Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

September 7, 2012

TOPICS - COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Releases Examination Procedures for Consumer Reporting Agencies. On September 5, the CFPB released procedures to guide its staff in examining "larger participant" consumer reporting agencies (CRAs). In July, the CFPB adopted a rule that will allow it to supervise CRAs with more than $7 million in annual receipts from consumer reporting activities starting September 30, 2012. The procedures outline how examiners should assess a CRA's compliance with federal requirements, primarily under the Fair Credit Reporting Act, relating to (i) using and providing accurate consumer information, (ii) handling consumer disputes, (iii) providing disclosures to consumers, and (iv) preventing fraud and identity theft. While the procedures focus on issues specific to consumer reporting, they include a module that directs examiners to consider whether a CRA offers any other consumer financial product or service that creates other risks to consumers, particularly with regard to Gramm-Leach-Bliley privacy requirements and potential unfair, deceptive, or abusive acts or practices (UDAAP violations).

CFPB Extends Comment Period for Finance Charge Definition Proposal. On August 31, the CFPB extended the comment period for aspects of two recently proposed rules. On July 9, the CFPB proposed a rule to merge the TILA and RESPA mortgage loan disclosures. That proposal includes potential changes to the definition of finance charge, comments on which were due September 7, 2012. Having heard from stakeholders that the proposed definition could impact changes

proposed in other CFPB mortgage-related rulemakings, the CFPB extended the comment deadline to November 6, 2012, which matches the deadline for most of the other aspects of the proposed TILA/RESPA disclosure rule. This extension does not impact the September 7, 2012 deadline for comments on whether the CFPB should delay implementation of certain new TILA and RESPA disclosures. Also on July 9, 2012, the CFPB proposed a rule to expand the types of mortgage loans subject to HOEPA, with comments due September 7, 2012. Given the extension of the deadline for comments on the definition of finance charge, which will impact the scope of the extended HOEPA coverage, the CFPB also extended the HOEPA proposed rule comment deadline to November 6, 2012.

OCC Names New Enforcement and Compliance Director. On September 5, the OCC announced the promotion of Ellen M. Warwick to Director for Enforcement and Compliance, responsible for conducting investigations, recommending administrative actions, and litigating enforcement actions. Ms. Warwick previously served as Assistant Director for Enforcement and Compliance and as Assistant Director for Litigation, among other positions with the OCC. She also has been a litigation attorney in private practice, a trial attorney with the DOJ, and a prosecutor in the Essex District Attorney's Office of Massachusetts.

Fannie Mae Announces Miscellaneous Servicing Policy Changes. On September 5, Fannie Mae issued Servicing Guide Announcement SVC-2012-20, which updates special investor reporting requirements to provide new guidance regarding reporting a foreclosure for a modified mortgage loan with principal forbearance. The Announcement also provides new contact information for servicers to use when a borrower or servicer of a first-lien mortgage requests information relating to a HomeSaver Advance Note.

FTC Issues Advertising and Privacy Guidelines for Mobile Application Developers. On September 5, the FTC published" Marketing Your Mobile App: Get It Right from the Start," a guide to assist mobile application developers in complying with federal advertising and privacy requirements. The Guide provides basic guidance and principles related to truthful advertising and consumer privacy protections. For example, the guide urges application developers to (i) disclose key information in advertising materials clearly and conspicuously, (ii) collect sensitive information only with user's affirmative consent, and (iii) avoid collecting unnecessary data and ensure the security of any sensitive data that is collected.

STATE ISSUES

Idaho and Pennsylvania Transition Certain Non-Mortgage Businesses to NMLS. Beginning September 1, 2012, Idaho and Pennsylvania transitioned to NMLS the state licensing process for certain non-mortgage consumer financial service providers. In Idaho, all money transmitters now have the option of using the NMLS to obtain or renew their licenses. In Pennsylvania, all debt management services, money transmitter, and accelerated mortgage payment providers can begin to use the NMLS for all licensing-related transactions as of September 1, 2012. Effective November 1, 2012, all new applications must be processed through NMLS, and all current license holders must submit a transition request by December 31, 2012.

