Bank Secrecy Act and Anti-Money Laundering (BSA/AML) compliance programs. Under the Federal Reserve Board Order, the bank is required to conduct a full review of its compliance program and submit written reports to the Federal Reserve Bank of New York regarding the review's findings and recommendations. Any proposed improvements are subject to approval by the Federal Reserve Bank of New York. The OCC Order identifies "critical deficiencies" in the bank's BSA/AML compliance programs with respect to suspicious activity reporting, transaction monitoring, customer due diligence, and internal control implementation and requires specific corrective actions in response. Neither order requires a civil money penalty. On the same day, the Federal Reserve Board and the OCC issued consent orders concerning the bank's derivatives trading activity. Under those orders, the bank must take corrective action as to its risk-management program, finance and internal audit functions, and Chief Investment Office, but the orders do not include a monetary settlement. The Federal Reserve Board stated that the corrective actions are necessary in light of disclosed, significant losses in a large synthetic credit portfolio managed by the Chief Investment Office. An OCC report found that the bank lacked adequate oversight to protect itself from such material risk, and had other inadequate risk management processes, trade valuation controls, and audit processes.

HHS Issues New HIPAA Rules. On January 17, the Department of Health and Human Services (HHS) issued a new rule under the Health Insurance Portability and Accountability Act (HIPAA). The omnibus rule is intended to enhance patient privacy protections, provide new rights with regard to patient health information, and strengthen the government's enforcement abilities. For example, the new rights allow patients to (i) request a copy of their electronic medical record in an electronic form and (ii) instruct their provider not to share information about their treatment with their health plan when the patient pays by cash. The rule also sets limits on how information is used and disclosed for marketing and fundraising purposes and prohibits the sale of individuals' health information without their permission. While the rules are of general interest as an important development regarding privacy rights, HIPAA protections can, in some circumstances, apply to financial service providers. Not only may financial services firms need to take note as a provider of health care benefits to their employees, but also because the rule expands applicability of HIPAA requirements to "business associates" of health care providers, health plans, and other entities that process health insurance claims and receive protected health information.

Fannie Mae Announces Numerous Updates to Selling Guide. On January 17, Fannie Mae issued Selling Guide Announcement SEL-2013-01, which provides notice of updates to several Selling Guide topics. First, eligibility for delivery of FHA-insured, HUD-guaranteed, VA-guaranteed, and RD-guaranteed mortgages is now available on a negotiated basis only. This change is effective for all government loans, including whole loans sold to Fannie Mae on or after May 1, 2013, and government loans in MBS with issue dates on or after May 1, 2013. Second, with regard to borrower refunds for overpayment of fees, effective immediately, the Guide has been updated to allow reimbursements in purchase transactions and limited cash-out refinance transactions to include refunds that may be required in accordance with certain federal laws or regulations. In such cases, the HUD-1 Settlement Statement must clearly identify the refund with a notation for the reason, and the loan file must include documentation to support the amount and reason for the refund. Third, the Announcement details a new policy regarding acceptable principal balance curtailments that may be made prior to delivery of a mortgage loan to Fannie Mae and lists the reasons for which Fannie Mae will permit curtailments, as well as documentation and delivery requirements. Finally, the Announcement lists updates and clarifications related to mortgage loans with an *inter vivos* revocable trust borrower.

President Signs Video Privacy Protection Act Amendments. On January 10, President Obama signed H.R. 6671, which amends the Video Privacy Protection Act to facilitate compliance for modern video service providers. The Act was originally passed in 1988 to limit the disclosure of information about consumers' "video tape rental or sales records," and its application to certain modern video service providers (e.g. Netflix) is not clear. The amendments allow such providers to obtain consumer consent to disclosure through electronic means using the Internet. Such consent must be in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer. Consumers can provide consent in advance, but not for more than two years or until consent is withdrawn by the consumer, and service providers must provide an opportunity for the consumer to withdraw consent on a case-by-case basis or to withdraw from ongoing disclosures, at the consumer's election.

OFAC Issues Advisory on Efforts to Evade Iran Sanctions. On January 10, the Office of Foreign Assets Control (OFAC) issued an advisory to highlight practices being used to evade sanctions on Iran, including the use of third-country exchange houses or trading companies that are acting as money transmitters to process funds transfers through the United States in support of unauthorized business with Iran. According to the advisory, the transactions at issue omit references to Iranian addresses and omit the names of Iranian persons or entities in the originator or beneficiary fields. Funds are then transmitted from an exchange house or trading company located in a third country to or through the United States on behalf of an individual or company located in Iran or on behalf of a U.S.-designated person without referencing the involvement of Iran or the designated persons. OFAC urged U.S. financial institutions to (i) monitor payments involving the third-country exchange house or trading company that may be processing commercial transactions related to Iran, and requesting additional information from correspondents on the nature of such transactions and the parties involved, (ii) conduct account and/or transaction reviews for individual exchange houses or trading companies that have repeatedly violated or attempted to violate U.S. sanctions against Iran, and (iii) contact their correspondents that maintain accounts for, or facilitate transactions on behalf of, a third-country exchange house or trading company that engages in any of the practices identified in the advisory.

