Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

May 3, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

OCC, FDIC Announce Overdraft Enforcement Actions. On April 30, the OCC and the FDICannounced parallel enforcement actions against a national bank and an affiliated state bank to resolve allegations that the institutions violated Section 5 of the FTC Act in their marketing and implementation of overdraft protection programs, checking rewards programs, and stop-payment processes for preauthorized recurring electronic fund transfers. The OCC claims that (i) bank employees failed to disclose technical limitations of the standard overdraft protection practices opt-out, (ii) the bank's overdraft opt-in notice described fees that the bank did not actually charge, (iii) the bank failed to disclose that it would not transfer funds from a savings account to cover overdrafts in linked checking accounts if the savings account did not have funds to cover the entire overdrawn balance on a given day, even if the available funds would have covered one or more overdrawn items, (iv) the bank failed to disclose technical limitations of its preauthorized recurring electronic funds transfers that prevented it from stopping certain transfers upon customer request, and (v) the bank failed to disclose posting date requirements for its checking reward program. The OCC orders require the bank to pay approximately $2.5 million in restitution and a $5 million civil money penalty. In addition, the bank must (i) appoint an independent compliance committee, (ii) update its compliance risk management systems with appropriate policies and procedures, and (iii) adjust its written compliance risk management policy. The FDIC order requires the state bank to refund customers roughly $1.4 million and pay a $5 million civil penalty.

CFPB Issues Revised Remittance Transfer Rule. On April 30, the CFPB issued a revised final rule to amend regulations applicable to consumer remittance transfers of over fifteen dollars originating in the United States and sent internationally. Generally, the rule requires remittance transfer providers to (i) provide written pre-payment disclosures of the exchange rates and fees associated with a transfer of funds, as well as the amount of funds the recipient will receive, and (ii)

investigate consumer disputes and remedy errors. The revised rule makes optional the original requirement to disclose (i) recipient institution fees for transfers to an account, except where the recipient institution is acting as an agent of the provider and (ii) taxes imposed by a person other than the remittance transfer provider. Instead, the revised rule requires providers to include a disclaimer on disclosures that the recipient may receive less than the disclosed total value due to these two categories of fees and taxes. The revised rule exempts from certain error resolution requirements two additional errors: (i) providing an incorrect account number or (ii) providing an incorrect recipient institution identifier. For the exception to apply, a remittance transfer provider must (i) notify the sender prior to the transfer that the transfer amount could be lost, (ii) implement reasonable measures to verify the accuracy of a recipient institution identifier, and (iii) make reasonable efforts to retrieve misdirected funds. In addition, the revised rule provides institutions more time to comply with the new remittance transfer standards. The final regulations, as revised by this rule, take effect on October 28, 2013.

CFPB Publishes Additional Mortgage Rule Compliance Guides. On May 2, the CFPB published three additional guides to assist companies seeking to comply with its HOEPA rule, ECOA valuations rule, and TILA high-priced mortgage appraisal rule. As with otherprior guides it has released**,** the CFPB cautions that the guides are not a substitute for the rules and the Official Interpretations, and that the guides do not consider other federal or state laws that may apply to the origination of mortgage loans. BuckleySandler also has prepared detailed analyses of these and other CFPB mortgage rules.

CFPB Amends Credit Card Ability-to-Pay Rule. On April 29, the CFPB amended Regulation Z to make it easier for spouses or partners who do not work outside of the home to qualify for credit cards. Regulation Z generally requires that credit card issuers consider an applicant's independent ability to pay regardless of age. A Federal Reserve Board rule adopted to implement the Credit CARD Act, which took effect on October 1, 2011, required card issuers to consider only an individual card applicant's independent income or assets. The rule received criticism from members of Congress and other stakeholders who argued the rule limited access to credit for stay-at-home spouses and partners. The CFPB's revised rule allows credit card issuers to consider third-party income for a consumer who is 21 or older, if the applicant has a reasonable expectation of access to such income. The CFPB rule does not change the independent ability to pay requirement for individuals under 21 years old. The rule is effective as of May 3, 2013 and compliance with the rule is required by November 4, 2013. Card issuers may, at their option, comply with the rule prior to that date.

CFPB Issues Semiannual Servicemember Complaint Report. On May 1, the CFPB's Office of Servicemember Affairs published its Semi-Annual Complaint Report, which states that the volume of complaints from servicemembers, veterans, and their families has steadily increased since the CFPB first started accepting complaints in July 2011. The report provides limited summary information about the complaints, noting that mortgage complaints predominate, followed by credit card and credit reporting complaints. In a related blog post, the CFPB states that it has received more than 5,000 servicemember complaints to date, and calls again for additional questions or complaints from the entire military community.