Washington Amends Consumer Loan Act and Mortgage Broker Practices Act Regulations. Recently, the Washington State Department of Financial Institutions finalized two rulemakings to amend existing regulations and adopt new regulations under the Consumer Loan Act and the Mortgage Broker Practices Act. The final rules make numerous changes impacting mortgage and other consumer lenders, including with regard to licensing and reporting. For example, the amendments to the Consumer Loan Act regulations (i) add requirements and prohibitions relating to force-placed insurance, (ii) clarify licensing exemptions for consumer lenders and mortgage originators, and (iii) add new provisions addressing the activities of servicers and third party residential mortgage loan modification services. The amendments under the Mortgage Broker Practices Act include some of the changes made under the Consumer Loan Act and, among other things (i) revise the definition of mortgage broker, (ii) require approval from the Department for an individual to work as a designated broker for more than one licensee, and (iii) clarify application of loan originator requirements to inactive licensees. All of the changes take effect on November 1, 2012.

Illinois Amends Collection Agency Law. On August 24, Illinois amended the Collection Agency Act to add certain definitions and new requirements for debt buyers. House Bill 5016 adds new definitions for (i) charge-off balance, (ii) charge-off date, (iii) current balance, and (iv) debt buyer. The bill subjects debt buyers to the Collection Agency Act generally, including statute of limitations requirements for collection actions, but exempts debt buyers from certain requirements when pursuing a debt it owns. For example, debt buyers need not maintain a trust account or surety bond. The changes take effect on January 1, 2013.

COURTS

Second Circuit Reinstates MBS Class Action, Loosens Requirements for Pleading Damages. On September 6, the U.S. Court of Appeals for the Second Circuit held that a plaintiff has class standing to assert the claims of purchasers of securities backed by mortgages originated by the same lenders that originated the mortgages backing the named plaintiff's securities, even when the securities were purchased from different trusts. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, No 11-2762, 2012 WL 3854431 (2nd Cir. Sep. 6, 2012). In this case, the plaintiff, an institutional purchaser of certain mortgage-backed securities, filed suit on behalf of a putative class alleging that the offering documents contained material misstatements regarding the mortgage loan originators' underwriting guidelines, the property appraisals of the loans, and the risks associated with the certificates. The district court dismissed the case, holding the named plaintiff lacked standing to bring claims on behalf of proposed class members that purchased securities from trusts other than the trusts from which the plaintiff bought securities. The district court also held that the plaintiff failed to allege a cognizable loss because the plaintiff knew the certificates might not be liquid and therefore could not allege injury based on a hypothetical price. On appeal, after acknowledging that putative class members purchased certificates issued through seventeen separate offerings backed by separate pools of loans, the court held that the named plaintiff raises a "sufficiently similar set of concerns" to allow it to seek to represent proposed class members who purchased securities backed by loans made by common originators. In overturning the district court with regard to the plaintiff's ability to plead a cognizable injury, the court reasoned that while it may be difficult to value illiquid assets, "the value of a security is not unascertainable simply because it trades in an illiquid market." The court reversed in favor of the plaintiff and remanded the case for further proceedings.

Lender Settles TILA, UDAP Claims Over HELOC Reductions. On August 31, a lender preliminarily settled with a class of borrowers who claimed that the bank suspended or reduced borrower home equity lines of credit (HELOCs) in violation of the Truth in Lending Act and California's Unfair Competition Law. Plaintiffs' Notice of Motion and Motion for Preliminary Approval of Class Action Settlement Agreement, *In Re Citibank HELOC Reduction Litig.*, No. 09-350 (N.D. Cal. Aug. 31, 2012). The borrowers claimed that the bank improperly utilized computerized automated valuation models (AVMs) as the basis for suspending or decreasing customer HELOCs because of the decline in the value of the underlying property. The complaint also charged that customers were injured because (i) the annual fee to maintain the HELOC was not adjusted to account for the decreased limit, and (ii) the borrowers' credit ratings were damaged as a result of the reduced credit limit. The named plaintiff also alleged injury because he was forced to obtain a replacement home equity line, which resulted in payment of an early termination fee

on the old HELOC and additional costs related to the new HELOC. Under the agreement, class members will have a right to request reinstatement of their HELOC accounts, the bank will expand the information contained in credit-line reduction notices based on collateral deterioration, and customers who incurred an early closure release fee when closing the account subsequent to the suspension or reduction may make a claim for the cash payment of $120.