STATE ISSUES

CSBS Announces Implementation Date for National Mortgage Loan Originator Test. On January 16, the CSBS announced that a new national mortgage loan originator (MLO) test with a uniform state component will be available on April 1, 2013. The 2009 SAFE Act requires that MLOs pass a test in order to obtain a state originator license through the NMLS. Since adoption of the SAFE Act, the test has been comprised of two parts: a national component and a state-specific component. The new test administered by the NMLS is meant to streamline the licensing process for originators seeking to obtain licenses in multiple states. Twenty state agencies will no longer require a state-specific test component as of April 1, 2013, with four more states removing the requirement on July 1, 2013. The NMLS posted additional details about the test, including costs and enrollment eligibility.

Florida AG Announces Settlement with Prepaid Debit Card Companies. On January 16, Florida Attorney General Pam Bondi announced that she obtained "first of their kind" settlements from the state's five largest prepaid debit card companies. The settlements resolve claims that the companies failed to properly disclose information about fees and misled consumers with claims that use of the cards would improve credit history. While the agreements are not identical, they each require enhanced compliance measures, which generally relate to fee disclosures, use of comparison charts, and use of claims about credit improvements. Each company also agreed to make a donation to the Central Florida Chapter of Junior Achievement and pay the cost and fees for the matters investigated to the Office of the Attorney General.

Michigan Amends Rental-Purchase Agreement Act. Last month, Michigan enacted HB 5892, which makes several amendments to the state's Rental-Purchase Agreement Act. Effective January 3, 2013, a lessor is prohibited from requiring numerous fees, including (i) any processing fee, (ii) a periodic payment or late fee for a rental period beginning after the lessee has returned or surrendered the leased property to the lessor or the lessor's agent, and (iii) any charge or fee for reinstatement of the rental-purchase agreement in addition to or in excess of those expressly permitted by the Act. The bill also revised the conditions under which a lessee who fails to make timely periodic payments may reinstate a rental-purchase agreement without losing any rights or options. The bill included a revised sample rental-purchase agreement form to reflect the enacted changes.

COURTS

Sixth Circuit Affirms Fair Lending Class Certification Denial. On January 15, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court's denial of class certification sought by a proposed class of borrowers alleging that a lender's mortgage loan pricing policy, which granted discretion to local loan originators, disparately impacted racial minorities. *Miller v. Countrywide Bank, N.A.*, No. 12-5250, 2013 WL 149853 (6th Cir. Jan. 15, 2013). The outcome was expected following the U.S. Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which held that a policy that allows local units discretion to act can only present a common question if the local units share a common mode of exercising that discretion. In this case, the borrowers sued their lender on behalf of a proposed class claiming that the lender's policy granting local agents discretion to deviate from par rates, within a specified range, when originating loans was racially biased. The appeals court held, as in *Dukes*, that the borrowers did not assert that the policy guided how local agents exercised their discretion and as such the policy could not have caused or contributed to the alleged disparate impacts. The court rejected the borrowers' attempts to distinguish *Dukes* based on the Seventh Circuit's holding in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490 (7th Cir.), because that case involved companywide policies that contributed to the alleged disparate impact that arose from the delegation of discretion to individual actors. The Sixth Circuit held that no similar policy existed in this case and affirmed denial of class certification.

Sixth Circuit Holds That Mortgage Foreclosures are Debt Collections Under the FDCPA. On January 14, the U.S. Court of Appeals for the Sixth Circuit held that mortgage foreclosures are debt collections under the FDCPA. *Glazer v. Chase Home Finance LLC*, No. 10-3416, 2013 WL 141699 (6th Cir. Jan. 14, 2013). The decision rejects the view held by a majority of district courts, including the district court in this case, that mortgage foreclosures are generally outside the scope of the FDCPA because they are enforcements of a security instrument, not attempts to collect money. In this case, the borrower brought suit alleging that the law firm that attempted to foreclose on his property violated the FDCPA, and the district court dismissed the claim, ruling that foreclosures are not debt collections. In reaching its conclusion, the Sixth Circuit reasoned that "whether an obligation is a 'debt' depends not on whether the obligation is secured, but rather upon the purpose for which it was incurred." The court explained that collecting such a debt can occur through personal solicitation or legal proceedings. As such, the court held that "*every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt," and, therefore, every mortgage foreclosure is a debt collection. Further, the court held that lawyers who meet the general definition of "debt collector" must comply with the FDCPA when engaged in a mortgage foreclosure. The Sixth Circuit reversed the district court's dismissal and remanded the case for further proceedings.

Massachusetts Supreme Court Holds Standing in Servicemember Proceeding Requires Evidence of Mortgagee Status. On January 14, the Massachusetts Supreme Judicial Court (SJC) reversed a Land Court decision and held that a trustee lacked standing to bring a servicemember proceeding because the trustee was not the clear holder of either the note or the mortgage. *HSBC Bank USA, N.A. v. Matt*, 464 Mass. 193 (Mass. 2013). As the court explained, the Massachusetts Soldiers' and Sailors' Civil Relief Act provides a procedural framework for ascertaining whether borrowers are entitled to protections under the federal Servicemembers Civil Relief Act (SCRA). Failure to bring a such a servicemember proceeding, which is separate from the foreclosure proceeding, leaves the title vulnerable to a challenge that the foreclosure sale was defective due to the possibility that it violated a borrower's rights under the SCRA. On appeal, the borrower argued that the Land Court erred in holding that the trustee bringing the servicemember proceeding satisfied general requirements of standing based on its contractual right to become the holder of a mortgage, even though the trustee failed to establish that it was the current holder of the note or the mortgage. Extending its holding in *Eaton v. Fannie Mae* that a party with an option to become the holder of a mortgage does not have the present authority to foreclose, the court held that the Massachusetts servicemembers act contemplated that only mortgagees would have the requisite standing to bring a servicemember complaint, and parties with an option to hold the mortgage lack standing. As such, the court held that "only mortgagees or those acting on behalf of mortgagees have standing to bring servicemember proceedings."

