December 22, 2012

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Realigns Supervision Team. On December 17, the CFPB announced a reorganization of part of its Division of Supervision, Enforcement, and Fair Lending. Effective immediately, CFPB staff members responsible for supervision activities are organized in two offices: Examinations and Policy. Previously, supervision staff were organized into offices for Nonbank Supervision and Large Bank Supervision. According to the CFPB's announcement, the Examinations team will (i) recruit, train, and commission examiners, (ii) ensure policies and procedures are followed, and (iii) plan and execute examinations appropriately in light of resources and priorities. The CFPB's four regional offices will report to the Examinations team, which is being led, on an acting basis, by Paul Sanford. Mr. Sanford had been Acting Assistant Director for Large Bank Supervision. The CFPB explains that its Policy team will ensure that policy decisions for supervision are consistent with both the law and the CFPB's mission, and that such decisions are consistent across markets, charters, and regions. The Policy team will be further organized by product or service market, rather than by the type of financial institution. Each market team will be responsible for developing supervision strategy and policy across both bank and nonbank markets. Peggy Twohig, formerly the head of the CFPB's Nonbank Supervision office, will be the Assistant Director of Supervision Policy.

CFPB Releases Student Lending Examination Procedures. On December 17, the CFPB released its Student Lending Examination Procedures, which are an extension of the CFPB's General Supervision and Examination Manual and will be used as a field guide by CFPB examiners to review student lender compliance with federal consumer financial laws. The Student Lending Examination Procedures are organized in seven modules: (i) Advertising, Marketing, and Lead Generation, (ii) Application, Qualification, Loan Origination, and Disbursement, (iii) Loan Repayment, Account Maintenance, Payoff Processing, and Payment Plans, (iv) Customer Inquiries and Complaints, (v) Collections, Accounts in Default, and Credit Reporting, (vi) Information Sharing and Privacy, and (vii) Examination Conclusion and Wrap-up. Under the first module, for example, CFPB examiners will assess whether a lender's advertising and marketing practices are deceptive, misleading, or discriminatory by sampling all of the lender's marketing and advertising materials, including print, electronic and other media, such as the Internet, email and text messages, telephone solicitation scripts, agreements and disclosures. With regard to borrower complaints, examiners will assess, among other things, the systems, procedures, and policies used by a lender for tracking, handling, investigating, and resolving consumer inquiries, disputes, and complaints. The CFPB has the authority to supervise large bank and nonbank student lenders, and, as with its other procedures, the CFPB will use the same examination procedures across both types of institutions.

CFPB Announces Mortgage Policy Field Hearings. On December 18, the CFPB announced field hearings on mortgage policy to be held on January 10, 2013 in Baltimore, MD, and on January 17, 2013, in Atlanta, GA. The CFPB is expected to finalize a series of mortgage-related rules by January 21, 2013. In the past, the CFPB has issued final rules or announced other policy initiatives in connection with field hearings.

CFPB Seeks Public Input on Impacts of CARD Act. On December 19, the CFPB issued a notice and request for information about the impact of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act or Act) on the consumer credit card market. The request seeks information about: (i) how the CARD Act has changed the substantive terms and conditions of credit card agreements, (ii) the effectiveness of disclosure of terms, fees, and other expenses of credit card plans, (iii) the adequacy of protections against unfair or deceptive acts or practices relating to credit card plans, and (iv) whether the Act has affected the cost and availability of credit, the safety and soundness of any credit card issuers, the use of risk-based pricing, or the innovation of new products. The CFPB explained that it will use the data gathered to prepare a publicly available report to Congress on the state of the consumer credit card market, and to inform future policy decisions regarding credit cards. The CFPB will accept comments for 60 days following publication of the notice in the Federal Register.

FTC Finalizes Children's' Privacy Rule Amendments. On December 19, the FTC announced final amendments to the Children's Online Privacy Protection Act Rule. According to the FTC's release, the final amendments (i) include geolocation information, photographs, and videos in the list of "personal information" that cannot be collected from children under 13 without parental notice and consent, (ii) offer companies a streamlined, voluntary, and transparent approval process for new ways of getting parental consent, (iii) close a loophole that allowed kid-directed apps and websites to permit third parties to collect personal information from children through plug-ins without parental notice and consent, (iv) require compliance by such third parties in some of those cases, (v) require compliance by persistent identifiers that can recognize users over time and across different websites or online services, (vi) require that covered website operators and online service providers take reasonable steps to release children's personal information only to companies that are capable of keeping it secure and confidential, (vii) require that covered website operators adopt reasonable procedures for data retention and deletion, and (viii) strengthen the FTC's oversight of self-regulatory safe harbor programs. The amendments also modify several other key definitions in the rule. Notably, the revised definition of "operator" clarifies that the rule covers a child-directed site or service that integrates outside services that collect personal information from its visitors, but it does not extend liability to platforms that merely offer the public access to child-directed apps. FTC

Commissioner Maureen Ohlhausen voted against the amendments and issued a dissenting statement in which she argued that the new definition of "operator" goes beyond what Congress authorized by imposing obligations on websites or online services that do not collect personal information from children or have access to or control of such information collected by a third party.

FTC Orders Data Brokers to Provide Consumer Data Practices Information. On December 18, the FTC issued orders requiring nine data brokerage companies to provide information about (i) the nature and sources of the consumer information the data brokers collect, (ii) how they use, maintain, and disseminate the information, and (iii) the extent to which the data brokers allow consumers to access and correct their information or to opt out of having their personal information sold. The FTC states that it plans to use the data to study privacy practices in the data broker industry, and to make recommendations as to how the industry could improve its privacy practices. Earlier this year, members of the House and Senate issued separate requests for similar material. The brokers targeted by the various requests and orders overlap only in part.

DOJ Announces LIBOR-related Criminal Charges and Penalties, Regulators Announce Parallel Civil Enforcement Actions. On December 19, both federal law enforcement and U.S. and foreign regulatory authorities announced that a Japanese bank and its Swiss bank parent company agreed to pay more than $1.5 billion to resolve criminal and civil investigations into the firms' role in the manipulation of the London Interbank Offered Rate (LIBOR), a global benchmark rate used in financial products and transactions. The DOJ announced that the Japanese bank has signed a plea agreement, whereby the bank agreed to pay a $100 million fine and plead guilty to one count of engaging in a scheme to defraud counterparties to interest rate derivatives trades by secretly manipulating LIBOR benchmark interest rates. In addition, its parent company entered into a non-prosecution agreement (NPA), whereby the parent company agreed to pay an additional $400 million penalty, admit to specified facts, and assist the DOJ with its ongoing LIBOR investigation. The DOJ explained that the NPA reflects the parent company's substantial cooperation in discovering and disclosing LIBOR misconduct within the institution and recognizes the significant remedial measures undertaken by new management to enhance internal controls. Domestic and foreign regulators also announced penalties and disgorgement to resolve parallel civil investigations, including a $700 million penalty obtained by the CFTC, $259.2 million as a result of a U.K. Financial Services Authority action, and $64.3 million to resolve a Swiss Financial Markets Authority action.