Ninth Circuit Holds Omission of Annual Fee in Credit Card Advertisements, Online Application Not Misleading. On August 31, the U.S. Court of Appeals for the Ninth Circuit upheld a district court's dismissal of a putative class action alleging that a credit card issuer and a retailer violated California law when they failed to explicitly state the card's annual fee in advertisements. *Davis v. HSBC Bank Nevada, N.A.*, No. 10-56488, 2012 WL 3804370 (9th Cir. Aug. 31, 2012). The cardholder applied for a credit card that offered rewards for purchases, to be used at the retailer's stores. Neither the advertisement for the card nor the application website mentioned that the card required an annual fee. The fee was disclosed only in the "Terms and Conditions" that the cardholder acknowledged having read and accepted prior to opening the credit account. On appeal, the cardholder argued that the omission of the annual fee in the advertisements, combined with the promise of rewards, constituted false advertising because it implied that no offsetting charges would erode the rewards. The court held that the advertisement was unlikely to deceive a reasonable consumer, even though it is possible that some people could misunderstand the terms. The court also rejected the cardholder's argument that the issuer and retailer fraudulently concealed the fee. In doing so the court drew a distinction from its earlier decision in *Barrer v. Chase Bank, N.A.*, 566 F.3d 883 (9th Cir. 2009), in which it held that a provision granting the issuer the right to alter the cardholder's APR was buried in fine print and therefore violated TILA's "clear and conspicuous" requirement. The court explained that its decision in *Barrer* had no bearing on the cardholder's instant common law claims. Finally, the court rejected the cardholder's claim that the online application and advertisements violated the state's Unfair Competition Law because the online application is protected by a federal safe harbor and the advertisements were not deceptive.

Federal Court Dismisses Fannie Mae Shareholders' Subprime Suit Against Underwriters, Allows Claims to Proceed Against Fannie Mae, Officers. On August 30, the U.S. District Court for the Southern District of New York ruled on multiple motions to dismiss filed in four consolidated cases pending against Fannie Mae, certain former officers, and several banks, related to Fannie Mae's exposure to certain risky mortgages. *In re Fannie Mae 2008 Secs. Litig.*, No. 09-2013, 2012 WL 3758537 (S.D.N.Y. Aug. 30, 2012). The main class of shareholders alleges that Fannie Mae and certain of its former officers violated federal securities laws by failing to adequately disclose the company's exposure to subprime and Alt-A

mortgages. Separately, institutional investors brought their own federal securities claims, as well as state statutory and common law fraud and negligence claims against Fannie Mae, certain officers, and certain of its underwriters related to the same alleged misrepresentations. Many of the same allegations are contained in SEC enforcement actions pending against a number of the same individual defendants. In a single opinion, the court dismissed certain of the claims but allowed others to proceed. The court allowed to proceed the federal securities claims brought by the main class and two other plaintiffs against Fannie Mae and certain of its officers with regard to Fannie Mae's subprime mortgage disclosures and risk management controls, but dismissed all state law claims, including those against Fannie Mae, certain officers, and certain underwriters. The court also dismissed in full a suit that one underwriter faced alone because the plaintiffs failed to present evidence sufficient to show the underwriter intentionally provided investors allegedly false information it received from Fannie Mae.

Federal Court Dismisses Consumer Privacy Action Brought Under California's Shine the Light Act. On August 24, the U.S. District Court for the Northern District of California dismissed a putative class action alleging that Time magazine failed to establish procedures to comply with California's Shine the Light Act (SLA). *Murray v. Time, Inc.*, No 12-00431, 2012 WL 3634387 (N.D. Cal. Aug. 24, 2012). The SLA requires businesses to disclose to California consumers upon request any information collected and shared with third-party direct marketers. Alternatively, businesses can adopt a policy of not sharing consumer information without first obtaining consumer consent. All businesses must make consumers aware of their SLA rights by (i) maintaining a disclosure on their website and providing contact information for consumers to make a request about information shared with direct marketers, (ii) requiring customer service agents to provide the contact information upon request, or (iii) making the contact information available at every place of business in the state. The named plaintiff contends that by the nature of its business Time only could provide the required information on its website, and that it failed to do so. The court dismissed the case, holding that the named plaintiff suffered no economic or informational injury and therefore lacked standing to pursue his claims. The court held that the plaintiff's general allegations concerning the "inherent monetary value" of consumer data are presented without any facts regarding the value of his specific personal information and therefore could not prove any economic injury. With regard to informational injury, the court explained that the plaintiff does not claim that he was deprived any information in response to a request, but rather that he was deprived of the ability to make the request. Such a procedural violation of the SLA, the court held, does not equate to informational injury. The court allowed the plaintiff to re-plead additional facts in support of his claim, but he may not add other plaintiffs or defendants.