California District Court Unseals FCA Complaint Filed Against Numerous Banks. Last week, after the government declined to intervene in the case, the U.S. District Court for the Central District of California unsealed a *qui tam* False Claims Act (FCA) complaint filed by a whistleblower in April 2012 against numerous banks. *U.S. ex rel Hastings v. Wells Fargo Bank, N.A.*, No. 12-3624, Complaint (C.D. Cal. Apr. 26, 2012). The relator claims that the banks knowingly endorsed for FHA-insurance mortgage loans originated in transactions where down payment gift programs were used fraudulently. According to allegations in the complaint, the banks' programs generated gift funds by manipulating the sales price to pass FHA down payment assistance fees onto the buyer. Further, the alleged system forced the borrower to repay the down payment gift, a violation of FHA policy. The relator alleges that the banks then submitted to HUD false certifications for the non-compliant endorsed loans, upon which HUD relied to issue FHA mortgage insurance. The relator claims that the government was required to pay, and will continue to have to pay, FHA benefits on defaulted loans that contained material violations, and seeks treble damages and penalties under the FCA, a cease and desist order against the lenders, and a civil penalty of $5,500 to $11,000 for each alleged violation of the FCA.

California District Court Holds Assignee Indirect Auto Finance Company Not Subject to FDCPA. On January 9, the U.S. District Court for the Central District of California held that an indirect auto finance company that took assignment of a retail installment sales contract from an automobile dealer is not a debt collector subject to the FDCPA. *Tu v. Camino Real Chevrolet,* No. 12-9456, 2013 WL 140278 (C.D. Cal. Jan. 9, 2013). As the court explained, FDCPA Section 1692a(6) defines a "debt collector" to include any person who uses any instrumentality of interstate commerce or the mails for the principle purpose of enforcing security interests. In this case, a customer purchased and financed a car with a dealer who subsequently assigned the retail installment sales contract to an auto finance company. When the borrower fell behind on his payments and the finance company tried to collect the debt, the borrower sued the finance company, alleging violations of the FDCPA. The court held that the finance company was primarily in the business of accepting installment sales contracts with its debt collection activities ancillary to its financing activities. Therefore, the finance company is not a debt collector as defined by the FDCPA. The court dismissed the borrower's claims.

Retail Customers Obtain Unusually Favorable Settlement in Zip Code Collection Case. On January 11, the U.S. District Court for the Northern District of California approved a settlement between a retailer and a class of customers to resolve allegations that the retailer violated the California Song-Beverly Credit Card Act by collecting customer zip codes as part of credit card purchase transactions and storing that information in a customer databases. *Burdewick v. Kohl's Dep't Stores, Inc.*, No. 12-119, Final Order and Judgment (Jan. 11, 2013). The settlement is the most recent in a series following the California Supreme Court's 2011 decision in *Pineda v. Williams-Sonoma Stores Inc.* that zip codes constitute "personal identification information" under the Act. In this case, class members can submit claims to obtain a gift card from a common $650,000 fund. The exact amount of the gift card will depend upon the number of valid claims, but actual payments are expected to far exceed the $10-$20 amounts typically provided by most similar settlements to date. Moreover, the settlement places no restriction on the use or transferability of the cards.The court also approved a $215,000 award to class counsel, and a $7,500 incentive award to the class representative.

Two California Appellate Courts Invalidate Auto Installment Contract Arbitration Clauses. Recently, the California Court of Appeals for the First and Second Appellate Districts affirmed lower court orders denying two automobile dealerships' petitions to compel arbitration, holding that the arbitration clause in the vehicle retail installment sales contracts (RISC) was procedurally and substantively unconscionable. *Norton v. Ford of Santa Monica*, B237273, 2012 WL 6721400 (Cal. Ct. App. Dec. 28, 2012); *Natalini v. Import Motors, Inc.*, A133236, 2013 WL 64611 (Cal. Ct. App. Jan. 7, 2013). Both trial courts rejected the dealerships' motions to compel arbitration of complaints alleging multiple causes of action, including violations of the California Consumer Legal Remedies Act, Automobile Sales Finance Act, and Business and Unfair and Deceptive Acts and Practices Act, holding that the arbitration clauses in the RISCs were unconscionable. On appeal, the courts agreed that the arbitration provisions were substantively unconscionable because they were systematically structured to provide only the dealer a right and opportunity to appeal and, because the arbitration agreement provided no fee waiver for the consumer, the financial ramifications of the clause favored the corporate dealership over the individual consumer. Both courts also held that the arbitration clauses were procedurally unconscionable because they contained elements of surprise, with the First Appellate District also holding that the RISC contained elements of oppression since the contract was one of adhesion. Applying a "sliding scale" to the relative importance of each element, the courts found the arbitration clauses sufficiently substantively and procedurally unconscionable and upheld the trial courts' denial of the dealerships' petitions to compel arbitration.

FIRM NEWS

Upcoming STAGE Network Webinar: The Residential Mortgage-Backed Securities Working Group - Where Do Things Stand, Today?