Federal Reserve Board Issues Statement on Deposit Advance Products. On April 25, the Federal Reserve Board issued a policy statement on deposit advance products. The statement came on the same day that the OCC and the FDIC proposed more formal guidance for such products. The Board statement identifies potential "significant risks" associated with deposit advance products, including UDAP risk and other consumer compliance risk. The statement directs examiners to thoroughly review any deposit advance products offered by supervised institutions for compliance with Section 5 of the FTC Act and reminds banks of their responsibility for vendors hired

to offer deposit advance products.

President Obama Nominates New FHFA Director. On May 1, President Obama announced the nomination of Representative Mel Watt (D-NC) to serve as Director of the FHFA. Mr. Watt has represented portions of Charlotte and other North Carolina communities since 1993 and currently is a member of the House Committees on Financial Services and Judiciary. He would replace FHFA Acting Director Edward DeMarco, who federal and state Democratic policymakers and housing groups have called on to be replaced, in part based on his decision to not direct Fannie Mae and Freddie Mac to engage in broad principal reduction programs. On the same day as the President's announcement, the Congressional Budget Office released a report that examined three options for Fannie Mae and Freddie Mac to use principal forgiveness, which the CBO finds would be likely to (i) result in small savings to the government, (ii) slightly reduce mortgage foreclosure and delinquency rates, and (iii) slightly boost overall economic growth.

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Fannie Mae Announces Miscellaneous Servicing Policy Changes. On May 1, Fannie Mae issued Servicing Guide Announcement SVC-2013-10, which includes numerous servicing policy changes. The announcement informs servicers that they must (i) conduct regular testing of compliance with applicable laws in all jurisdictions in which they service mortgage loans for Fannie Mae, (ii) provide test results to senior management and, upon request, to Fannie Mae, and (iii)

maintain evidence of any corrective actions. For eMortgages, the Announcement explains that servicers must obtain special approval to service such mortgages by contacting their Servicing Consultant, Portfolio Manager, or Fannie Mae's National Servicing Organization's Servicing Solutions Center. The Announcement also (i) provides new requirements for repayments of escrow deficits and shortages for all conventional loan modifications, (ii) requires servicers to obtain the results of property valuation order requests for the purposes of bidding instructions through HomeSaver Solutions® Network within 7 to 10 calendar days from the date the servicer submits the request, (iii) clarifies delinquency management and default prevention policies outlined in SVC-2012-18, (iv) removes Guide language regarding temporary possession of mortgage notes, and (v) incorporates a recent change to Moody's rating system.

HUD Supplements Guidance on FHA Lender Insurance Program. On May 1, HUD issued Mortgagee Letter 2013-12, which updates and replaces another recently issued letter - 2013-10 - on the FHA's Lender Insurance Program. The letter explains enhancements to that program, which allows high-performing mortgagees to conduct pre-endorsement reviews and insure loans. Those enhancements were implemented by a January 2012 HUD rule. The letter summarizes changes made by that rule, reviews mortgagee eligibility requirements for participation in the Lender Insurance program, and outlines the initial application process. Among other things, the letter also discusses the conditions under which a mortgagee's lender insurance authority can be terminated or suspended and explains how mortgages with such authority are subject to a revised indemnification policy.

CFPB, FTC Announce Roundtable on Data Integrity in Debt Collection. On May 1, the FTC and the CFPB announced a roundtable to "examine the flow of consumer data throughout the debt collection process" and discuss (i) the amount of documentation and other information currently available to different types of collectors and at different points in the debt collection process, (ii) the information needed to verify and substantiate debts, (iii) the costs and benefits of providing consumers with additional disclosures about their debts and debt-related rights, and (iv) information issues relating to pleading and judgment in debt collection litigation. The event will be held on June 6, 2013 in Washington, DC and is open to the public.

CFPB Announces Consumer Advisory Board Meeting. On May 1, the CFPB announced its next Consumer Advisory Board Meeting, scheduled for May 15, 2013 in Los Angeles, CA. The meeting agenda includes a public session that will feature remarks from CFPB Director Cordray and comments from consumer groups, community and industry representatives, and members of the public.

CFPB Proposes Financial Education Policies. On April 30, the CFPB published policy recommendations for advancing K-12 financial education. The paper, "Transforming the Financial Lives of a Generation of Young Americans," identifies perceived problems for young people in the financial marketplace and reviews current approaches to financial education for the target age groups. The CFPB recommends that state policymakers and educators (i) introduce key financial education concepts early and make a stand-alone financial education course a graduation requirement for high school students, (ii) include personal financial management questions in standardized tests, (iii) provide opportunities throughout the K-12 years to practice money management through innovative, hands-on learning opportunities, (iv) create consistent opportunities and incentives for teachers to take financial education training for use in teaching financial management to their students, and (v) encourage parents and guardians to discuss money management topics at home and provide them with the tools necessary to have conversations about money with their children.