NCUA Files Its Largest MBS Suit To Date. On December 17, the National Credit Union Administration (NCUA) announced a lawsuit on behalf of four insolvent credit unions against a mortgage securitizer in which the agency alleges violations of federal and state securities laws in the sale of $3.6 billion in mortgage-backed securities. The complaint, which the NCUA filed in the U.S. District Court for the District of Kansas, claims that the securitizer made numerous misrepresentations and omissions in the offering documents regarding adherence to the originators' underwriting guidelines, which concealed the true risk associated with the securities and routinely overvalued them. When the allegedly risky securities lost value, the NCUA claims, the credit unions were forced into conservatorship and liquidated as a result of the losses sustained. The NCUA has eight similar suits pending, and it has previously settled similar claims for more than $170 million with three other mortgage securities firms.

Federal Banking Regulators Release 2013 CRA Asset-Size Threshold Adjustments. On December 19, the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation jointly announced the adjusted thresholds for asset size used to define small and intermediate small banks and savings associations under the Community Reinvestment Act. Effective January 1, 2013, a small bank or savings association will mean an institution that, as of December 31 of either of the past two years, had assets of less than $1.186

billion. An intermediate small bank or savings association will mean an institution with assets of at least $296 million as of December 31 of both of the prior two years, and less than $1.186 billion as of December 31 of either of the prior two years.

Federal Reserve Board Proposes New Oversight of Foreign Banks. On December 14, the Federal Reserve Board (FRB) announced a proposal to strengthen its capabilities to oversee certain foreign banks that operate in the U.S. The proposed rules generally apply to foreign banking organizations with a U.S. banking presence and total global consolidated assets of $50 billion or more and would subject certain U.S. operations of such firms to capital plan stress tests, single-counterparty credit limits, overall risk management, and early remediation. In addition, a foreign banking organization with both $50 billion or more in global consolidated assets and U.S. subsidiaries with $10 billion or more in total assets generally would be required to organize its U.S. subsidiaries under a single U.S. intermediate holding company (IHC) to allow for the consistent supervision and regulation of the U.S. operations of foreign banking organizations and help facilitate the resolution of failing U.S. operations of a foreign bank if needed. As proposed, the rules also would subject IHCs to the same risk-based and leverage capital standards applicable to U.S. bank holding companies. Further, IHCs with $50 billion or more in consolidated assets would be subject to the capital plan rule. Finally, the U.S. operations of any foreign banking organization with combined U.S. assets of $50 billion or more would be subject to certain enhanced liquidity requirements. The (FRB) plans to give covered foreign firms until July 1, 2015 to comply. Comments on the proposal are due by March 31, 2013.

Federal Reserve Board Updates Large Institution Supervision Framework. On December 17, the Federal Reserve Board (FRB) issued Supervisory Letter SR 12-17, which describes an updated framework for the consolidated supervision of large financial institutions in order to enhance the resilience of a firm, lower the probability of its failure, and reduce the impact on the financial system in the event of an institution's failure. With regard to the former, the letter specifies the FRB's expectations with regard to (i) capital and liquidity planning and position, (ii) corporate governance, (iii) recover planning, and (iv) management of core business lines. In support of its goal to reduce the impact of a failed firm, the letter describes the FRB's expectations with regard to (i) management of critical operations, (ii) support of banking offices, (iii) resolution planning, and (iv) other macroprudential supervisory approaches. The letter also summarizes the FRB's supervisory activities designed to assess each firm and support these goals. The framework applies to (i) Large Institution Supervision Coordinating Committee (LISCC) firms, (ii) domestic bank and savings and loan holding companies with consolidated assets of $50 billion or more that are not included in the LISCC portfolio, and (iii) foreign banking organizations with combined assets of U.S. operations of $50 billion or more that are not included in the LISCC portfolio.

FDIC Supervisory Insights Focuses on Mobile Payments and High-Yield Checking. On December 17, the FDIC published the Winter 2012 issues of Supervisory Insights. The two featured articles focus on mobile payments and high-yield checking. In "Mobile Payments: An Evolving Landscape," FDIC staff (i) review mobile payment technology, (ii) provide guidance regarding understanding and managing risks, and (iii) include a chart explaining the applicability of various federal laws to mobile payments. The article states that, going forward, non-bank mobile payment providers may start to capture greater market share from financial institutions and alter bank/customer relationships. The article describes the potential for banks to gradually be pushed out of the payment transaction, and identifies potential impacts of such disintermediation, including loss of access to key customer data. A second article, "High-Yield Checking Accounts: Know the Rules," reviews the features of high-yield checking accounts and identifies problematic disclosures that may accompany their promotion. The article identifies what examiners look for when examining high-yield account offerings and provides best practices for banks.

FDIC Releases Community Bank Study. On December 18, the FDIC released the results of a study of U.S. community banking and other community bank measures resulting from its year-long

Community Banking Initiative. The study explores the definition of a community bank, structural changes among community and non-community banks, the geography of community banking, the performance of community banks compared to non-community banks, the performance of community bank lending specialty groups, and capital formation at community banks. Other materials developed by the FDIC as part of the Initiative include the findings of a review of the FDIC's examination, rulemaking, and guidance processes.

Freddie Mac Offers Flexibility for Certain Selling Guide Verification Requirements. On December 14, Freddie Mac issued Bulletin 2012-28 (Bulletin), which provides sellers more flexibility with regard to certain required verifications. Under the new policy, Freddie Mac will (i) allow sellers to obtain a verbal verification of employment or a verification of existence of the business, as applicable, after the note date, provided the verifications are obtained prior to the delivery date, and (ii) provide additional options for sellers when documenting the terms of secondary financing, the fees and costs paid in connection with secondary financing and the evidence of subordination of secondary financing to the first lien. The Bulletin also (i) clarifies condominium project review and eligibility requirements, (ii) updates the Single-Family Seller/Servicer Guide (Guide) to reflect the new property valuation requirements for Relief Refinance Mortgages(SM) secured by properties affected by disasters, (iii) reminds sellers and servicers about base conforming loan limits and high-cost area loan limits for 2013, and (iv) reminds sellers and servicers who use the services of a warehouse lender that Freddie Mac may refuse to fund or delay funding if the warehouse lender has not submitted acceptable documentation as required in Guide Chapter 19.