The STAGE Network will host a webinar on January 24, 2013, from 2:00 - 3:15 PM ET, to discuss current and anticipated actions by the Residential Mortgage-Backed Securities Working Group, with a focus on key members such as the U.S. Department of Justice, the Securities and Exchange

Commission, and the state Attorneys General. The session will feature insights from BuckleySandler LLP attorneys Andrew W. Schilling, former Chief of the Civil Division of the U.S. Attorney's Office for the Southern District of New York, and Thomas A. Sporkin, former Chief of the Enforcement Division's Office of Market Intelligence at the SEC. They will be joined by Nicole Gueron, former Deputy Chief Trial Counsel and member of the Executive Staff at the Office of the New York State Attorney General, of Clarick Gueron Reisbaum LLP. The discussion will be moderated by Jeremiah S. Buckley of BuckleySandler LLP. **Click here to register.**

James Shreve will be interviewed on the Home & Family Finance radio show on January 20, 2013 at 3:00 PM. The interview will discuss steps consumers can take to better secure their mobile wallet and the show will air nationally on several radio networks.

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

Donna Wilson will participate in a Strafford CLE entitled "Privacy Class Actions: Latest Developments in Intentional Privacy and Negligent Data Breach Litigation" on January 24, 2013. Panelists will discuss theories of liability in privacy litigation, related questions of statutory damages, defenses for defendants, lessons from recent data breach settlements, and potential insurance coverage to minimize litigation and liability costs.

Andrew Sandler will participate in a Women in Housing and Finance event on February 4, 2013 from 12:00 - 1:30 PM. Mr. Sandler will be joined by Donna Murphy, Principal Deputy Chief of the Housing and Civil Enforcement Section, Department of Justice, to discuss key fair lending issues for 2013. The event will be hosted at BuckleySandler's Washington, DC office.

James Parkinson will speak at a symposium entitled "Bribes Without Borders: The Challenge of Fighting Corruption in the Global Context," produced by the Washington College of Law on February 12, 2013 in Washington, D.C.

Jonice Gray Tucker, Amanda Raines, and Thomas Dowell will discuss recent CFPB enforcement actions relating to add-on products during a Women in Housing in Finance event on February 12, 2013, from 12:00 - 1:30 PM. The event will be hosted at BuckleySandler's Washington, DC office.

David Baris will speak at seminars sponsored by the Community Bankers Association of Georgia on February 12, 2013 in Atlanta, GA, and February 13, 2013 in Macon, GA on "What Bank Boards of Directors Need to Know about Capital Planning and How to Raise Capital in This Challenging Market".

David Baris will speak at the 2013 American Bankers Association National Conference for Community Bankers at the JW Marriott Orlando, Grande Lakes, Orlando, FL on February 18, 2013. His topic is entitled "Challenges and Opportunities for Bank Boards in 2013".

James Shreve will speak at the RSA Conference in San Francisco, California on February 28, 2013. The session, "Who Owns the Data in Mobile Payments and Why that Matters," will examine regulatory and contractual issues that may arise from data ownership in mobile payments systems.

James Parkinson will speak on corruption risks associated with doing business in India at a panel produced by the Association of the Bar of the City of New York City on March 1, 2013.

Thomas Sporkin and James Shreve will speak at the International Association of Privacy Professionals Global Privacy Summit in Washington, DC on March 7, 2013. The session, "Demystifying SEC Guidance on Cybersecurity Risk," will discuss guidance from the SEC's Division of Corporate Finance on how and when actual or possible cybersecurity incidents and their costs should be included in public filings.

Andrew Sandler will participate in the "Fair Lending Forum" at CBA Live 2013, the Consumer Bankers Association's annual conference for retail banking leaders, to be held March 11-13, 2013 in Phoenix, AZ.

Andrew Schilling will be a panelist for "False Claims Act: Enforcement and Compliance Issues Explored," a Knowledge Congress CLE webcast, on March 13, 2013. This event will present an overview of the False Claims Act and address regulatory updates and enforcement developments, key takeaways from related cases, identifying risks for potential FCA violations, and developing a robust compliance program.

Jonice Gray Tucker will speak at the American Bar Association's Business Law Section Spring Meeting on April 4, 2013 in Washington, D.C. The panel on which she is participating will focus on CFPB enforcement actions.

Jonice Gray Tucker and Valerie Hletko will moderate a panel entitled "Extreme Makeover: Consumer Protection Edition" at the American Bar Association's Business Law Section Spring Meeting on April 4, 2013 in Washington, D.C. The panel will focus on the CFPB's new regulations and related compliance expectations.

Andrew Sandler will speak at the 39th Annual Bankers Legal Conference which will be held April 4-5, 2013 at The Westin Austin at the Domain.

FIRM PUBLICATIONS

Thomas Sporkin published "Will Rakoff Opinion Impact Decision on Steven Cohen" in Law360 on December 5, 2012.

Jeremiah Buckley authored "How CFPB Can Turn Restrictive Mortgage Rule into a Win for All" for American Banker on December 10, 2012.

Andrew Schilling, Matthew Previn, and Ross Morrison published "New York Becoming the Leading Venue for Financial Fraud Whistleblower Suits," in the December 18, 2012 issue of Bloomberg BNA's Banking Report.