CFPB Explains Use of Civil Penalty Fund. On April 26, the CFPB issued a final rule that (i)

establishes the governance structure of the Civil Penalty Fund, including the position of Civil Penalty Fund Administrator, (ii) identifies categories of victims who may receive funds and the amounts they may receive, (iii) establishes procedures for allocating funds for payments to victims and for consumer education and financial literacy programs, and for distributing allocated funds to individual victims, (iv) describes the circumstances in which payments to certain victims or classes of victims will be deemed impracticable, and (v) requires the Administrator to issue regular reports. While the CFPB issued the rule without a notice and comment period because the rule is exempt from the Administrative Procedures Act and other rulemaking requirements, it also issued a related proposal in which the CFPB seeks comment on, among other things, (i) whether it should make payments to victims of any *type* of "activities" for which it has imposed civil penalties, even if no enforcement action imposed a civil penalty for the *particular* "activities" that harmed the victim, (ii) whether it should limit payments to a share of the civil penalties collected for the particular violations that harmed a consumer, as opposed to using general Civil Penalty Fund dollars, and (iii) alternatives to the allocation procedures to be used when sufficient funds are not available to compensate fully the uncompensated harm of all victims to whom it is practicable to make payments. Comments on the proposal are due within 60 days of its publication in the Federal Register.

NIST Revamps Core Computer Security Guide. On April 30, the National Institute of Standards and Technology (NIST) published a substantially revised version of its Special Publication 800-53, "Security and Privacy Controls for Federal Information Systems and Organizations," the government's core computer security guide. Although developed for use by federal agencies, the NIST Special Publication is widely used in the private sector. The revisions are the most extensive since the document first was published in 2005 and is meant to address evolving and emerging cyber security threats. For example, the new guide incorporates issues specific to (i) mobile and cloud computing, (ii) insider threats, (iii) applications security, (iv) supply chain risks, (v) advanced persistent threats, and (vi) trustworthiness, assurance, and resilience of information systems. It is sector-specific to allow organizations greater flexibility in building information security systems, and also provides for the first time a privacy controls catalog.

STATE ISSUES

CSBS Releases Annual Report. On May 2, the CSBS released its 2012 annual report, which aggregates and reviews the organization's activities in the prior year, identifies future goals for the organization, and outlines specific priorities for 2013. The paper also incorporates more focused reports on past and future activities by various CSBS divisions and boards, including a report from the Policy and Supervision Division that reviews bank supervision, consumer protection and non-bank supervision, and legislative and regulatory policy, including the CSBS positions on community bank regulatory relief and federal proposed capital rules.

North Dakota Amends UCC to Require Electronic Recording. On April 30, North Dakota enacted HB 1136, which compels the Secretary of State to provide an electronic means for filing any record required to be filed under the state Uniform Commercial Code. The bill also, among other things, directs the Secretary to establish an electronic system and requires electronic filing to obtain or amend certain liens, including repairman's liens and other non-mortgage liens. The changes become effective August 1, 2015. If the Secretary makes a report to the legislative management and to the information technology committee certifying that the electronic filing system is ready for implementation, these changes will become effective ninety days following the completion of the certificate requirement.

Indiana Increases Max Credit Service Charge, Supervised Loan Finance Charge. On April 26, Indiana enacted SB 238, which increases the maximum credit service charge for a consumer credit

sale other than one involving a revolving charge account and the maximum finance charge for a supervised loan. Effective July 1, 2013, the bill increases the applicable amounts financed, which are subject to the graduated service charge or loan finance charge percentage, and increases the service charge or loan finance charge percentage that applies if the graduated percentages do not apply. For consumer loans other than supervised loans, the bill increases the permitted loan finance charge from 21% to 25%, provides that the lender may contract for and receive a loan origination fee of not more than 2% of the loan amount (or line of credit, for a revolving loan) in the case of a loan secured by an interest in land, or $50 in the case of a loan not secured by an interest in land. For supervised loans, the bill provides that the lender may contract for and receive a loan origination fee of not more than $50. For both supervised loans and consumer loans other than supervised loans, (i) the permitted minimum loan finance charge may be imposed only if the lender does not assess a loan origination fee, and (ii) in the case of a loan not secured by an interest in land, if a lender retains any part of a loan origination fee charged on a loan that is paid in full by a new loan from the same lender, certain other restrictions apply.

Vermont Expands Foreclosure Mediation Program. On April 26, Vermont enacted HB 431 to expand its foreclosure mediation program to cover all residential foreclosures, unless (i) the loan is not subject to government loss mitigation program requirements, (ii) the mortgagee met with or made reasonable efforts to meet with the mortgagor in person in Vermont to discuss any applicable loss mitigation options, and (iii) the plaintiff in the foreclosure action certifies in a separate document filed with its complaint that the foregoing requirements have been satisfied and describes its efforts to meet with the mortgagor in person to discuss applicable loss mitigation efforts. Under current law, the mediation program applies only to HAMP loans. The bill also modifies certain of the mediation procedures and expands the sanctions a court may impose for failure to comply with certain mediation obligations. The changes take effect on December 1, 2013.