Sixth Circuit Holds Computer Hacking Losses Covered by Insurance. Last month, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court holding that the computer fraud rider to a retailer's Crime Policy covered losses resulting from the theft of customers' financial information by computer hackers. *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No 10-4576/4608, 2012 WL 3608432 (6th Cir. Aug. 23, 2012).The retailer incurred millions of dollars in expenses and attorney fees related to a data breach in which computer hackers stole customers' credit card and bank account information. The retailer submitted a claim for the losses under the computer fraud rider to its Blanket Crime Policy, which the insurer denied because the policy excluded third-party theft of "proprietary" or "confidential information." The retailer filed suit and prevailed on summary judgment. On appeal, the court upheld the district court's application of a proximate cause standard to determine that the losses were covered as losses sustained as a direct result of the theft. The court also rejected the insurer's argument that the losses were excluded as losses of "proprietary or confidential information" because the retailer did not "own or hold single or sole right" to the stolen information and the information did not relate to the manner in which the business operated.

MISCELLANY

NACHA Proposes Guidelines for Use of QR Codes for Consumer Bill Pay. On August 30, NACHA - The Electronic Payments Association, proposed guidelines to facilitate the use of Quick Response (QR) codes for consumer bill payments. A QR code is a type of barcode readable by a mobile device equipped with a QR application. The guidelines, developed by NACHA's Council for Electronic Billing and Payment, seek to establish a single QR code format to serve consumer bill pay needs through a variety of channels, including a biller's website, a financial institution's online bill pay website site, or other aggregation bill pay websites. The proposal recommends guidelines for the QR code size and format, billing data to be included, and encoding format. NACHA has requested comment from interested parties by September 19, 2012 and expects to prepare a final version of the guidelines before the end of 2012.

FIRMNEWS

Andrew Sandler will speak at the National Mortgage News 2nd Annual Mortgage Regulatory Forum taking place September 13-14, 2012, in Arlington, VA. The Mortgage Regulatory Forum is created to provide the most up-to-date information on newly implemented regulations, and regulations in the pipeline, for those on the origination side of the business, as well as mortgage servicing.

Margo Tank, Jim Shreve, and Ryan Pollard will present a Practicing Law Institute webinar titled "Mobile Payments Compliance: Unique Disclosure, Advertising, and

Money Transmission Issues" on September 19, 2012.

Melissa Klimkiewicz and Jon Langlois will speak on a live teleconference sponsored by the National Business Institute on October 4, 2012. The presentation is titled "HAMP, HARP, HAFA and FHA Update: Evolving Program Requirements and Expectations." To register call (800) 931-3140 or visit the website, www.nbi-sems.com.

James Parkinson will speak at the American Bar Association's International White Collar Crime Conference in London on October 8, 2012. Mr. Parkinson's panel is entitled "What Every General Counsel Needs to Know Regarding Compliance and Internal Investigations."

Jonice Gray Tucker, Valerie Hletko, and Amanda Raines will present a webinar sponsored by the California Mortgage Bankers Association on October 9, 2012. Their remarks will focus on fair lending enforcement trends and related risk assessments.

John Stoner will speak on a panel addressing "The Uniform Commercial Code and the Mortgage Crisis" at the State Bar of California Annual Meeting on October 12, 2012. Mr. Stoner recently was appointed to the Commercial Transactions Committee of the State Bar of California.

David Krakoff will participate on a panel at The American Bar Association's Fifth Annual National Institute on the Foreign Corrupt Practices Act, being held October 17 - 19, 2012 at The Westin Georgetown. Mr. Krakoff's session on October 18, 2012 is titled "The Trial of an FCPA Case: Pitfalls and Pratfalls."

Thomas Sporkin will speak at the Securities Enforcement Forum 2012 on October 18, 2012, in Washington, DC. The Securities Enforcement Forum 2012 brings together securities enforcement and white-collar attorneys, current and former senior SEC and DOJ officials, in-house counsel and compliance executives, and other top professionals in the field.

Margo Tank will speak at the ACORD Implementation Forum in Ft. Lauderdale, FL on October 24, 2012. Ms. Tank's panel is titled "Guidelines for e-Signatures and e-Delivery in the Insurance - Cutting through the Legalese."