Andrew Schilling published "U.S. Using Subpoenas Under 1989 Act as New Tool to Probe Financial Firms," on January 3, 2013 on Reuters' Financial Regulatory Forum

About BuckleySandler LLP (www.buckleysandler.com)

With over 150 lawyers in Washington, New York, Los Angeles, and Orange County, BuckleySandler provides best-in-class legal counsel to meet the challenges of its financial services industry and other corporate and individual clients across the full range of government enforcement actions, complex and class action litigation, and transactional, regulatory, and public policy issues. The Firm represents many of the nation's leading financial services institutions. "The best at what they do in *the country." (Chambers USA).*

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

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MORTGAGES

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CFPB Plans Release of Mortgage Loan Originator Rule. On January 18, the CFPB announced that it will release a final rule regarding mortgage loan originator compensation and qualifications on Sunday, January 20. According to its press release, the rule will (i) prohibit steering incentives, (ii) prohibit "dual compensation," and (iii) set qualification and screening standards for loan originators, but it will not require, as proposed, that mortgage loan originators make available a loan option with no upfront discount points or origination fees, if they were making available one with upfront discount points or origination fees. The press release states that while the majority of the loan originator rule will take effect in January 2014, certain provisions related to mandatory arbitration restrictions will take effect in June 2013. BuckleySandler will review the rule once it is released and provide additional analysis.

Federal Agencies Issue Final Appraisal Rules. On January 18, the Federal Reserve Board, the

OCC, the FDIC, the NCUA, the FHFA, and the CFPB issued a final rule to implement Dodd-Frank Act amendments to TILA that require creditors to meet certain appraisal conditions before making a higher-risk loan. The rule uses the term "higher-priced mortgage loan," which covers: (i) a loan for which the APR exceeds the average prime offer rate (an average market rate) by 1.5 percent for a first-lien loan, (ii) 2.5 percent for a first-lien jumbo loan, and (iii) 3.5 percent for a subordinate-lien loan. For such loans, the final rule requires that a creditor obtain a written appraisal from a certified or licensed appraiser that is based on a physical property visit of the interior of the property. During the application process, the creditor must issue a disclosure stating (i) the purpose of the appraisal, (ii) that the creditor will provide the applicant a copy of any written appraisal, and (iii) that the applicant may choose to have a separate appraisal conducted at his or her own expense. The creditor must provide the borrower with a free copy of any written appraisals at least three business days before closing. Additional appraisal requirements apply under certain circumstances. As did the proposed rule, and consistent with the statute, the final rule exempts loans that are considered "qualified mortgages," as recently defined by the CFPB, as well as reverse mortgages, loans secured by manufactured homes, and certain other loans.

On the same day, the CFPB issued a related rule to implement a Dodd-Frank Act provision that adds similar appraisal requirements to ECOA. The final rule generally mirrors the rule as proposed and requires that for any loan to be secured by a first lien on a dwelling, a creditor must (i) notify applicants within three business days of receiving an application of their right to receive a free copy of written appraisals and valuations and (ii) provide applicants a free copy of all written appraisals and valuations promptly after receiving them, but in no case later than three business days prior to closing on the mortgage. The rule prohibits creditors from charging additional fees for providing a copy of written appraisals and valuations, and allows applicants to waive the three day requirement, provided a copy of all written appraisals and valuations are provided at or prior to closing. Together, the revisions to TILA and ECOA, as implemented by these rules, require creditors to provide two appraisal disclosures to consumers applying for a higher-risk loan secured by a first lien on a borrower's principal dwelling. The rules take effect January 18, 2014.

DOJ Announces Redlining Enforcement Action against Community Bank. On January 15, the Department of Justice (DOJ) announced that it reached a settlement with a Michigan community bank regarding alleged redlining practices. In its complaint, the DOJ charged that between 2006 and 2009, the bank served the credit needs of white neighborhoods in the Saginaw and Flint, Michigan metropolitan areas to a significantly greater extent than it served the credit needs of majority African-American neighborhoods. Under the terms of the consent order, the bank is required to open a loan production office in an African-American neighborhood in Saginaw, invest $75,000 in a special financing program to increase the amount of credit the bank extends to majority African-American neighborhoods in and around Saginaw, invest $75,000 in partnerships with organizations that provide credit, financial, homeownership, and/or foreclosure prevention services to the residents of those neighborhoods, and invest $15,000 in outreach that promotes the bank's products and services to potential customers in those neighborhoods.

Federal Reserve Board Announces Additional Monetary Settlements in Lieu of Independent Foreclosure Review. On January 16, the Federal Reserve Board announced that two additional mortgage servicers subject to consent orders issued in April 2011 agreed in principle to a monetary resolution of allegations that the firms engaged in improper mortgage servicing and foreclosure practices. As described, the agreements in principle mirror those obtained by the Federal Reserve Board and the OCC from 10 other servicers, which were announced last week. Together the two firms will provide $232 million in direct payments to more than 220,000 borrowers whose homes were in foreclosure during 2009 and 2010. The companies also will provide $325 million in other assistance, such as loan modifications and forgiveness of deficiency judgments. On January 18, the Federal Reserve Board and the OCC announced an agreement in principle with another servicer that will provide $96 million in direct payments to more than 112,000 borrowers, and $153 million in other assistance. Under all three agreements, borrowers will be contacted by the end of March about their exact payout, which could range from hundreds of dollars to $125,000, depending upon the type of alleged servicing error.