COURTS

Federal District Court Denies Certification in Loan Modification Class Action. On April 29, the U.S. District Court for the Central District of California refused to certify a class seeking to challenge a mortgage servicer's loan modification practices. *Campusano v. BAC Home Loans Servicing, LP*, No. 11-4609, slip op. (C.D. Cal. Apr. 29, 2013). The named borrowers allege thattheir mortgage servicer breached agreements to modify mortgage loans by failing to timely implement the terms of the modification agreements and claim that the servicer's failures are pervasive and appropriate for class treatment. The court held that the class lacked commonality and typicality because the borrowers failed to demonstrate that their modification agreements were the only ones used by the servicer and that all such agreements contained identical provisions pertaining to effective dates and other material terms. The court also held that the borrowers failed to demonstrate that (i) differences in contract would be immaterial to the question of whether acceptance of a first payment binds the servicer to the agreement regardless of other contract deficiencies and (ii) the borrowers suffered harm as a result of the servicer's quality control, validation, and repudiation procedures. The court denied the borrowers' motion for class certification.

California Federal Court Holds Online Purchase Transactions for Shipped Merchandise Not Covered by Song-Beverly Credit Card Act. On April 30, the U.S. District Court for the Central District of California held that Section 1747.08 of the Song-Beverly Credit Card Act, which prohibits retailers from requiring personal information as a condition to completing credit card transactions, does not apply to online purchase transactions in which the merchandise is shipped or delivered to the customer. *Ambers v. Buy.com*, No. 13-196, slip op. (C.D. Cal. Apr. 30, 2013). The ruling extends a recent holding by the California Supreme Court in *Apple Inc. v. Sup. Ct. Los Angeles*, which held that the Song-Beverly provisions do not apply when the item purchased is downloaded

via the Internet. In this case, the customer claimed on behalf of a putative class whose claims could total $500 million that *Apple* created a standard that applies the Song-Beverly protections whenever the retailer has "some mechanism" to verify the customer's identity. The plaintiff argued that the retailer's request as part of the purchase transaction for a phone number in addition to the shipping address violated the statutory privacy protection. The court reasoned that as explained in *Apple*, the state legislature intended to allow retailers to verify that a person making a card purchase is authorized to do so, and stated that the shipping address alone would not work as an anti-fraud mechanism because a person who buys merchandise online may direct shipments to addresses not related to the credit card billing address. As such, the court held that Song-Beverly privacy protection does not apply to online purchases where the merchandise is being shipped or delivered, and granted the retailer's motion to dismiss.

Government Drops One Claim in Mortgage False Claims Act Case. On April 29, the U.S. Attorney for the Southern District of New York dropped its reverse false claims count in a pending False Claims Act case against a mortgage lender. *U.S. v. Wells Fargo Bank, N.A.*, No. 12-7527. Although the government's letter does not provide the reasoning behind its decision, during the recent oral argument on the lender's motion to dismiss, the judge questioned the claim, noting that the obligation to pay at issue is conditional because it depends on an exercise of discretion by the government. The lender's motion to dismiss remains pending.

Tenth Circuit Holds Affidavit Sufficient to Avoid Summary Judgment on FCRA Emotional Damage Claim. Recently, the U.S. Court of Appeals for the Tenth Circuit affirmed in part and reversed in part a district court's award of summary judgment to a mortgage servicer who provided a negative credit report after the borrower refinanced his home without notifying the closing agent that his servicing rights had been transferred. *Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173 (10th Cir. 2013). The district court granted summary judgment to the servicer and its foreclosure law firm after concluding that the borrower had failed to provide sufficient evidence of actual economic or emotional damages, or willfulness to support his FCRA claim. The Tenth Circuit affirmed the district court's determination that the borrower had not provided evidence of economic damages or willfulness, but concluded that the evidence presented was sufficient to create a genuine issue of material fact about whether the borrower suffered emotional damages and reversed and remanded for further proceedings on that claim. In so doing, the court explained that borrowers can rely solely on their own testimony to establish emotional harm if they explain their injury in reasonable detail and do not rely on conclusory statements. The appellate court also affirmed the district court's award of summary judgment in favor of the servicer on the borrower's FDCPA claim, concluding that the servicer acquired the debt before it was in default, and thus did not qualify as a "debt collector" under the statute.