Freddie Mac Supplements Storm Relief Guidance. On December 18, Freddie Mac updated its disaster relief policies through Bulletin 2012-29 (Bulletin). Effective immediately, but only temporarily, servicers must perform one interior disaster-related property inspection for delinquent mortgages secured by properties in eligible disaster areas that have been identified as abandoned as of, or prior to the date of the area being declared an eligible disaster area. Freddie Mac will reimburse servicers up to $20 per property for the additional costs associated with completing the interior inspections. For mortgages secured by properties located in eligible disaster areas, which were reported as current in the most recent reporting cycle just prior to the area being declared an eligible disaster area, Freddie Mac will reimburse servicers up to $10 per property for one exterior property inspection related to the disaster. The Bulletin also provides instructions regarding forbearance plans for borrowers who are or were in approved or active trial period plans and whose property or places of employment are located in an eligible Hurricane Sandy disaster area.

Fannie Mae Updates Selling Guide to Reflect Previously Announced Policies. On December 18, Fannie Mae issued Selling Guide Announcement SEL-2012-14 (Announcement) announcing updates to the Selling Guide to reflect previously announced changes related to disaster policy and DU Refi Plus™ and Refi Plus Property Policies™. The Announcement also (i) provides further clarification regarding escrow account requirements for refinance transactions and clarification that the escrow account requirements do not apply to DU Refi Plus and Refi Plus mortgage loans, (ii) incorporates the Desktop Underwriter® archiving, and (iii) includes updated links from eFannieMae.com to the new business Web portal.

HUD Revises FHA Recertification Fee Calculation, Issues 2013 Loan Limits. On December 11, Department of Housing and Urban Development (HUD) issued Mortgagee Letter 2012-27, which changes the way the Federal Housing Administration (FHA) will calculate the recertification fee for its approved lenders. Effective immediately, FHA will calculate recertification fees based on the number of FHA-approved branch offices as of the first business day of the lender's annual reporting period. Lenders that wish to terminate branches and thereby not pay a recertification fee for the next annual period must do so on or before the last business day of the annual reporting period. On December 6, Mortgagee Letter 12-26 announced the FHA's single-family loan limits for 2013. The

FHA national loan limit floor remains at 65 percent of the national conforming limit (which holds constant at $417,000 for a one-unit property). The letter also lists the maximum FHA loan limits by property size for areas designated as high-cost. The letter also identifies certain exceptions to the limits, and notes that the FHA maximum claim amount for reverse mortgages remains at the statutory limit of $625,500.

FTC Announces Departure of Consumer Protection Director. On December 17, the FTC announced that the Director of its Bureau of Consumer Protection, David Vladeck, will leave the agency on December 31, 2012. Since taking the position in 2009, Mr. Vladeck has led the Bureau's focus on financial fraud and consumer privacy. Charles Harwood, who currently serves as a Deputy Director in the Bureau, will take over as Acting Director of the Bureau of Consumer Protection. The FTC also announced that Eileen Harrington, the agency's Executive Director, will retire at the end of year, and that Pat Bak, who currently serves as Deputy Executive Director, will serve as Acting Executive Director.

SEC Names Acting Directors for Corporation Finance, Trading and Markets. On December 17, the Securities and Exchange Commission (SEC) announced that Lona Nallengara will serve as Acting Director of the Division of Corporation Finance, replacing Meredith Cross who recently announced her departure. Mr. Nallengara has served as Deputy Director for Legal and Regulatory Policy of the Division since March 2011 and has been responsible for overseeing the Division's offices of Chief Counsel, Enforcement Liaison, International Corporate Finance, Mergers and Acquisitions, and Small Business Policy. The SEC also announced that John Ramsay will replace Robert Cook, Director of the Division of Trading and Markets, on an acting basis when Mr. Cook departs after a short transition period. Mr. Ramsay has served since September 2010 as a Deputy Director for the Division and is responsible for broker-dealer financial responsibility, risk oversight, and clearance and settlement functions. He has played a key role in the advancement of rules mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

STATE ISSUES

NMLS Announces 2013 Annual Conference. On December 18, the NMLS announced that its fifth Annual Conference and Training will be held February 26 - March 1, 2013, in San Antonio, Texas. The Conference allows companies that manage financial services licenses or registration through NMLS to hear directly from state and federal policymakers regarding the NMLS system and regulatory and compliance developments.

New York Consumer Privacy Bill Takes Effect. Last week, a New York law designed to protect consumers' social security numbers took effect. As previously reported, Assembly Bill 8992 prohibits private businesses from conditioning the provision of services on a consumer's willingness to disclose his or her Social Security number upon request. The law provides several exceptions, including when the collection of the Social Security Number is (i) otherwise required by law, (ii) requested in connection with the opening of a deposit account or a credit transaction initiated by the consumer, or (iii) required for any business function allowed under the Gramm Leach Bliley Act.

COURTS

California Appeals Court Enjoins Nonjudicial Foreclosure for Lenders' Failure to Comply with HUD Servicing Requirements. On December 13, the California Court of Appeal for the First Appellate District held that the HUD servicing requirements were incorporated by reference into the borrowers' FHA deed of trust and served as conditions precedent to the acceleration of the debt or to foreclosure. *Pfeifer v. Countrywide Home Loans*, No. A133071, 2012 WL 6216039 (Cal. Ct. App. Dec. 13, 2012). In this case, after the lender declared the borrowers' FHA-insured mortgage in default and commenced nonjudicial foreclosure proceedings, the borrowers filed suit against the lender seeking general and punitive damages, as well as to enjoin the foreclosure proceedings and to obtain declaratory relief, for failure prior to provide the 30-day advance debt validation notice required by the Fair Debt Collection Practices Act (FDCPA) or to conduct a face-to-face interview required by HUD's servicing regulations prior to commencing foreclosure proceedings. On appeal, the court affirmed the lower court's ruling that the borrowers did not have a claim for damages against the collection firm under the FDCPA, because that firm was not a debt collector under the statute. However, the court reversed the trial court's judgment as to the borrowers' request for injunctive relief based on their wrongful foreclosure claim and their request for declaratory relief. The court agreed with the borrowers that the deed of trust incorporates by reference the servicing requirements of HUD, including the face-to-face interview, and the lenders had to comply with the servicing terms prior to commencing a valid nonjudicial foreclosure. The court also held that tender was not required, because the borrowers were seeking to enjoin a pending foreclosure sale based on the lenders' failure to comply with the HUD servicing requirements. Concurring with those courts that distinguish an offensive action from a defensive action, the court explained that the borrowers had no private right of action for failure to comply with the HUD regulations and could not seek damages based on their wrongful foreclosure action, but held that the HUD regulations may be used as an affirmative defense to a judicial foreclosure action instituted by the creditor.