Fannie Mae Announces Numerous Updates to Selling Guide. On January 17, Fannie Mae issued Selling Guide Announcement SEL-2013-01, which provides notice of updates to several Selling Guide topics. First, eligibility for delivery of FHA-insured, HUD-guaranteed, VA-guaranteed, and RD-guaranteed mortgages is now available on a negotiated basis only. This change is effective for all government loans, including whole loans sold to Fannie Mae on or after May 1, 2013, and government loans in MBS with issue dates on or after May 1, 2013. Second, with regard to borrower refunds for overpayment of fees, effective immediately, the Guide has been updated to allow reimbursements in purchase transactions and limited cash-out refinance transactions to include refunds that may be required in accordance with certain federal laws or regulations. In such cases, the HUD-1 Settlement Statement must clearly identify the refund with a notation for the reason, and the loan file must include documentation to support the amount and reason for the refund. Third, the Announcement details a new policy regarding acceptable principal balance curtailments that may be made prior to delivery of a mortgage loan to Fannie Mae and lists the reasons for which Fannie Mae will permit curtailments, as well as documentation and delivery requirements. Finally, the Announcement lists updates and clarifications related to mortgage loans with an *inter vivos* revocable trust borrower.

CSBS Announces Implementation Date for National Mortgage Loan Originator Test. On January 16, the CSBS announced that a new national mortgage loan originator (MLO) test with a uniform state component will be available on April 1, 2013. The 2009 SAFE Act requires that MLOs pass a test in order to obtain a state originator license through the NMLS. Since adoption of the SAFE Act, the test has been comprised of two parts: a national component and a state-specific component. The new test administered by the NMLS is meant to streamline the licensing process for originators seeking to obtain licenses in multiple states. Twenty state agencies will no longer require a state-specific test component as of April 1, 2013, with four more states removing the requirement on July 1, 2013. The NMLS posted additional details about the test, including costs and enrollment eligibility.

Sixth Circuit Affirms Fair Lending Class Certification Denial. On January 15, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court's denial of class certification sought by a proposed class of borrowers alleging that a lender's mortgage loan pricing policy, which granted discretion to local loan originators, disparately impacted racial minorities. *Miller v. Countrywide Bank, N.A.*, No. 12-5250, 2013 WL 149853 (6th Cir. Jan. 15, 2013). The outcome was expected following the U.S. Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which held that a policy that allows local units discretion to act can only present a common question if the local units share a common mode of exercising that discretion. In this case, the borrowers sued their lender on behalf of a proposed class claiming that the lender's policy granting local agents discretion to deviate from par rates, within a specified range, when originating loans was racially biased. The appeals court held, as in *Dukes*, that the borrowers did not assert that the policy guided how local agents exercised their discretion and as such the policy could not have caused or contributed to the alleged disparate impacts. The court rejected the borrowers' attempts to distinguish *Dukes* based on the Seventh Circuit's holding in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490 (7th Cir.), because that case involved companywide policies that contributed to the alleged disparate impact that arose from the delegation of discretion to individual actors. The Sixth Circuit held that no similar policy existed in this case and affirmed denial of class certification.

Sixth Circuit Holds That Mortgage Foreclosures are Debt Collections Under the FDCPA. On January 14, the U.S. Court of Appeals for the Sixth Circuit held that mortgage foreclosures are debt collections under the FDCPA. *Glazer v. Chase Home Finance LLC*, No. 10-3416, 2013 WL 141699 (6th Cir. Jan. 14, 2013). The decision rejects the view held by a majority of district courts, including the district court in this case, that mortgage foreclosures are generally outside the scope of the FDCPA because they are enforcements of a security instrument, not attempts to collect money. In this case, the borrower brought suit alleging that the law firm that attempted to foreclose on his property violated the FDCPA, and the district court dismissed the claim, ruling that foreclosures are not debt collections. In reaching its conclusion, the Sixth Circuit reasoned that "whether an obligation is a 'debt' depends not on whether the obligation is secured, but rather upon the purpose for which it was incurred." The court explained that collecting such a debt can occur through personal solicitation or legal proceedings. As such, the court held that "*every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt," and, therefore, every mortgage foreclosure is a debt collection. Further, the court held that lawyers who meet the general definition of "debt collector" must comply with the FDCPA when engaged in a mortgage foreclosure. The Sixth Circuit reversed the district court's dismissal and remanded the case for further proceedings.

Massachusetts Supreme Court Holds Standing in Servicemember Proceeding Requires Evidence of Mortgagee Status. On January 14, the Massachusetts Supreme Judicial Court (SJC) reversed a Land Court decision and held that a trustee lacked standing to bring a servicemember proceeding because the trustee was not the clear holder of either the note or the mortgage. *HSBC Bank USA, N.A. v. Matt*, 464 Mass. 193 (Mass. 2013). As the court explained, the Massachusetts Soldiers' and Sailors' Civil Relief Act provides a procedural framework for ascertaining whether borrowers are entitled to protections under the federal Servicemembers Civil Relief Act (SCRA). Failure to bring a such a servicemember proceeding, which is separate from the foreclosure proceeding, leaves the title vulnerable to a challenge that the foreclosure sale was defective due to the possibility that it violated a borrower's rights under the SCRA. On appeal, the borrower argued that the Land Court erred in holding that the trustee bringing the servicemember proceeding satisfied general requirements of standing based on its contractual right to become the holder of a mortgage, even though the trustee failed to establish that it was the current holder of the note or the mortgage. Extending its holding in *Eaton v. Fannie Mae* that a party with an option to become the holder of a mortgage does not have the present authority to foreclose, the court held that the Massachusetts servicemembers act contemplated that only mortgagees would have the requisite standing to bring a servicemember complaint, and parties with an option to hold the mortgage lack standing. As such, the court held that "only mortgagees or those acting on behalf of mortgagees have standing to bring servicemember proceedings."