FIRM NEWS

Complimentary Webinar - SEC Whistleblower 101: How to Prevent or Mitigate Whistleblower Claims

Thomas Sporkin will participate in an American Association of Bank Directors webinar entitled "SEC Whistleblower 101: How to Prevent or Mitigate Whistleblower Claims" on May 6, 2013, 2:00 - 3:00 PM ET. The webinar will be moderated by David Baris and will cover several aspects of the current whistleblower claims environment including guidance on minimizing potential whistleblower risk and strategies for ensuring that your bank's board and officers comply with their duties under the law. For registration and other information, please click here.

Jeffrey Naimon will participate on an Inside Mortgage Finance audio conference entitled "QM Checklist: Prepare for Ability-to-Repay/Qualified Mortgage Implementation," on May 9, 2013, 2:30

PM ET.

James Parkinson will speak at ACI's Conference for FCPA and Anti-Corruption in the Life Sciences Industry on May 15, 2013, on a panel titled, "Managing Corruption Risks in a Transactional Setting: How to Prevent FCPA Pitfalls in Life Science Joint Ventures, Mergers & Acquisitions and Collaborations."

Andrew Sandler will speak at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference, May 20, 2013 in Boca Raton, FL. Mr. Sandler's panel is: "Major Litigation and Enforcement Trends".

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

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

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

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

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

FIRM PUBLICATIONS

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

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

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

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

About BuckleySandler LLP (www.buckleysandler.com)

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

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

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

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

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

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HUD Supplements Guidance on FHA Lender Insurance Program. On May 1, HUD issued Mortgagee Letter 2013-12, which updates and replaces another recently issued letter - 2013-10 - on the FHA's Lender Insurance Program. The letter explains enhancements to that program, which allows high-performing mortgagees to conduct pre-endorsement reviews and insure loans. Those

enhancements were implemented by a January 2012 HUD rule. The letter summarizes changes made by that rule, reviews mortgagee eligibility requirements for participation in the Lender Insurance program, and outlines the initial application process. Among other things, the letter also discusses the conditions under which a mortgagee's lender insurance authority can be terminated or suspended and explains how mortgages with such authority are subject to a revised indemnification policy.

Federal District Court Denies Certification in Loan Modification Class Action. On April 29, the U.S. District Court for the Central District of California refused to certify a class seeking to challenge a mortgage servicer's loan modification practices. *Campusano v. BAC Home Loans Servicing, LP*, No. 11-4609, slip op. (C.D. Cal. Apr. 29, 2013). The named borrowers allege thattheir mortgage servicer breached agreements to modify mortgage loans by failing to timely implement the terms of the modification agreements and claim that the servicer's failures are pervasive and appropriate for class treatment. The court held that the class lacked commonality and typicality because the borrowers failed to demonstrate that their modification agreements were the only ones used by the servicer and that all such agreements contained identical provisions pertaining to effective dates and other material terms. The court also held that the borrowers failed to demonstrate that (i) differences in contract would be immaterial to the question of whether acceptance of a first payment binds the servicer to the agreement regardless of other contract deficiencies and (ii) the borrowers suffered harm as a result of the servicer's quality control, validation, and repudiation procedures. The court denied the borrowers' motion for class certification.

Government Drops One Claim in Mortgage False Claims Act Case. On April 29, the U.S. Attorney for the Southern District of New York dropped its reverse false claims count in a pending False Claims Act case against a mortgage lender. *U.S. v. Wells Fargo Bank, N.A.*, No. 12-7527. Although the government's letter does not provide the reasoning behind its decision, during the recent oral argument on the lender's motion to dismiss, the judge questioned the claim, noting that the obligation to pay at issue is conditional because it depends on an exercise of discretion by the government. The lender's motion to dismiss remains pending.

Vermont Expands Foreclosure Mediation Program. On April 26, Vermont enacted HB 431 to expand its foreclosure mediation program to cover all residential foreclosures, unless (i) the loan is not subject to government loss mitigation program requirements, (ii) the mortgagee met with or made reasonable efforts to meet with the mortgagor in person in Vermont to discuss any applicable loss mitigation options, and (iii) the plaintiff in the foreclosure action certifies in a separate document filed with its complaint that the foregoing requirements have been satisfied and describes its efforts to meet with the mortgagor in person to discuss applicable loss mitigation efforts. Under current law, the mediation program applies only to HAMP loans. The bill also modifies certain of the mediation procedures and expands the sanctions a court may impose for failure to comply with certain mediation obligations. The changes take effect on December 1, 2013.