Fifth Circuit Holds Data on Personal Cell Phone Not Protected by Stored Communications Act. On December 12, the U.S. Court of Appeals for the Fifth Circuit held that the Stored Communications Act (SCA) does not apply to data stored in a personal cell phone and affirmed a district court's grant of summary judgment to the defendants. *Garcia v. City of Laredo, Texas*, No. 11-41118, 2012 WL 6176479 (5th Cir. Dec. 12, 2012). In this case, after being terminated from her employment based on evidence downloaded by her employer from her cell phone, a former police dispatcher sued the City of Laredo for violating the SCA by accessing the contents of her cell phone without permission. The appeals court agreed with the district court that the cell phone data was not protected by the SCA. Consistent with decisions by the Eleventh Circuit and several district courts that the SCA does not apply to data stored on a personal computer, the court reasoned that an individual's cell phone is analogous to an individual's computer hard drive - it only enables, and does not provide an electronic communication service. Therefore, the court held, the contents of the device are outside the scope of the "facilities" covered by the SCA. The court affirmed summary judgment in favor of the City of Laredo.

California Federal District Court Holds Force-Placed Insurance Claims Not Preempted by National Bank Act. On December 11, the U.S. District Court for the Northern District of California refused to preempt under the National Bank Act claims that a mortgage lender breached its contract by force-placing a backdated flood insurance policy on the borrower's property. *Ellsworth v. U.S. Bank*, No. C 12-02506, 2012 WL 6176905 (N.D. Cal. Dec. 11, 2012). The borrower brought a putative class action against his lender and flood insurer on behalf of himself and similarly situated borrowers, alleging that the lender and insurance company overcharged him for a temporary force-placed flood insurance policy that was backdated, and for which the lender received a kickback from the insurer. The lender and insurer moved to dismiss on the grounds that the borrower's claims are preempted by the National Bank Act and barred by California's filed rate doctrine and the voluntary payment doctrine, and that the borrower failed to state a claim. The court held that the borrower's claims are not preempted by the National Bank Act because they are at their core about practices-the alleged kickbacks and backdating-rather than fees. Further, the court held that claims based on overcharging due to the alleged kickback scheme are not a challenge to the rates of the premiums, but rather the allegedly unlawful conduct, and therefore are not barred by the filed rate doctrine. The court also declined to dismiss based on the defendants' attempts to apply the voluntary payment doctrine and arguments the borrower failed to state a claim, and denied defendants' motions to dismiss.

FDIC Obtains Jury Verdict and Settlement in Separate Actions in California District Court Against Former Bank Officers and Prohibition Order Against Bank CEO. On December 7, the FDIC, as receiver of a failed bank, obtained a jury verdict in its favor in the U.S. District Court for the Central District of California against a group of former bank officers. *FDIC v. Van Dellen*, No. 10-CV-04915, Doc. 596 (C.D. Cal. Dec. 7, 2012). On December 12, the former chief executive officer of the same bank settled a separate FDIC civil action and consented to an order of prohibition from further participation in the banking industry. *FDIC v. Perry*, No. CV 11-5561 (C.D. Cal. Dec. 12, 2012); *In re Perry*, No. FDIC-12-642e. In the first case, the FDIC sued the group of former officers, alleging that, in pursuit of bonuses for high loan origination volumes, the officers approved homebuilder loans to unqualified borrowers. The jury found that the former officers breached their duty of care and acted negligently in approving 23 loans and awarded approximately $169 million in damages to the FDIC. In a separate action against the former CEO of the same bank, the FDIC alleged that the CEO was negligent in allowing the bank to generate mortgage loans in 2007 which the bank was then unable to sell, allegedly resulting in $600 million in losses to the bank. The CEO settled the FDIC's claims for $12 million, $1 million of which is to be paid from personal funds and the remainder from insurance funds. In addition, the CEO consented to an FDIC order prohibiting him from further participation in the conduct of any financial institution or organization.

FIRM NEWS

Season's Greetings from InfoBytes! Please note that this will be the final InfoBytes for 2012. We look forward to bringing you all the latest developments affecting the financial services industry, and more, when we return in 2013.

STAGE Network Completes Successful Year of Webinars, Other Outreach: During the past year the State Attorneys General Enforcement (STAGE) Network hosted several successful webinar presentations on timely issues related to the actions of state Attorneys General (AGs) and other enforcement actors in the financial services sector. One example was a January interview with former Rhode Island AG Patrick Lynch, featuring an "Insider's View" on dealing with state AGs. Another was a session with South Carolina AG Alan Wilson regarding his decision, along with two other state AGs to intervene in litigation concerning the Constitutionality of certain aspects of the Dodd-Frank financial reform legislation. Viewers of the Network's most recent webcast heard from former Florida AG Bill McCollum on the use of outside counsel by AGs offices, to both develop and pursue claims. To open its 2013 efforts, the Network plans to present a webinar focusing on recent enforcement activities by the Residential Mortgage Backed Securities (RMBS) Working Group, a federal / state initiative co-chaired by New York AG Eric Schneiderman. The webinar will be held in late January and will bring STAGE participants up to date on significant developments and expected activities related to the RMBS Working Group. Additional details concerning the STAGE Network are available at http://www.stage-network.com/.

Jonathan Cannon will speak at the Young Lawyers "Beer and Basics Program" at the American Bar Association's Consumer Financial Services Committee Winter Meeting on January 5, 2013 in Naples, FL. Mr. Cannon will discuss the CFPB's proposed mortgage servicing rules.

Jonice Gray Tucker will speak at the American Bar Association's Consumer Financial Services Committee Winter Meeting on January 6, 2013 in Naples, FL. The panel on which she is participating will address CFPB examinations and enforcement actions.

Joseph Reilly will speak at the American Bar Association's Consumer Financial Services Committee Winter Meeting on January 8, 2013 in Naples, FL. Mr. Reilly will participate on a panel entitled "The Ability-to-Repay / Qualified Mortgage Rule: The Saga Continues."

David Krakoff will be an instructor for the Second Annual NACDL White Collar Criminal Defense College at Stetson. He will participate in a panel presentation entitled "Overview of Handling a White Collar Case" on January 10, 2013.

David Whitaker will speak at the E-Signature Summit for Bank Executives on January 17, 2013 in New York City. Mr. Whitaker will be discussing key regulatory developments and judicial decisions of the past two years affecting the use of electronic records and signatures in electronic financial services.

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.

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.

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.

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

Elizabeth McGinn and Kristopher Knabe wrote "Ethical Issues in the Digital Age: Navigating E-Discovery Challenges" on November 1, 2012 for the American Bar Association.

Benjamin Klubes, Matthew Previn, Michelle Rogers, and Ann Wiles published "How the DOJ is Adapting in the War on Financial Fraud" in the November 9, 2012 issue of Law360.

Clinton Rockwell and Daniel Ladd published "SAFE, or Out? Who's In, Who's Not under the SAFE Act" in the November 20, 2012 issue of Consumer Financial Services Law Report.

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.

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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

CFPB Announces Mortgage Policy Field Hearings. On December 18, the CFPB announced field hearings on mortgage policy to be held on January 10, 2013 in Baltimore, MD, and on January 17, 2013, in Atlanta, GA. The CFPB is expected to finalize a series of mortgage-related rules by January 21, 2013. In the past, the CFPB has issued final rules or announced other policy initiatives in connection with field hearings.