California District Court Unseals FCA Complaint Filed Against Numerous Banks. Last week, after the government declined to intervene in the case, the U.S. District Court for the Central District of California unsealed a *qui tam* False Claims Act (FCA) complaint filed by a whistleblower in April 2012 against numerous banks. *U.S. ex rel Hastings v. Wells Fargo Bank, N.A.*, No. 12-3624, Complaint (C.D. Cal. Apr. 26, 2012). The relator claims that the banks knowingly endorsed for FHA-insurance mortgage loans originated in transactions where down payment gift programs were used fraudulently. According to allegations in the complaint, the banks' programs generated gift funds by manipulating the sales price to pass FHA down payment assistance fees onto the buyer. Further, the alleged system forced the borrower to repay the down payment gift, a violation of FHA policy. The relator alleges that the banks then submitted to HUD false certifications for the non-compliant endorsed loans, upon which HUD relied to issue FHA mortgage insurance. The relator claims that the government was required to pay, and will continue to have to pay, FHA benefits on defaulted loans that contained material violations, and seeks treble damages and penalties under the FCA, a cease and desist order against the lenders, and a civil penalty of $5,500 to $11,000 for each alleged violation of the FCA.

BANKING

Federal Regulators Announce BSA/AML and Derivatives Trading Enforcement Actions Against Large Bank. On January 14, the Federal Reserve Board and the OCC issued two consent orders against a large international bank and its trust company over alleged deficiencies in its Bank Secrecy Act and Anti-Money Laundering (BSA/AML) compliance programs. Under the Federal Reserve Board Order, the bank is required to conduct a full review of its compliance program and submit written reports to the Federal Reserve Bank of New York regarding the review's findings and recommendations. Any proposed improvements are subject to approval by the Federal Reserve Bank of New York. The OCC Order identifies "critical deficiencies" in the bank's BSA/AML compliance programs with respect to suspicious activity reporting, transaction monitoring, customer due diligence, and internal control implementation and requires specific corrective actions in response. Neither order requires a civil money penalty. On the same day, the Federal Reserve Board and the OCC issued consent orders concerning the bank's derivatives trading activity. Under those orders, the bank must take corrective action as to its risk-management program, finance and internal audit functions, and Chief Investment Office, but the orders do not include a monetary settlement. The Federal Reserve Board stated that the corrective actions are necessary in light of disclosed, significant losses in a large synthetic credit portfolio managed by the Chief Investment Office. An OCC report found that the bank lacked adequate oversight to protect itself from such material risk, and had other inadequate risk management processes, trade valuation controls, and audit processes.

OFAC Issues Advisory on Efforts to Evade Iran Sanctions. On January 10, the Office of Foreign Assets Control (OFAC) issued an advisory to highlight practices being used to evade sanctions on Iran, including the use of third-country exchange houses or trading companies that are acting as money transmitters to process funds transfers through the United States in support of unauthorized business with Iran. According to the advisory, the transactions at issue omit references to Iranian addresses and omit the names of Iranian persons or entities in the originator or beneficiary fields. Funds are then transmitted from an exchange house or trading company located in a third country to or through the United States on behalf of an individual or company located in Iran or on behalf of a U.S.-designated person without referencing the involvement of Iran or the designated persons. OFAC urged U.S. financial institutions to (i) monitor payments involving the third-country exchange house or trading company that may be processing commercial transactions related to Iran, and requesting additional information from correspondents on the nature of such transactions and the parties involved, (ii) conduct account and/or transaction reviews for individual exchange houses or trading companies that have repeatedly violated or attempted to violate U.S. sanctions against Iran, and (iii) contact their correspondents that maintain accounts for, or facilitate transactions on behalf of, a third-country exchange house or trading company that engages in any of the practices identified in the advisory.

CONSUMER FINANCE

Florida AG Announces Settlement with Prepaid Debit Card Companies. On January 16, Florida Attorney General Pam Bondi announced that she obtained "first of their kind" settlements from the state's five largest prepaid debit card companies. The settlements resolve claims that the companies failed to properly disclose information about fees and misled consumers with claims that use of the cards would improve credit history. While the agreements are not identical, they each require enhanced compliance measures, which generally relate to fee disclosures, use of comparison charts, and use of claims about credit improvements. Each company also agreed to make a donation to the Central Florida Chapter of Junior Achievement and pay the cost and fees for the matters investigated to the Office of the Attorney General.

Michigan Amends Rental-Purchase Agreement Act. Last month, Michigan enacted HB 5892, which makes several amendments to the state's Rental-Purchase Agreement Act. Effective January 3, 2013, a lessor is prohibited from requiring numerous fees, including (i) any processing fee, (ii) a periodic payment or late fee for a rental period beginning after the lessee has returned or surrendered the leased property to the lessor or the lessor's agent, and (iii) any charge or fee for reinstatement of the rental-purchase agreement in addition to or in excess of those expressly permitted by the Act. The bill also revised the conditions under which a lessee who fails to make timely periodic payments may reinstate a rental-purchase agreement without losing any rights or options. The bill included a revised sample rental-purchase agreement form to reflect the enacted changes.