BANKING

OCC, FDIC Announce Overdraft Enforcement Actions. On April 30, the OCC and the FDICannounced parallel enforcement actions against a national bank and an affiliated state bank to resolve allegations that the institutions violated Section 5 of the FTC Act in their marketing and implementation of overdraft protection programs, checking rewards programs, and stop-payment processes for preauthorized recurring electronic fund transfers. The OCC claims that (i) bank employees failed to disclose technical limitations of the standard overdraft protection practices opt-out, (ii) the bank's overdraft opt-in notice described fees that the bank did not actually charge, (iii) the bank failed to disclose that it would not transfer funds from a savings account to cover

overdrafts in linked checking accounts if the savings account did not have funds to cover the entire overdrawn balance on a given day, even if the available funds would have covered one or more overdrawn items, (iv) the bank failed to disclose technical limitations of its preauthorized recurring electronic funds transfers that prevented it from stopping certain transfers upon customer request, and (v) the bank failed to disclose posting date requirements for its checking reward program. The OCC orders require the bank to pay approximately $2.5 million in restitution and a $5 million civil money penalty. In addition, the bank must (i) appoint an independent compliance committee, (ii) update its compliance risk management systems with appropriate policies and procedures, and (iii) adjust its written compliance risk management policy. The FDIC order requires the state bank to refund customers roughly $1.4 million and pay a $5 million civil penalty.

CFPB Issues Revised Remittance Transfer Rule. On April 30, the CFPB issued a revised final rule to amend regulations applicable to consumer remittance transfers of over fifteen dollars originating in the United States and sent internationally. Generally, the rule requires remittance transfer providers to (i) provide written pre-payment disclosures of the exchange rates and fees associated with a transfer of funds, as well as the amount of funds the recipient will receive, and (ii) investigate consumer disputes and remedy errors. The revised rule makes optional the original requirement to disclose (i) recipient institution fees for transfers to an account, except where the recipient institution is acting as an agent of the provider and (ii) taxes imposed by a person other than the remittance transfer provider. Instead, the revised rule requires providers to include a disclaimer on disclosures that the recipient may receive less than the disclosed total value due to these two categories of fees and taxes. The revised rule exempts from certain error resolution requirements two additional errors: (i) providing an incorrect account number or (ii) providing an incorrect recipient institution identifier. For the exception to apply, a remittance transfer provider must (i) notify the sender prior to the transfer that the transfer amount could be lost, (ii) implement reasonable measures to verify the accuracy of a recipient institution identifier, and (iii) make reasonable efforts to retrieve misdirected funds. In addition, the revised rule provides institutions more time to comply with the new remittance transfer standards. The final regulations, as revised by this rule, take effect on October 28, 2013.

Federal Reserve Board Issues Statement on Deposit Advance Products. On April 25, the Federal Reserve Board issued a policy statement on deposit advance products. The statement came on the same day that the OCC and the FDIC proposed more formal guidance for such products. The Board statement identifies potential "significant risks" associated with deposit advance products, including UDAP risk and other consumer compliance risk. The statement directs examiners to thoroughly review any deposit advance products offered by supervised institutions for compliance with Section 5 of the FTC Act and reminds banks of their responsibility for vendors hired to offer deposit advance products.

CSBS Releases Annual Report. On May 2, the CSBS released its 2012 annual report, which aggregates and reviews the organization's activities in the prior year, identifies future goals for the organization, and outlines specific priorities for 2013. The paper also incorporates more focused reports on past and future activities by various CSBS divisions and boards, including a report from the Policy and Supervision Division that reviews bank supervision, consumer protection and non-bank supervision, and legislative and regulatory policy, including the CSBS positions on community bank regulatory relief and federal proposed capital rules.

CONSUMER FINANCE

CFPB Issues Semiannual Servicemember Complaint Report. On May 1, the CFPB's Office of Servicemember Affairs published its Semi-Annual Complaint Report, which states that the volume of complaints from servicemembers, veterans, and their families has steadily increased since the CFPB first started accepting complaints in July 2011. The report provides limited summary information about the complaints, noting that mortgage complaints predominate, followed by credit card and credit reporting complaints. In a related blog post, the CFPB states that it has received more than 5,000 servicemember complaints to date, and calls again for additional questions or complaints from the entire military community.

CFPB, FTC Announce Roundtable on Data Integrity in Debt Collection. On May 1, the FTC and the CFPB announced a roundtable to "examine the flow of consumer data throughout the debt collection process" and discuss (i) the amount of documentation and other information currently available to different types of collectors and at different points in the debt collection process, (ii) the information needed to verify and substantiate debts, (iii) the costs and benefits of providing consumers with additional disclosures about their debts and debt-related rights, and (iv) information issues relating to pleading and judgment in debt collection litigation. The event will be held on June 6, 2013 in Washington, DC and is open to the public.

CFPB Announces Consumer Advisory Board Meeting. On May 1, the CFPB announced its next Consumer Advisory Board Meeting, scheduled for May 15, 2013 in Los Angeles, CA. The meeting agenda includes a public session that will feature remarks from CFPB Director Cordray and comments from consumer groups, community and industry representatives, and members of the public.