NCUA Files Its Largest MBS Suit To Date. On December 17, the National Credit Union Administration (NCUA) announced a lawsuit on behalf of four insolvent credit unions against a mortgage securitizer in which the agency alleges violations of federal and state securities laws in the sale of $3.6 billion in mortgage-backed securities. The complaint, which the NCUA filed in the U.S. District Court for the District of Kansas, claims that the securitizer made numerous misrepresentations and omissions in the offering documents regarding adherence to the originators' underwriting guidelines, which concealed the true risk associated with the securities and routinely overvalued them. When the allegedly risky securities lost value, the NCUA claims, the credit unions were forced into conservatorship and liquidated as a result of the losses sustained. The NCUA has eight similar suits pending, and it has previously settled similar claims for more than $170 million with three other mortgage securities firms.

Freddie Mac Offers Flexibility for Certain Selling Guide Verification Requirements. On December 14, Freddie Mac issued Bulletin 2012-28 (Bulletin), which provides sellers more flexibility with regard to certain required verifications. Under the new policy, Freddie Mac will (i) allow sellers to obtain a verbal verification of employment or a verification of existence of the business, as applicable, after the note date, provided the verifications are obtained prior to the delivery date, and (ii) provide additional options for sellers when documenting the terms of secondary financing, the fees and costs paid in connection with secondary financing and the evidence of subordination of secondary financing to the first lien. The Bulletin also (i) clarifies condominium project review and eligibility requirements, (ii) updates the Single-Family Seller/Servicer Guide (Guide) to reflect the new property valuation requirements for Relief Refinance Mortgages(SM) secured by properties affected by disasters, (iii) reminds sellers and servicers about base conforming loan limits and high-cost area loan limits for 2013, and (iv) reminds sellers and servicers who use the services of a warehouse lender that Freddie Mac may refuse to fund or delay funding if the warehouse lender has not submitted acceptable documentation as required in Guide Chapter 19.

Freddie Mac Supplements Storm Relief Guidance. On December 18, Freddie Mac updated its disaster relief policies through Bulletin 2012-29 (Bulletin). Effective immediately, but only temporarily, servicers must perform one interior disaster-related property inspection for delinquent mortgages secured by properties in eligible disaster areas that have been identified as abandoned as of, or prior to the date of the area being declared an eligible disaster area. Freddie Mac will reimburse servicers up to $20 per property for the additional costs associated with completing the interior inspections. For mortgages secured by properties located in eligible disaster areas, which were reported as current in the most recent reporting cycle just prior to the area being declared an eligible disaster area, Freddie Mac will reimburse servicers up to $10 per property for one exterior property inspection related to the disaster. The Bulletin also provides instructions regarding forbearance plans for borrowers who are or were in approved or active trial period plans and whose property or places of employment are located in an eligible Hurricane Sandy disaster area.

Fannie Mae Updates Selling Guide to Reflect Previously Announced Policies. On December 18, Fannie Mae issued Selling Guide Announcement SEL-2012-14 (Announcement) announcing updates to the Selling Guide to reflect previously announced changes related to disaster policy and DU Refi Plus™ and Refi Plus Property Policies™. The Announcement also (i) provides further clarification regarding escrow account requirements for refinance transactions and clarification that the escrow account requirements do not apply to DU Refi Plus and Refi Plus mortgage loans, (ii) incorporates the Desktop Underwriter® archiving, and (iii) includes updated links from eFannieMae.com to the new business Web portal.

HUD Revises FHA Recertification Fee Calculation, Issues 2013 Loan Limits. On December 11, Department of Housing and Urban Development (HUD) issued Mortgagee Letter 2012-27, which changes the way the Federal Housing Administration (FHA) will calculate the recertification fee for its approved lenders. Effective immediately, FHA will calculate recertification fees based on the number of FHA-approved branch offices as of the first business day of the lender's annual reporting period. Lenders that wish to terminate branches and thereby not pay a recertification fee for the next annual period must do so on or before the last business day of the annual reporting period. On December 6, Mortgagee Letter 12-26 announced the FHA's single-family loan limits for 2013. The FHA national loan limit floor remains at 65 percent of the national conforming limit (which holds constant at $417,000 for a one-unit property). The letter also lists the maximum FHA loan limits by property size for areas designated as high-cost. The letter also identifies certain exceptions to the limits, and notes that the FHA maximum claim amount for reverse mortgages remains at the statutory limit of $625,500.

NMLS Announces 2013 Annual Conference. On December 18, the NMLS announced that its fifth Annual Conference and Training will be held February 26 - March 1, 2013, in San Antonio, Texas. The Conference allows companies that manage financial services licenses or registration through NMLS to hear directly from state and federal policymakers regarding the NMLS system and regulatory and compliance developments.

California Appeals Court Enjoins Nonjudicial Foreclosure for Lenders' Failure to Comply with HUD Servicing Requirements. On December 13, the California Court of Appeal for the First Appellate District held that the HUD servicing requirements were incorporated by reference into the borrowers' FHA deed of trust and served as conditions precedent to the acceleration of the debt or to foreclosure. *Pfeifer v. Countrywide Home Loans*, No. A133071, 2012 WL 6216039 (Cal. Ct. App. Dec. 13, 2012). In this case, after the lender declared the borrowers' FHA-insured mortgage in default and commenced nonjudicial foreclosure proceedings, the borrowers filed suit against the lender seeking general and punitive damages, as well as to enjoin the foreclosure proceedings and to obtain declaratory relief, for failure prior to provide the 30-day advance debt validation notice required by the Fair Debt Collection Practices Act (FDCPA) or to conduct a face-to-face interview required by HUD's servicing regulations prior to commencing foreclosure proceedings. On appeal, the court affirmed the lower court's ruling that the borrowers did not have a claim for damages against the collection firm under the FDCPA, because that firm was not a debt collector under the statute. However, the court reversed the trial court's judgment as to the borrowers' request for injunctive relief based on their wrongful foreclosure claim and their request for declaratory relief. The court agreed with the borrowers that the deed of trust incorporates by reference the servicing requirements of HUD, including the face-to-face interview, and the lenders had to comply with the servicing terms prior to commencing a valid nonjudicial foreclosure. The court also held that tender was not required, because the borrowers were seeking to enjoin a pending foreclosure sale based on the lenders' failure to comply with the HUD servicing requirements. Concurring with those courts that distinguish an offensive action from a defensive action, the court explained that the borrowers had no private right of action for failure to comply with the HUD regulations and could not seek damages based on their wrongful foreclosure action, but held that the HUD regulations may be used as an affirmative defense to a judicial foreclosure action instituted by the creditor.

