Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

November 12, 2010

Topics In This Issue

Federal Issues

CSBS Adds New Credit Report Functionality to NMLS. On November 1, the Conference of State Bank Supervisors (CSBS) announced that the Nationwide Mortgage Licensing System and Registry (NMLS) now can process credit histories for individual mortgage loan originators (MLOs) and that, effective immediately, all licensed residential MLOs participating in the NMLS must complete a credit authorization process, regardless of prior state requirements. Providing credit history processing through the NMLS fulfills a mandate in the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the SAFE Act) that MLOs authorize the NMLS to obtain independent credit reports from a consumer reporting agency. NMLS now has automated this process so that a single credit report may be used by one or more states. New license applicants wishing to obtain an MLO license and transitioning applicants will be required to authorize a credit report and score with the submission of their license application or their transition request. Those MLOs who have already filed an application through NMLS will need to authorize a credit report and score through NMLS prior to the deadline(s) imposed by the state(s) in which they are licensed, even if credit information was previously reviewed by a state agency. The credit report functionality in NMLS will require the MLO to complete an identity verification process and pay a $15 fee. Once an MLO has authorized the credit report, each state regulator will independently review the credit information of MLOs licensed in their jurisdiction. The SAFE Act leaves it to the discretion of each state regulator to develop their own processes and standards for reviewing credit information and determining the financial responsibility of its licensees. For a copy of the CSBS press release, please click here.

FTC Obtains Judgment against Companies that Debited Money without Consumer's Permission. On November 5, the Federal Trade Commission (FTC) announced that a federal judge entered a default judgment of over $3.6 million against a payment processor and its subsidiary for allegedly violating the FTC's Telemarketing Sales Rule as well as various state consumer protection laws. The case arose out of a 2007 complaint in which the FTC and seven states filed suit against Your Money Access, LLC, and its subsidiary, YMA Company, LLC. In their complaint, the plaintiffs alleged that the defendant companies violated the FTC's Telemarketing Sales Rule and state consumer protection laws by illegally debiting consumers' bank accounts on behalf of deceptive telemarketers and internet scammers. The plaintiffs further alleged that these violations significantly

aided the deceptive telemarketers and internet scammers by providing them with access to the banking system and a means to extract money from consumers' bank accounts. In addition to the $3.6 million judgment, the defendant companies also are enjoined by the terms of a 2008 default judgment from processing payments for any client whose business practices are deceptive, unfair, or abusive within the meaning of the FTC Act, the Telemarketing Sales Rule, and state consumer protection laws. For a copy of the press release, please click here.

FTC Lengthens Comment Period for Proposed Policy Statement Regarding Collection of Decedents' Debts. On November 8, the Federal Trade Commission (FTC) extended the public comment period on a proposed policy statement that is meant to clarify when the FTC will take action under the Fair Debt Collection Practices Act and the FTC Act against debt collectors who contact the relatives of deceased customers in order to collect a debt from the decedent's estate. Comments on the policy statement are now due December 1, 2010. As reported in *InfoBytes*, Oct. 8, 2010, the FTC recently published a proposed policy statement in the Federal Register clarifying how the FTC will enforce federal law regarding (i) whom debt collectors are allowed to contact to discuss a decedent's debt, (ii) how debt collectors can contact and identify the right party to discuss a decedent's debt, and (iii) how debt collectors should avoid misleading relatives into believing that they are personally obligated to pay the debt. The FTC decided to extend the comment period from November 8 in order to give interested parties more time to present their views. For a copy of the press release, please see http://www.ftc.gov/opa/2010/11/fdcpa.shtm.