CFPB Proposes Financial Education Policies. On April 30, the CFPB published policy recommendations for advancing K-12 financial education. The paper, "Transforming the Financial Lives of a Generation of Young Americans," identifies perceived problems for young people in the financial marketplace and reviews current approaches to financial education for the target age groups. The CFPB recommends that state policymakers and educators (i) introduce key financial education concepts early and make a stand-alone financial education course a graduation requirement for high school students, (ii) include personal financial management questions in standardized tests, (iii) provide opportunities throughout the K-12 years to practice money management through innovative, hands-on learning opportunities, (iv) create consistent opportunities and incentives for teachers to take financial education training for use in teaching financial management to their students, and (v) encourage parents and guardians to discuss money management topics at home and provide them with the tools necessary to have conversations about money with their children.

CFPB Explains Use of Civil Penalty Fund. On April 26, the CFPB issued a final rule that (i) establishes the governance structure of the Civil Penalty Fund, including the position of Civil Penalty Fund Administrator, (ii) identifies categories of victims who may receive funds and the amounts they may receive, (iii) establishes procedures for allocating funds for payments to victims and for consumer education and financial literacy programs, and for distributing allocated funds to individual victims, (iv) describes the circumstances in which payments to certain victims or classes of victims will be deemed impracticable, and (v) requires the Administrator to issue regular reports. While the CFPB issued the rule without a notice and comment period because the rule is exempt from the Administrative Procedures Act and other rulemaking requirements, it also issued a related proposal in which the CFPB seeks comment on, among other things, (i) whether it should make payments to victims of any *type* of "activities" for which it has imposed civil penalties, even if no enforcement action imposed a civil penalty for the *particular* "activities" that harmed the victim, (ii) whether it should limit payments to a share of the civil penalties collected for the particular violations that harmed a consumer, as opposed to using general Civil Penalty Fund dollars, and (iii) alternatives to

the allocation procedures to be used when sufficient funds are not available to compensate fully the uncompensated harm of all victims to whom it is practicable to make payments. Comments on the proposal are due within 60 days of its publication in the Federal Register.

Indiana Increases Max Credit Service Charge, Supervised Loan Finance Charge. On April 26, Indiana enacted SB 238, which increases the maximum credit service charge for a consumer credit sale other than one involving a revolving charge account and the maximum finance charge for a supervised loan. Effective July 1, 2013, the bill increases the applicable amounts financed, which are subject to the graduated service charge or loan finance charge percentage, and increases the service charge or loan finance charge percentage that applies if the graduated percentages do not apply. For consumer loans other than supervised loans, the bill increases the permitted loan finance charge from 21% to 25%, provides that the lender may contract for and receive a loan origination fee of not more than 2% of the loan amount (or line of credit, for a revolving loan) in the case of a loan secured by an interest in land, or $50 in the case of a loan not secured by an interest in land. For supervised loans, the bill provides that the lender may contract for and receive a loan origination fee of not more than $50. For both supervised loans and consumer loans other than supervised loans, (i) the permitted minimum loan finance charge may be imposed only if the lender does not assess a loan origination fee, and (ii) in the case of a loan not secured by an interest in land, if a lender retains any part of a loan origination fee charged on a loan that is paid in full by a new loan from the same lender, certain other restrictions apply.

Tenth Circuit Holds Affidavit Sufficient to Avoid Summary Judgment on FCRA Emotional Damage Claim. Recently, the U.S. Court of Appeals for the Tenth Circuit affirmed in part and reversed in part a district court's award of summary judgment to a mortgage servicer who provided a negative credit report after the borrower refinanced his home without notifying the closing agent that his servicing rights had been transferred. *Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173 (10th Cir. 2013). The district court granted summary judgment to the servicer and its foreclosure law firm after concluding that the borrower had failed to provide sufficient evidence of actual economic or emotional damages, or willfulness to support his FCRA claim. The Tenth Circuit affirmed the district court's determination that the borrower had not provided evidence of economic damages or willfulness, but concluded that the evidence presented was sufficient to create a genuine issue of material fact about whether the borrower suffered emotional damages and reversed and remanded for further proceedings on that claim. In so doing, the court explained that borrowers can rely solely on their own testimony to establish emotional harm if they explain their injury in reasonable detail and do not rely on conclusory statements. The appellate court also affirmed the district court's award of summary judgment in favor of the servicer on the borrower's FDCPA claim, concluding that the servicer acquired the debt before it was in default, and thus did not qualify as a "debt collector" under the statute.