David Krakoff, James Parkinson, Andrew Schilling, and Thomas Sporkin will speak at the Commerce and Industry Group's seminar, "Anti-Bribery: The Changing Anti-Corruption Environment in Key Jurisdictions" on October 24, 2012, in London. The panel will examine recent developments in anti-corruption enforcement in the UK, US, and Continental Europe; it will also consider best practices to identify and mitigate exposure to corruption risk.

Margo Tank will speak at The Electronic Signature and Records Association's Annual Conference, November 14-15, 2012, in Washington, DC. Ms. Tank's panel will discuss electronic signatures and mobile technology.

David Krakoff will speak at ACI's Inaugural Summit on White Collar Litigation being held January 23-24, 2013, in New York, NY. Mr. Krakoff will participate in the session entitled "FCPA Case Review: A Hands-On Look at the Year in the FCPA and What Litigators Need to Take Away."

FIRM PUBLICATIONS

Bradley Marcus and Nakiya Whitaker authored for the August 2012 issue of Mortgage Banking Magazine an article titled "The Risk of Vicarious Liability for Broker Misconduct."

Thomas Sporkin, Robyn Quattrone, and Stephen LeBlanc authored "Crowdfunding Offers Attractive Financing Alternative, But SEC Must Give More Clarity", which was published by Accelus on August 21, 2012.

Andrew Schilling published "Whistle-blower Bounties May Encourage Residential Mortgage-Backed Securities Fraud Reporting" on August 29, 2012 in the Westlaw Journal Bank & Lender Liability.

Thomas Sporkin published "The SEC's Wells Process Turns 40" on August 31, 2012 in Law 360.

David Krakoff and Lauren Randell authored "FCPA: Were the Sting Trials Doomed from the Start?" for the September 1, 2012 Law Journal Newsletters - Business Crimes Bulletin.

About BuckleySandler LLP (www.BuckleySandler.com)

With over 150 lawyers in Washington, DC, Los Angeles, and New York, 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 St NW, Suite 700, Washington D.C. 20037, (202) 349-8000

Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (424) 203-1000

New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400

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

In addition, please feel free to email our attorneys. A list of attorneys can be found at: http://www.buckleysandler.com/professionals/professionals.

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 contained herein is drawn from various public sources, including other publications.

MORTGAGES

CFPB Extends Comment Period for Finance Charge Definition Proposal. On August 31, the CFPB extended the comment period for aspects of two recently proposed rules. On July 9, the CFPB proposed a rule to merge the TILA and RESPA mortgage loan disclosures. That proposal includes potential changes to the definition of finance charge, comments on which were due September 7, 2012. Having heard from stakeholders that the proposed definition could impact changes proposed in other CFPB mortgage-related rulemakings, the CFPB extended the comment deadline to November 6, 2012, which matches the deadline for most of the other aspects of the proposed TILA/RESPA disclosure rule. This extension does not impact the September 7, 2012 deadline for comments on whether the CFPB should delay implementation of certain new TILA and RESPA disclosures. Also on July 9, 2012, the CFPB proposed a rule to expand the types of mortgage loans subject to HOEPA, with comments due September 7, 2012. Given the extension of the deadline for comments on the definition of finance charge, which will impact the scope of the extended HOEPA coverage, the CFPB also extended the HOEPA proposed rule comment deadline to November 6, 2012.

Fannie Mae Announces Miscellaneous Servicing Policy Changes. On September 5, Fannie Mae issued Servicing Guide Announcement SVC-2012-20, which updates special investor reporting requirements to provide new guidance regarding reporting a foreclosure for a modified mortgage loan with principal forbearance. The Announcement also provides new contact information for

servicers to use when a borrower or servicer of a first-lien mortgage requests information relating to a HomeSaver Advance Note.

Washington Amends Consumer Loan Act and Mortgage Broker Practices Act Regulations. Recently, the Washington State Department of Financial Institutions finalized two rulemakings to amend existing regulations and adopt new regulations under the Consumer Loan Act and the Mortgage Broker Practices Act. The final rules make numerous changes impacting mortgage and other consumer lenders, including with regard to licensing and reporting. For example, the amendments to the Consumer Loan Act regulations (i) add requirements and prohibitions relating to force-placed insurance, (ii) clarify licensing exemptions for consumer lenders and mortgage originators, and (iii) add new provisions addressing the activities of servicers and third party residential mortgage loan modification services. The amendments under the Mortgage Broker Practices Act include some of the changes made under the Consumer Loan Act and, among other things (i) revise the definition of mortgage broker, (ii) require approval from the Department for an individual to work as a designated broker for more than one licensee, and (iii) clarify application of loan originator requirements to inactive licensees. All of the changes take effect on November 1, 2012.