California District Court Holds Assignee Indirect Auto Finance Company Not Subject to FDCPA. On January 9, the U.S. District Court for the Central District of California held that an indirect auto finance company that took assignment of a retail installment sales contract from an automobile dealer is not a debt collector subject to the FDCPA. *Tu v. Camino Real Chevrolet,* No. 12-9456, 2013 WL 140278 (C.D. Cal. Jan. 9, 2013). As the court explained, FDCPA Section 1692a(6) defines a "debt collector" to include any person who uses any instrumentality of interstate commerce or the mails for the principle purpose of enforcing security interests. In this case, a customer purchased and financed a car with a dealer who subsequently assigned the retail installment sales contract to an auto finance company. When the borrower fell behind on his payments and the finance company tried to collect the debt, the borrower sued the finance company, alleging violations of the FDCPA. The court held that the finance company was primarily in the business of accepting installment sales contracts with its debt collection activities ancillary to its financing activities. Therefore, the finance company is not a debt collector as defined by the FDCPA. The court dismissed the borrower's claims.

Two California Appellate Courts Invalidate Auto Installment Contract Arbitration Clauses. Recently, the California Court of Appeals for the First and Second Appellate Districts affirmed lower court orders denying two automobile dealerships' petitions to compel arbitration, holding that the arbitration clause in the vehicle retail installment sales contracts (RISC) was procedurally and substantively unconscionable. *Norton v. Ford of Santa Monica*, B237273, 2012 WL 6721400 (Cal. Ct. App. Dec. 28, 2012); *Natalini v. Import Motors, Inc.*, A133236, 2013 WL 64611 (Cal. Ct. App. Jan. 7, 2013). Both trial courts rejected the dealerships' motions to compel arbitration of complaints alleging multiple causes of action, including violations of the California Consumer Legal Remedies Act, Automobile Sales Finance Act, and Business and Unfair and Deceptive Acts and Practices Act, holding that the arbitration clauses in the RISCs were unconscionable. On appeal, the courts agreed that the arbitration provisions were substantively unconscionable because they were systematically structured to provide only the dealer a right and opportunity to appeal and, because the arbitration agreement provided no fee waiver for the consumer, the financial ramifications of the clause favored the corporate dealership over the individual consumer. Both courts also held that the arbitration clauses were procedurally unconscionable because they contained elements of surprise, with the First Appellate District also holding that the RISC contained elements of oppression since the contract was one of adhesion. Applying a "sliding scale" to the relative importance of each element, the courts found the arbitration clauses sufficiently substantively and procedurally unconscionable and upheld the trial courts' denial of the dealerships' petitions to compel arbitration.

E-COMMERCE

President Signs Video Privacy Protection Act Amendments. On January 10, President Obama signed H.R. 6671, which amends the Video Privacy Protection Act to facilitate compliance for modern video service providers. The Act was originally passed in 1988 to limit the disclosure of information about consumers' "video tape rental or sales records," and its application to certain modern video service providers (e.g. Netflix) is not clear. The amendments allow such providers to obtain consumer consent to disclosure through electronic means using the Internet. Such consent must be in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer. Consumers can provide consent in advance, but not for more than two years or until consent is withdrawn by the consumer, and service providers must provide an opportunity for the consumer to withdraw consent on a case-by-case basis or to withdraw from ongoing disclosures, at the consumer's election.

PRIVACY/DATA SECURITY

HHS Issues New HIPAA Rules. On January 17, the Department of Health and Human Services (HHS) issued a new rule under the Health Insurance Portability and Accountability Act (HIPAA). The omnibus rule is intended to enhance patient privacy protections, provide new rights with regard to patient health information, and strengthen the government's enforcement abilities. For example, the new rights allow patients to (i) request a copy of their electronic medical record in an electronic form and (ii) instruct their provider not to share information about their treatment with their health plan when the patient pays by cash. The rule also sets limits on how information is used and disclosed for marketing and fundraising purposes and prohibits the sale of individuals' health information without their permission. While the rules are of general interest as an important development regarding privacy rights, HIPAA protections can, in some circumstances, apply to financial service providers. Not only may financial services firms need to take note as a provider of health care benefits to their employees, but also because the rule expands applicability of HIPAA requirements to "business associates" of health care providers, health plans, and other entities that process health insurance claims and receive protected health information.

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Retail Customers Obtain Unusually Favorable Settlement in Zip Code Collection Case. On January 11, the U.S. District Court for the Northern District of California approved a settlement between a retailer and a class of customers to resolve allegations that the retailer violated the California Song-Beverly Credit Card Act by collecting customer zip codes as part of credit card purchase transactions and storing that information in a customer databases. *Burdewick v. Kohl's Dep't Stores, Inc.*, No. 12-119, Final Order and Judgment (Jan. 11, 2013). The settlement is the most recent in a series following the California Supreme Court's 2011 decision in *Pineda v. Williams-Sonoma Stores Inc.* that zip codes constitute "personal identification information" under the

Act. In this case, class members can submit claims to obtain a gift card from a common $650,000 fund. The exact amount of the gift card will depend upon the number of valid claims, but actual payments are expected to far exceed the $10-$20 amounts typically provided by most similar settlements to date. Moreover, the settlement places no restriction on the use or transferability of the cards.The court also approved a $215,000 award to class counsel, and a $7,500 incentive award to the class representative.

PAYMENTS

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