CREDIT CARDS

CFPB Amends Credit Card Ability-to-Pay Rule. On April 29, the CFPB amended Regulation Z to make it easier for spouses or partners who do not work outside of the home to qualify for credit cards. Regulation Z generally requires that credit card issuers consider an applicant's independent ability to pay regardless of age. A Federal Reserve Board rule adopted to implement the Credit CARD Act, which took effect on October 1, 2011, required card issuers to consider only an individual card applicant's independent income or assets. The rule received criticism from members of Congress and other stakeholders who argued the rule limited access to credit for stay-at-home spouses and partners. The CFPB's revised rule allows credit card issuers to consider third-party income for a consumer who is 21 or older, if the applicant has a reasonable expectation of access to such income. The CFPB rule does not change the independent ability to pay requirement for

individuals under 21 years old. The rule is effective as of May 3, 2013 and compliance with the rule is required by November 4, 2013. Card issuers may, at their option, comply with the rule prior to that date.

E-COMMERCE

North Dakota Amends UCC to Require Electronic Recording. On April 30, North Dakota enacted HB 1136, which compels the Secretary of State to provide an electronic means for filing any record required to be filed under the state Uniform Commercial Code. The bill also, among other things, directs the Secretary to establish an electronic system and requires electronic filing to obtain or amend certain liens, including repairman's liens and other non-mortgage liens. The changes become effective August 1, 2015. If the Secretary makes a report to the legislative management and to the information technology committee certifying that the electronic filing system is ready for implementation, these changes will become effective ninety days following the completion of the certificate requirement.

PRIVACY/DATA SECURITY

NIST Revamps Core Computer Security Guide. On April 30, the National Institute of Standards and Technology (NIST) published a substantially revised version of its Special Publication 800-53, "Security and Privacy Controls for Federal Information Systems and Organizations," the government's core computer security guide. Although developed for use by federal agencies, the NIST Special Publication is widely used in the private sector. The revisions are the most extensive since the document first was published in 2005 and is meant to address evolving and emerging cyber security threats. For example, the new guide incorporates issues specific to (i) mobile and cloud computing, (ii) insider threats, (iii) applications security, (iv) supply chain risks, (v) advanced persistent threats, and (vi) trustworthiness, assurance, and resilience of information systems. It is sector-specific to allow organizations greater flexibility in building information security systems, and also provides for the first time a privacy controls catalog.

California Federal Court Holds Online Purchase Transactions for Shipped Merchandise Not Covered by Song-Beverly Credit Card Act. On April 30, the U.S. District Court for the Central District of California held that Section 1747.08 of the Song-Beverly Credit Card Act, which prohibits retailers from requiring personal information as a condition to completing credit card transactions, does not apply to online purchase transactions in which the merchandise is shipped or delivered to the customer. *Ambers v. Buy.com*, No. 13-196, slip op. (C.D. Cal. Apr. 30, 2013). The ruling extends a recent holding by the California Supreme Court in *Apple Inc. v. Sup. Ct. Los Angeles*, which held that the Song-Beverly provisions do not apply when the item purchased is downloaded via the Internet. In this case, the customer claimed on behalf of a putative class whose claims could total $500 million that *Apple* created a standard that applies the Song-Beverly protections whenever the retailer has "some mechanism" to verify the customer's identity. The plaintiff argued that the retailer's request as part of the purchase transaction for a phone number in addition to the shipping address violated the statutory privacy protection. The court reasoned that as explained in *Apple*, the state legislature intended to allow retailers to verify that a person making a card purchase is authorized to do so, and stated that the shipping address alone would not work as an anti-fraud mechanism because a person who buys merchandise online may direct shipments to addresses not related to the credit card billing address. As such, the court held that Song-Beverly privacy protection does not apply to online purchases where the merchandise is being shipped or delivered, and granted the retailer's motion to dismiss.

PAYMENTS

CFPB Issues Revised Remittance Transfer Rule. On April 30, the CFPB issued a revised final rule to amend regulations applicable to consumer remittance transfers of over fifteen dollars originating in the United States and sent internationally. Generally, the rule requires remittance transfer providers to (i) provide written pre-payment disclosures of the exchange rates and fees associated with a transfer of funds, as well as the amount of funds the recipient will receive, and (ii) investigate consumer disputes and remedy errors. The revised rule makes optional the original requirement to disclose (i) recipient institution fees for transfers to an account, except where the recipient institution is acting as an agent of the provider and (ii) taxes imposed by a person other than the remittance transfer provider. Instead, the revised rule requires providers to include a disclaimer on disclosures that the recipient may receive less than the disclosed total value due to these two categories of fees and taxes. The revised rule exempts from certain error resolution requirements two additional errors: (i) providing an incorrect account number or (ii) providing an incorrect recipient institution identifier. For the exception to apply, a remittance transfer provider must (i) notify the sender prior to the transfer that the transfer amount could be lost, (ii) implement reasonable measures to verify the accuracy of a recipient institution identifier, and (iii) make reasonable efforts to retrieve misdirected funds. In addition, the revised rule provides institutions more time to comply with the new remittance transfer standards. The final regulations, as revised by this rule, take effect on October 28, 2013.