FDIC Obtains Jury Verdict and Settlement in Separate Actions in California District Court Against Former Bank Officers and Prohibition Order Against Bank CEO. On December 7, the FDIC, as receiver of a failed bank, obtained a jury verdict in its favor in the U.S. District Court for the Central District of California against a group of former bank officers. *FDIC v. Van Dellen*, No. 10-CV-04915, Doc. 596 (C.D. Cal. Dec. 7, 2012). On December 12, the former chief executive officer of the same bank settled a separate FDIC civil action and consented to an order of prohibition from further participation in the banking industry. *FDIC v. Perry*, No. CV 11-5561 (C.D. Cal. Dec. 12, 2012); *In re Perry*, No. FDIC-12-642e. In the first case, the FDIC sued the group of former officers, alleging that, in pursuit of bonuses for high loan origination volumes, the officers approved homebuilder loans to unqualified borrowers. The jury found that the former officers breached their duty of care and acted negligently in approving 23 loans and awarded approximately $169 million in damages to the FDIC. In a separate action against the former CEO of the same bank, the FDIC alleged that the CEO was negligent in allowing the bank to generate mortgage loans in 2007 which the bank was then unable to sell, allegedly resulting in $600 million in losses to the bank. The CEO settled the FDIC's claims for $12 million, $1 million of which is to be paid from personal funds and the remainder from insurance funds. In addition, the CEO consented to an FDIC order prohibiting him from further participation in the conduct of any financial institution or organization.

BANKING

CFPB Realigns Supervision Team. On December 17, the CFPB announced a reorganization of part of its Division of Supervision, Enforcement, and Fair Lending. Effective immediately, CFPB staff members responsible for supervision activities are organized in two offices: Examinations and Policy. Previously, supervision staff were organized into offices for Nonbank Supervision and Large Bank Supervision. According to the CFPB's announcement, the Examinations team will (i) recruit, train, and commission examiners, (ii) ensure policies and procedures are followed, and (iii) plan and execute examinations appropriately in light of resources and priorities. The CFPB's four regional offices will report to the Examinations team, which is being led, on an acting basis, by Paul Sanford. Mr. Sanford had been Acting Assistant Director for Large Bank Supervision. The CFPB explains that its Policy team will ensure that policy decisions for supervision are consistent with both the law and the CFPB's mission, and that such decisions are consistent across markets, charters, and regions. The Policy team will be further organized by product or service market, rather than by the type of financial institution. Each market team will be responsible for developing supervision strategy and policy across both bank and nonbank markets. Peggy Twohig, formerly the head of the CFPB's Nonbank Supervision office, will be the Assistant Director of Supervision Policy.

DOJ Announces LIBOR-related Criminal Charges and Penalties, Regulators Announce Parallel Civil Enforcement Actions. On December 19, both federal law enforcement and U.S. and foreign regulatory authorities announced that a Japanese bank and its Swiss bank parent company agreed to pay more than $1.5 billion to resolve criminal and civil investigations into the firms' role in the manipulation of the London Interbank Offered Rate (LIBOR), a global benchmark rate used in financial products and transactions. The DOJ announced that the Japanese bank has signed a plea agreement, whereby the bank agreed to pay a $100 million fine and plead guilty to one count of engaging in a scheme to defraud counterparties to interest rate derivatives trades by secretly manipulating LIBOR benchmark interest rates. In addition, its parent company entered into a non-prosecution agreement (NPA), whereby the parent company agreed to pay an additional $400 million penalty, admit to specified facts, and assist the DOJ with its ongoing LIBOR investigation. The DOJ explained that the NPA reflects the parent company's substantial cooperation in discovering and disclosing LIBOR misconduct within the institution and recognizes the significant remedial measures undertaken by new management to enhance internal controls. Domestic and foreign regulators also announced penalties and disgorgement to resolve parallel civil investigations, including a $700 million penalty obtained by the CFTC, $259.2 million as a result of a U.K. Financial Services Authority action, and $64.3 million to resolve a Swiss Financial Markets Authority action.

Federal Banking Regulators Release 2013 CRA Asset-Size Threshold Adjustments. On December 19, the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation jointly announced the adjusted thresholds for asset size used to define small and intermediate small banks and savings associations under the Community Reinvestment Act. Effective January 1, 2013, a small bank or savings association will mean an institution that, as of December 31 of either of the past two years, had assets of less than $1.186

billion. An intermediate small bank or savings association will mean an institution with assets of at least $296 million as of December 31 of both of the prior two years, and less than $1.186 billion as of December 31 of either of the prior two years.

Federal Reserve Board Proposes New Oversight of Foreign Banks. On December 14, the Federal Reserve Board (FRB) announced a proposal to strengthen its capabilities to oversee certain foreign banks that operate in the U.S. The proposed rules generally apply to foreign banking organizations with a U.S. banking presence and total global consolidated assets of $50 billion or more and would subject certain U.S. operations of such firms to capital plan stress tests, single-counterparty credit limits, overall risk management, and early remediation. In addition, a foreign banking organization with both $50 billion or more in global consolidated assets and U.S. subsidiaries with $10 billion or more in total assets generally would be required to organize its U.S. subsidiaries under a single U.S. intermediate holding company (IHC) to allow for the consistent supervision and regulation of the U.S. operations of foreign banking organizations and help facilitate the resolution of failing U.S. operations of a foreign bank if needed. As proposed, the rules also would subject IHCs to the same risk-based and leverage capital standards applicable to U.S. bank holding companies. Further, IHCs with $50 billion or more in consolidated assets would be subject to the capital plan rule. Finally, the U.S. operations of any foreign banking organization with combined U.S. assets of $50 billion or more would be subject to certain enhanced liquidity requirements. The (FRB) plans to give covered foreign firms until July 1, 2015 to comply. Comments on the proposal are due by March 31, 2013.

Federal Reserve Board Updates Large Institution Supervision Framework. On December 17, the Federal Reserve Board (FRB) issued Supervisory Letter SR 12-17, which describes an updated framework for the consolidated supervision of large financial institutions in order to enhance the resilience of a firm, lower the probability of its failure, and reduce the impact on the financial system in the event of an institution's failure. With regard to the former, the letter specifies the FRB's expectations with regard to (i) capital and liquidity planning and position, (ii) corporate governance, (iii) recover planning, and (iv) management of core business lines. In support of its goal to reduce the impact of a failed firm, the letter describes the FRB's expectations with regard to (i) management of critical operations, (ii) support of banking offices, (iii) resolution planning, and (iv) other macroprudential supervisory approaches. The letter also summarizes the FRB's supervisory activities designed to assess each firm and support these goals. The framework applies to (i) Large Institution Supervision Coordinating Committee (LISCC) firms, (ii) domestic bank and savings and loan holding companies with consolidated assets of $50 billion or more that are not included in the LISCC portfolio, and (iii) foreign banking organizations with combined assets of U.S. operations of $50 billion or more that are not included in the LISCC portfolio.