Lender Settles TILA, UDAP Claims Over HELOC Reductions. On August 31, a lender preliminarily settled with a class of borrowers who claimed that the bank suspended or reduced borrower home equity lines of credit (HELOCs) in violation of the Truth in Lending Act and California's Unfair Competition Law. Plaintiffs' Notice of Motion and Motion for Preliminary Approval of Class Action Settlement Agreement, *In Re Citibank HELOC Reduction Litig.*, No. 09-350 (N.D. Cal. Aug. 31, 2012). The borrowers claimed that the bank improperly utilized computerized automated valuation models (AVMs) as the basis for suspending or decreasing customer HELOCs because of the decline in the value of the underlying property. The complaint also charged that customers were injured because (i) the annual fee to maintain the HELOC was not adjusted to account for the decreased limit, and (ii) the borrowers' credit ratings were damaged as a result of the reduced credit limit. The named plaintiff also alleged injury because he was forced to obtain a replacement home equity line, which resulted in payment of an early termination fee on the old HELOC and additional costs related to the new HELOC. Under the agreement, class members will have a right to request reinstatement of their HELOC accounts, the bank will expand the information contained in credit-line reduction notices based on collateral deterioration, and customers who incurred an early closure release fee when closing the account subsequent to the suspension or reduction may make a claim for the cash payment of $120.

BANKING

OCC Names New Enforcement and Compliance Director. On September 5, the OCC announced the promotion of Ellen M. Warwick to Director for Enforcement and Compliance, responsible for conducting investigations, recommending administrative actions, and litigating enforcement actions. Ms. Warwick previously served as Assistant Director for Enforcement and Compliance and as Assistant Director for Litigation, among other positions with the OCC. She also has been a litigation attorney in private practice, a trial attorney with the DOJ, and a prosecutor in the Essex District Attorney's Office of Massachusetts.

CONSUMER FINANCE

CFPB Releases Examination Procedures for Consumer Reporting Agencies. On September 5, the CFPB released procedures to guide its staff in examining "larger participant" consumer reporting agencies (CRAs). In July, the CFPB adopted a rule that will allow it to supervise CRAs with more than $7 million in annual receipts from consumer reporting activities starting September 30, 2012. The procedures outline how examiners should assess a CRA's compliance with federal requirements, primarily under the Fair Credit Reporting Act, relating to (i) using and providing accurate consumer information, (ii) handling consumer disputes, (iii) providing disclosures to consumers, and (iv) preventing fraud and identity theft. While the procedures focus on issues specific to consumer reporting, they include a module that directs examiners to consider whether a CRA offers any other consumer financial product or service that creates other risks to consumers, particularly with regard to Gramm-Leach-Bliley privacy requirements and potential unfair, deceptive, or abusive acts or practices (UDAAP violations).

Idaho and Pennsylvania Transition Certain Non-Mortgage Businesses to NMLS. Beginning September 1, 2012, Idaho and Pennsylvania transitioned to NMLS the state licensing process for certain non-mortgage consumer financial service providers. In Idaho, all money transmitters now have the option of using the NMLS to obtain or renew their licenses. In Pennsylvania, all debt management services, money transmitter, and accelerated mortgage payment providers can begin to use the NMLS for all licensing-related transactions as of September 1, 2012. Effective November 1, 2012, all new applications must be processed through NMLS, and all current license holders must submit a transition request by December 31, 2012.

Illinois Amends Collection Agency Law. On August 24, Illinois amended the Collection Agency Act to add certain definitions and new requirements for debt buyers. House Bill 5016 adds new definitions for (i) charge-off balance, (ii) charge-off date, (iii) current balance, and (iv) debt buyer. The bill subjects debt buyers to

the Collection Agency Act generally, including statute of limitations requirements for collection actions, but exempts debt buyers from certain requirements when pursuing a debt it owns. For example, debt buyers need not maintain a trust account or surety bond. The changes take effect on January 1, 2013.