FDIC Issues Final Rule Providing Temporary Unlimited Deposit Insurance Coverage for Noninterest-bearing Transaction Accounts. On November 9, the Federal Deposit Insurance Corporation (FDIC) approved a final rule to implement Section 343 of the Dodd-Frank Wall Street Reform and Consumer Protection Act by providing temporary unlimited deposit insurance coverage for noninterest-bearing transaction accounts at all FDIC-insured institutions and by requiring depository institutions to notify customers about changes to the insurance coverage status of their accounts. Through the new rule, the FDIC has created a new category of deposit insurance for noninterest-bearing transaction accounts that will function separate from, and in addition to the coverage provided to depositors for other accounts at an insured depository institution. This new category of deposit insurance will operate much like the FDIC's Transaction Account Guarantee Program (TAGP), which is set to expire December 31, 2010 (as reported in *InfoBytes*, October 1, 2010). Additionally, the rule creates a number of new disclosure requirements that obligate depository institutions (i) to post notices at their branches and on their websites about the new program, (ii) to inform customers with Interest on Lawyer Trust Accounts and low-interest negotiable order of withdrawal accounts that such accounts will no longer be covered by unlimited deposit insurance as of January 1, 2011, and (iii) to notify customers individually of actions that affect the deposit insurance coverage of funds held in noninterest-bearing transaction accounts. Unlike TAGP, all depository institutions are automatically covered by the new program without any additional assessments. The Rule will become effective on December 31, 2010 and will expire on December 31, 2012. For a copy of the FDIC's press release, please see http://www.fdic.gov/news/news/press/2010/pr10247.html; for a copy of the final rule, please see http://www.fdic.gov/news/board/Nov9no4.pdf.

FDIC Proposes Rules to Adjust Assessment Base Calculations. On November 9, the Federal Deposit Insurance Corporation (FDIC) approved two proposed rules that would amend its deposit insurance assessment regulations to comply with provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The first proposal would change the assessment base from one based on adjusted domestic deposits to one based on average adjusted consolidated total assets. Since this change would increase the assessment base for banks significantly, the proposed rule also suggests lowering assessment rates so that the total amount of FDIC revenue collected through assessments would not change materially. The second proposed rule would replace an April 13, 2010 proposed rule revising the deposit insurance assessment system for large institutions by eliminating risk categories and debt ratings from the assessment calculation and replacing them with scorecards. The FDIC also proposes that both rules take effect April 1, 2011. For a copy of the FDIC's press release and the proposed rules, please see http://www.fdic.gov/news/news/press/2010/pr10248.html.

HUD Issues Guidance to Lenders Regarding HECM Referral List. On November 8, the Department of Housing and Urban Development (HUD) issued Mortgage Letter 10-37, which requires lenders to provide each client with a list of no fewer than nine HUD-approved HECM counseling agencies. The Mortgagee Letter further requires that lenders should complete the HECM Referral List Update in FHA Connection within one business day of requesting a FHA case number. The Mortgagee Letter is effective for case numbers issued on or after February 1, 2011, although lenders may opt to begin using these new screens on November 22. For a copy of Mortgagee Letter 10-37, please click here.

HUD Launches YouTube Channel. In an effort to boost home consumer awareness, the U.S. Department of Housing and Urban Development (HUD) has partnered with the National Association of Realtors (NAR) to produce short videos that walk potential homebuyers through the process of purchasing a home. The videos are freely accessible through HUD's YouTube channel (www.youtube.com/HUDchannel). The first three videos address (i) how to shop for a home, (ii) how to shop for a loan by comparing Good Faith Estimates (GFEs), and, (iii) how to compare a HUD-1 Settlement Statement with a GFE to ensure that the loan terms initially offered by the lender match the loan terms on the note at closing. A press release announcing the launch of the YouTube channel is available here.

FHFA Issues Interim Rule on Debt Collection. On November 10, the Federal Housing Finance Agency (FHFA) issued an interim final rule on debt collection. The interim final rules sets forth procedures for use by the FHFA in collecting debts owed to the Federal Government. The rule includes procedures for collection of debts through salary offset, administrative offset, tax refund offset, and administrative wage garnishment. The rule provides in part that the FHFA will transfer debts delinquent for over 180 days to the Department of the Treasury for collection, and that debts delinquent for less than 180 days may be referred to debt collection centers. The interim final rule is effective immediately; however FHFA will accept written comments on the rule until January 10, 2011. For a copy of the interim final rule, please click here.