FDIC Releases Community Bank Study. On December 18, the FDIC released the results of a study of U.S. community banking and other community bank measures resulting from its year-long Community Banking Initiative. The study explores the definition of a community bank, structural changes among community and non-community banks, the geography of community banking, the performance of community banks compared to non-community banks, the performance of community bank lending specialty groups, and capital formation at community banks. Other materials developed by the FDIC as part of the Initiative include the findings of a review of the FDIC's examination, rulemaking, and guidance processes.

CONSUMER FINANCE

CFPB Realigns Supervision Team. On December 17, the CFPB announced a reorganization of part of its Division of Supervision, Enforcement, and Fair Lending. Effective immediately, CFPB staff members responsible for supervision activities are organized in two offices: Examinations and Policy. Previously, supervision staff were organized into offices for Nonbank Supervision and Large

Bank Supervision. According to the CFPB's announcement, the Examinations team will (i) recruit, train, and commission examiners, (ii) ensure policies and procedures are followed, and (iii) plan and execute examinations appropriately in light of resources and priorities. The CFPB's four regional offices will report to the Examinations team, which is being led, on an acting basis, by Paul Sanford. Mr. Sanford had been Acting Assistant Director for Large Bank Supervision. The CFPB explains that its Policy team will ensure that policy decisions for supervision are consistent with both the law and the CFPB's mission, and that such decisions are consistent across markets, charters, and regions. The Policy team will be further organized by product or service market, rather than by the type of financial institution. Each market team will be responsible for developing supervision strategy and policy across both bank and nonbank markets. Peggy Twohig, formerly the head of the CFPB's Nonbank Supervision office, will be the Assistant Director of Supervision Policy.

CFPB Releases Student Lending Examination Procedures. On December 17, the CFPB released its Student Lending Examination Procedures, which are an extension of the CFPB's General Supervision and Examination Manual and will be used as a field guide by CFPB examiners to review student lender compliance with federal consumer financial laws. The Student Lending Examination Procedures are organized in seven modules: (i) Advertising, Marketing, and Lead Generation, (ii) Application, Qualification, Loan Origination, and Disbursement, (iii) Loan Repayment, Account Maintenance, Payoff Processing, and Payment Plans, (iv) Customer Inquiries and Complaints, (v) Collections, Accounts in Default, and Credit Reporting, (vi) Information Sharing and Privacy, and (vii) Examination Conclusion and Wrap-up. Under the first module, for example, CFPB examiners will assess whether a lender's advertising and marketing practices are deceptive, misleading, or discriminatory by sampling all of the lender's marketing and advertising materials, including print, electronic and other media, such as the Internet, email and text messages, telephone solicitation scripts, agreements and disclosures. With regard to borrower complaints, examiners will assess, among other things, the systems, procedures, and policies used by a lender for tracking, handling, investigating, and resolving consumer inquiries, disputes, and complaints. The CFPB has the authority to supervise large bank and nonbank student lenders, and, as with its other procedures, the CFPB will use the same examination procedures across both types of institutions.

CFPB Announces Mortgage Policy Field Hearings. On December 18, the CFPB announced field hearings on mortgage policy to be held on January 10, 2013 in Baltimore, MD, and on January 17, 2013, in Atlanta, GA. The CFPB is expected to finalize a series of mortgage-related rules by January 21, 2013. In the past, the CFPB has issued final rules or announced other policy initiatives in connection with field hearings.

CFPB Seeks Public Input on Impacts of CARD Act. On December 19, the CFPB issued a notice and request for information about the impact of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act or Act) on the consumer credit card market. The request seeks information about: (i) how the CARD Act has changed the substantive terms and conditions of credit card agreements, (ii) the effectiveness of disclosure of terms, fees, and other expenses of credit card plans, (iii) the adequacy of protections against unfair or deceptive acts or practices relating to credit card plans, and (iv) whether the Act has affected the cost and availability of credit, the safety and soundness of any credit card issuers, the use of risk-based pricing, or the innovation of new products. The CFPB explained that it will use the data gathered to prepare a publicly available report to Congress on the state of the consumer credit card market, and to inform future policy decisions regarding credit cards. The CFPB will accept comments for 60 days following publication of the notice in the Federal Register.

FTC Announces Departure of Consumer Protection Director. On December 17, the FTC announced that the Director of its Bureau of Consumer Protection, David Vladeck, will leave the agency on December 31, 2012. Since taking the position in 2009, Mr. Vladeck has led the Bureau's focus on financial fraud and consumer privacy. Charles Harwood, who currently serves as a Deputy Director in the Bureau, will take over as Acting Director of the Bureau of Consumer Protection. The FTC also announced that Eileen Harrington, the agency's Executive Director, will retire at the end of year, and that Pat Bak, who currently serves as Deputy Executive Director, will serve as Acting Executive Director.

SECURITIES

SEC Names Acting Directors for Corporation Finance, Trading and Markets. On December 17, the Securities and Exchange Commission (SEC) announced that Lona Nallengara will serve as Acting Director of the Division of Corporation Finance, replacing Meredith Cross who recently announced her departure. Mr. Nallengara has served as Deputy Director for Legal and Regulatory Policy of the Division since March 2011 and has been responsible for overseeing the Division's offices of Chief Counsel, Enforcement Liaison, International Corporate Finance, Mergers and Acquisitions, and Small Business Policy. The SEC also announced that John Ramsay will replace Robert Cook, Director of the Division of Trading and Markets, on an acting basis when Mr. Cook departs after a short transition period. Mr. Ramsay has served since September 2010 as a Deputy Director for the Division and is responsible for broker-dealer financial responsibility, risk oversight, and clearance and settlement functions. He has played a key role in the advancement of rules mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

CREDIT CARDS

CFPB Seeks Public Input on Impacts of CARD Act. On December 19, the CFPB issued a notice and request for information about the impact of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act or Act) on the consumer credit card market. The request seeks information about: (i) how the CARD Act has changed the substantive terms and conditions of credit card agreements, (ii) the effectiveness of disclosure of terms, fees, and other expenses of credit card plans, (iii) the adequacy of protections against unfair or deceptive acts or practices relating to credit card plans, and (iv) whether the Act has affected the cost and availability of credit, the safety and soundness of any credit card issuers, the use of risk-based pricing, or the innovation of new products. The CFPB explained that it will use the data gathered to prepare a publicly available report to Congress on the state of the consumer credit card market, and to inform future policy decisions regarding credit cards. The CFPB will accept comments for 60 days following publication of the notice in the Federal Register.