SECURITIES

Second Circuit Reinstates MBS Class Action, Loosens Requirements for Pleading Damages. On September 6, the U.S. Court of Appeals for the Second Circuit held that a plaintiff has class standing to assert the claims of purchasers of securities backed by mortgages originated by the same lenders that originated the mortgages backing the named plaintiff's securities, even when the securities were purchased from different trusts. *NECA-IBEW Health& Welfare Fund v. Goldman Sachs & Co.*, No 11-2762, 2012 WL 3854431 (2nd Cir. Sep. 6, 2012). In this case, the plaintiff, an institutional purchaser of certain mortgage-backed securities, filed suit on behalf of a putative class alleging that the offering documents contained material misstatements regarding the mortgage loan originators' underwriting guidelines, the property appraisals of the loans, and the risks associated with the certificates. The district court dismissed the case, holding the named plaintiff lacked standing to bring claims on behalf of proposed class members that purchased securities from trusts other than the trusts from which the plaintiff bought securities. The district court also held that the plaintiff failed to allege a cognizable loss because the plaintiff knew the certificates might not be liquid and therefore could not allege injury based on a hypothetical price. On appeal, after acknowledging that putative class members purchased certificates issued through seventeen separate offerings backed by separate pools of loans, the court held that the named plaintiff raises a "sufficiently similar set of concerns" to allow it to seek to represent proposed class members who purchased securities backed by loans made by common originators. In overturning the district court with regard to the plaintiff's ability to plead a cognizable injury, the court reasoned that while it may be difficult to value illiquid assets, "the value of a security is not unascertainable simply because it trades in an illiquid market." The court reversed in favor of the plaintiff and remanded the case for further proceedings.

Federal Court Dismisses Fannie Mae Shareholders' Subprime Suit Against Underwriters, Allows Claims to Proceed Against Fannie Mae, Officers. On August 30, the U.S. District Court for the Southern District of New York ruled on multiple motions to dismiss filed in four consolidated cases pending against Fannie Mae, certain former officers, and several banks, related to Fannie Mae's exposure to certain risky mortgages. *In re Fannie Mae 2008 Secs. Litig.*, No. 09-2013, 2012 WL 3758537 (S.D.N.Y. Aug. 30, 2012). The main class of shareholders alleges that Fannie Mae and certain of its former officers violated federal securities laws by failing to adequately disclose the company's exposure to subprime and Alt-A

mortgages. Separately, institutional investors brought their own federal securities claims, as well as state statutory and common law fraud and negligence claims against Fannie Mae, certain officers, and certain of its underwriters related to the same alleged misrepresentations. Many of the same allegations are contained in SEC enforcement actions pending against a number of the same individual defendants. In a single opinion, the court dismissed certain of the claims but allowed others to proceed. The court allowed to proceed the federal securities claims brought by the main class and two other plaintiffs against Fannie Mae and certain of its officers with regard to Fannie Mae's subprime mortgage disclosures and risk management controls, but dismissed all state law claims, including those against Fannie Mae, certain officers, and certain underwriters. The court also dismissed in full a suit that one underwriter faced alone because the plaintiffs failed to present evidence sufficient to show the underwriter intentionally provided investors allegedly false information it received from Fannie Mae.

CREDIT CARDS

Ninth Circuit Holds Omission of Annual Fee in Credit Card Advertisements, Online Application Not Misleading. On August 31, the U.S. Court of Appeals for the Ninth Circuit upheld a district court's dismissal of a putative class action alleging that a credit card issuer and a retailer violated California law when they failed to explicitly state the card's annual fee in advertisements. *Davis v. HSBC Bank Nevada, N.A.*, No. 10-56488, 2012 WL 3804370 (9th Cir. Aug. 31, 2012). The cardholder applied for a credit card that offered rewards for purchases, to be used at the retailer's stores. Neither the advertisement for the card nor the application website mentioned that the card required an annual fee. The fee was disclosed only in the "Terms and Conditions" that the cardholder acknowledged having read and accepted prior to opening the credit account. On appeal, the cardholder argued that the omission of the annual fee in the advertisements, combined with the promise of rewards, constituted false advertising because it implied that no offsetting charges would erode the rewards. The court held that the advertisement was unlikely to deceive a reasonable consumer, even though it is possible that some people could misunderstand the terms. The court also rejected the cardholder's argument that the issuer and retailer fraudulently concealed the fee. In doing so the court drew a distinction from its earlier decision in *Barrer v. Chase Bank, N.A.*, 566 F.3d 883 (9th Cir. 2009), in which it held that a provision granting the issuer the right to alter the cardholder's APR was buried in fine print and therefore violated TILA's "clear and conspicuous" requirement. The court explained that its decision in *Barrer* had no bearing on the cardholder's instant common law claims. Finally, the court rejected the cardholder's claim that the online application and advertisements violated the state's Unfair Competition Law because the online application is protected by a federal safe harbor and the advertisements were not deceptive.