State Issues

Rhode Island Considers New Surety Bond and Minimum Net Worth Requirements for Mortgage Loan Originators. On November 5, Rhode Island's Department of Business Regulation (DBR) proposed the adoption of Banking Regulation 6 (BR 6) entitled "Surety Bond and Minimum Net Worth Pursuant to the Secure and Fair Enforcement Mortgage Licensing Act of 2009," which would implement statutory requirements for mortgage loan originators regarding surety bonds and minimum net worth. The DBR maintains that the new regulation will protect Rhode Island consumers by reserving funds for those injured by mortgage loan originators and by ensuring that mortgage loan originators are financially stable. Under Section 5 of the new regulation, mortgage loan originators that originate between $1 and $10 million per year would be required to file a minimum $10,000 surety bond with the DBR while originators that originate more than $10 million per year would be required to file a surety of at least $15,000. The exact bond requirements would vary yearly based on a formula tied to the amount of mortgage loans originated in Rhode Island in the preceding year. According to the regulation, the surety bond must be continuous and will be used for the benefit of Rhode Island consumers injured by the mortgage loan originators, but the requirement can be fulfilled by utilizing the surety bond of the mortgage loan originator's licensed lender or loan broker. Section 6 of the new regulation would impose a requirement that applicants for a new license must demonstrate a minimum net worth of $10,000 for annual volume of Rhode Island loans originated in an amount up to $10 million, and $25,000 for volume of Rhode Island loans originated in an amount greater than $10 million. Applicants must maintain this minimum net worth continuously and cannot rely on the net worth of their employers to satisfy the requirement. The DBR may waive or modify the requirement if it deems it appropriate based on written evidence. The DBR is currently accepting written and oral comments on the new regulation, and it will hold a public hearing to consider the adoption of the new regulation. For a copy of the proposed regulation, please click here.

Courts

Court Holds Website Screenshot Not a "Printed Receipt" for FACTA Truncation Requirements. In a recent case, an Illinois federal district court held that a computer screenshot did not constitute a "printed receipt" subject to the Fair and Accurate Credit Transactions Act of 2003 (FACTA) restrictions against printing certain credit card information. *Kelleher v. Eaglerider, Inc.*, 2010 WL 4386837, No. 09-C-5772 (N.D. Ill. Oct. 28, 2010). The dispute arose from the reservation of a motorcycle rental through the defendant's website. Upon confirmation of the order, the website displayed the plaintiffs' credit card expiration date. Further, upon arrival at the store on the day of the rental, one plaintiff was required to sign a number of paper "rental" forms that included, among other things, the expiration date of the credit card, along with certain terms and conditions including a general release of liability. The plaintiffs alleged that both the online confirmations that displayed the card expiration date and the printed rental forms signed at the store constituted electronically printed receipts subject to the credit card number truncation requirements of FACTA. The defendant moved for summary judgment, arguing that (i) a website screenshot is not covered by the receipt requirement in FACTA, and (ii) that the plaintiff who signed the rental forms waived his rights per the release of liability clause. On review, the court granted the defendant's motion with respect to the claim based on the electronic receipt. In reaching this ruling, the court noted that there was "a good

deal of non-binding authority" to support each side, but that it ultimately found persuasive the holding in a recent 7th Circuit case, *Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794 (7th Cir. 2010) (as reported in *InfoBytes*, Aug. 20, 2010), in which the court held that an email confirmation did not constitute an electronically printed receipt because Congress intended the restriction to apply only to tangible, printed documents. However, the court denied the defendant's motion with respect to the plaintiffs' second FACTA claim, because it found that the rental forms signed by one of the plaintiffs did constitute receipts for purposes of FACTA and that a genuine issue of material fact remained as to whether the waiver provisions within the forms covered the FACTA claims. For a copy of the opinion, please click here.

Firm News

Sam Buffone, David Krakoff and James Parkinson will be speaking at the "FCPA Enforcement Update: Individuals in the Line of Fire," Webconference on December 6.

Andrew Sandler will be a speaking at PLI's "Banking Law Institute 2010: The Future is Here," on December 8. Mr. Sandler's session is: "Consumer Financial Protection & Enforcement Proceedings under the New Legislation."

James Parkinson will be speaking at "The FCPA's Exception and Affirmative Defenses," Webconference on December 21.

Donna Wilson will be speaking at the ACI Privacy & Security of Consumer & Employee Information Conference on January 25-26, 2011 in Washington, DC. The topic will be "Responding to the Latest Cyber Threats: Mobile Workforces, Technology, Data Thefts, and Cloud Computing."

Andrew Sandler will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27, 2011 at 11am. The conference is taking place at The Helmsley Park Lane Hotel, 36 Central Park South, NYC. The topic will be Emerging Federal and State Regulatory and Enforcement Initiatives: FTC, DOJ, SEC, FRB, and State AGs Perspectives. Also on the panel with Andy will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

Mortgages

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Banking

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Consumer Finance

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