INSURANCE

California Federal District Court Holds Force-Placed Insurance Claims Not Preempted by National Bank Act. On December 11, the U.S. District Court for the Northern District of California refused to preempt under the National Bank Act claims that a mortgage lender breached its contract by force-placing a backdated flood insurance policy on the borrower's property. *Ellsworth v. U.S. Bank*, No. C 12-02506, 2012 WL 6176905 (N.D. Cal. Dec. 11, 2012). The borrower brought a putative class action against his lender and flood insurer on behalf of himself and similarly situated borrowers, alleging that the lender and insurance company overcharged him for a temporary force-placed flood insurance policy that was backdated, and for which the lender received a kickback from the insurer. The lender and insurer moved to dismiss on the grounds that the borrower's claims are preempted by the National Bank Act and barred by California's filed rate doctrine and the voluntary payment doctrine, and that the borrower failed to state a claim. The court held that the borrower's claims are not preempted by the National Bank Act because they are at their core about practices-the alleged kickbacks and backdating-rather than fees. Further, the court held that claims based on overcharging due to the alleged kickback scheme are not a challenge to the rates of the premiums, but rather the allegedly unlawful conduct, and therefore are not barred by the filed rate doctrine. The court also declined to dismiss based on the defendants' attempts to apply the voluntary payment doctrine and arguments the borrower failed to state a claim, and denied defendants' motions to dismiss.

E-COMMERCE

FDIC Supervisory Insights Focuses on Mobile Payments and High-Yield Checking. On December 17, the FDIC published the Winter 2012 issues of Supervisory Insights. The two featured articles focus on mobile payments and high-yield checking. In "Mobile Payments: An Evolving Landscape," FDIC staff (i) review mobile payment technology, (ii) provide guidance regarding understanding and managing risks, and (iii) include a chart explaining the applicability of various federal laws to mobile payments. The article states that, going forward, non-bank mobile payment providers may start to capture greater market share from financial institutions and alter bank/customer relationships. The article describes the potential for banks to gradually be pushed out of the payment transaction, and identifies potential impacts of such disintermediation, including loss of access to key customer data. A second article, "High-Yield Checking Accounts: Know the Rules," reviews the features of high-yield checking accounts and identifies problematic disclosures that may accompany their promotion. The article identifies what examiners look for when examining high-yield account offerings and provides best practices for banks.

PRIVACY/DATA SECURITY

FTC Finalizes Children's' Privacy Rule Amendments. On December 19, the FTC announced final amendments to the Children's Online Privacy Protection Act Rule. According to the FTC's release, the final amendments (i) include geolocation information, photographs, and videos in the list of "personal information" that cannot be collected from children under 13 without parental notice and consent, (ii) offer companies a streamlined, voluntary, and transparent approval process for new ways of getting parental consent, (iii) close a loophole that allowed kid-directed apps and websites to permit third parties to collect personal information from children through plug-ins without parental notice and consent, (iv) require compliance by such third parties in some of those cases, (v) require compliance by persistent identifiers that can recognize users over time and across different websites or online services, (vi) require that covered website operators and online service providers take reasonable steps to release children's personal information only to companies that are capable of keeping it secure and confidential, (vii) require that covered website operators adopt reasonable procedures for data retention and deletion, and (viii) strengthen the FTC's oversight of self-regulatory safe harbor programs. The amendments also modify several other key definitions in the rule. Notably, the revised definition of "operator" clarifies that the rule covers a child-directed site or service that integrates outside services that collect personal information from its visitors, but it does not extend liability to platforms that merely offer the public access to child-directed apps. FTC Commissioner Maureen Ohlhausen voted against the amendments and issued a dissenting statement in which she argued that the new definition of "operator" goes beyond what Congress authorized by imposing obligations on websites or online services that do not collect personal information from children or have access to or control of such information collected by a third party.

FTC Orders Data Brokers to Provide Consumer Data Practices Information. On December 18, the FTC issued orders requiring nine data brokerage companies to provide information about (i) the nature and sources of the consumer information the data brokers collect, (ii) how they use, maintain, and disseminate the information, and (iii) the extent to which the data brokers allow consumers to access and correct their information or to opt out of having their personal information sold. The FTC states that it plans to use the data to study privacy practices in the data broker industry, and to make recommendations as to how the industry could improve its privacy practices. Earlier this year, members of the House and Senate issued separate requests for similar material. The brokers targeted by the various requests and orders overlap only in part.

New York Consumer Privacy Bill Takes Effect. Last week, a New York law designed to protect consumers' social security numbers took effect. As previously reported, Assembly Bill 8992 prohibits private businesses from conditioning the provision of services on a consumer's willingness to disclose his or her Social Security number upon request. The law provides several exceptions, including when the collection of the Social Security Number is (i) otherwise required by law, (ii) requested in connection with the opening of a deposit account or a credit transaction initiated by the consumer, or (iii) required for any business function allowed under the Gramm Leach Bliley Act.

Fifth Circuit Holds Data on Personal Cell Phone Not Protected by Stored Communications Act. On December 12, the U.S. Court of Appeals for the Fifth Circuit held that the Stored Communications Act (SCA) does not apply to data stored in a personal cell phone and affirmed a district court's grant of summary judgment to the defendants. *Garcia v. City of Laredo, Texas*, No. 11-41118, 2012 WL 6176479 (5th Cir. Dec. 12, 2012). In this case, after being terminated from her employment based on evidence downloaded by her employer from her cell phone, a former police dispatcher sued the City of Laredo for violating the SCA by accessing the contents of her cell phone without permission. The appeals court agreed with the district court that the cell phone data was not protected by the SCA. Consistent with decisions by the Eleventh Circuit and several district courts that the SCA does not apply to data stored on a personal computer, the court reasoned that an individual's cell phone is analogous to an individual's computer hard drive - it only enables, and does not provide an electronic communication service. Therefore, the court held, the contents of the device are outside the scope of the "facilities" covered by the SCA. The court affirmed summary judgment in favor of the City of Laredo.

PAYMENTS

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CRIMINAL ENFORCEMENT

DOJ Announces LIBOR-related Criminal Charges and Penalties, Regulators Announce Parallel Civil Enforcement Actions. On December 19, both federal law enforcement and U.S. and foreign regulatory authorities announced that a Japanese bank and its Swiss bank parent company agreed to pay more than $1.5 billion to resolve criminal and civil investigations into the firms' role in the manipulation of the London Interbank Offered Rate (LIBOR), a global benchmark rate used in financial products and transactions. The DOJ announced that the Japanese bank has signed a plea agreement, whereby the bank agreed to pay a $100 million fine and plead guilty to one count of engaging in a scheme to defraud counterparties to interest rate derivatives trades by secretly manipulating LIBOR benchmark interest rates. In addition, its parent company entered into a non-prosecution agreement (NPA), whereby the parent company agreed to pay an additional $400 million penalty, admit to specified facts, and assist the DOJ with its ongoing LIBOR investigation. The DOJ explained that the NPA reflects the parent company's substantial cooperation in discovering and disclosing LIBOR misconduct within the institution and recognizes the significant remedial measures undertaken by new management to enhance internal controls. Domestic and foreign regulators also announced penalties and disgorgement to resolve parallel civil investigations, including a $700 million penalty obtained by the CFTC, $259.2 million as a result of a U.K. Financial Services Authority action, and $64.3 million to resolve a Swiss Financial Markets Authority action.