E-COMMERCE

FTC Issues Advertising and Privacy Guidelines for Mobile Application Developers. On September 5, the FTC published "Marketing Your Mobile App: Get It Right from the Start," a guide to assist mobile application developers in complying with federal advertising and privacy requirements. The Guide provides basic guidance and principles related to truthful advertising and consumer privacy protections. For example, the guide urges application developers to (i) disclose key information in advertising materials clearly and conspicuously, (ii) collect sensitive information only with user's affirmative consent, and (iii) avoid collecting unnecessary data and ensure the security of any sensitive data that is collected.

PRIVACY / DATA SECURITY

Federal Court Dismisses Consumer Privacy Action Brought Under California's Shine the Light Act. On August 24, the U.S. District Court for the Northern District of California dismissed a putative class action alleging that Time magazine failed to establish procedures to comply with California's Shine the Light Act (SLA). *Murray v. Time, Inc.*, No 12-00431, 2012 WL 3634387 (N.D. Cal. Aug. 24, 2012). The SLA requires businesses to disclose to California consumers upon request any information collected and shared with third-party direct marketers. Alternatively, businesses can adopt a policy of not sharing consumer information without first obtaining consumer consent. All businesses must make consumers aware of their SLA rights by (i) maintaining a disclosure on their website and providing contact information for consumers to make a request about information shared with direct marketers, (ii) requiring customer service agents to provide the contact information upon request, or (iii) making the contact information available at every place of business in the state. The named plaintiff contends that by the nature of its business Time only could provide the required information on its website, and that it failed to do so. The court dismissed the case, holding that the named plaintiff suffered no economic or informational injury and therefore lacked standing to pursue his claims. The court held that the plaintiff's general allegations concerning the "inherent monetary value" of consumer data are presented without any facts regarding the value of his specific personal information and therefore could not prove any economic injury. With regard to informational injury, the court explained that the plaintiff does not claim that he was deprived any information in response to a request, but rather that he was deprived of the ability to make the request. Such a procedural violation of the SLA, the court held, does not equate to informational injury. The court allowed the plaintiff to re-plead additional facts in support of his claim, but he may not add other plaintiffs or defendants.

PAYMENTS

NACHA Proposes Guidelines for Use of QR Codes for Consumer Bill Pay. On August 30, NACHA - The Electronic Payments Association, proposed guidelines to facilitate the use of Quick Response (QR) codes for consumer bill payments. A QR code is a type of barcode readable by a mobile device equipped with a QR application. The guidelines, developed by NACHA's Council for Electronic Billing and Payment, seek to establish a single QR code format to serve consumer bill pay needs through a variety of channels, including a biller's website, a financial institution's online bill pay website site, or other aggregation bill pay websites. The proposal recommends guidelines for the QR code size and format, billing data to be included, and encoding format. NACHA has requested comment from interested parties by September 19, 2012 and expects to prepare a final version of the guidelines before the end of 2012.

INSURANCE

Sixth Circuit Holds Computer Hacking Losses Covered by Insurance. Last month, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court holding that the computer fraud rider to a retailer's Crime Policy covered losses resulting from the theft of customers' financial information by computer hackers. *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No 10-4576/4608, 2012 WL 3608432 (6th Cir. Aug. 23, 2012).The retailer incurred millions of dollars in expenses and attorney fees related to a data breach in which computer hackers stole customers' credit card and bank account information. The retailer submitted a claim for the losses under the computer fraud rider to its Blanket Crime Policy, which the insurer denied because the policy excluded third-party theft of "proprietary" or "confidential information." The retailer filed suit and prevailed on summary judgment. On appeal, the court upheld the district court's application of a proximate cause standard to determine that the losses were covered as losses sustained as a direct result of the theft. The court also rejected the insurer's argument that the losses were excluded as losses of "proprietary or confidential information" because the retailer did not "own or hold single or sole right" to the stolen information and the information did not relate to the manner in which the business operated.