

February 1, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)[FEDERAL ISSUES](#)[STATE ISSUES](#)[COURTS](#)[FIRM NEWS](#)[FIRM PUBLICATIONS](#)[MORTGAGES](#)[BANKING](#)[CONSUMER FINANCE](#)[SECURITIES](#)[CREDIT CARDS](#)[E-COMMERCE](#)[PRIVACY/DATA SECURITY](#)[CRIMINAL ENFORCEMENT](#)**[FEDERAL ISSUES](#)**

CFPB Launches Inquiry into Financial Products Marketed through Higher Learning Institutions. On January 31, the CFPB issued a [notice and request for comment](#) about how current and future arrangements between institutions of higher education and financial institutions could be structured "to promote positive financial decision-making among young consumers." The inquiry also is designed to help the CFPB "develop a clearer picture of the financial products and services that are being offered to college students, as well as consumers' experiences using those products and services." Specifically, with regard to campus affinity relationships, the CFPB wants to know, among other things, (i) what types of campus affinity products are being offered to students, what features do they have, how are they being marketed, and what are their terms and conditions, including fees, (ii) what information about students is being provided to the education institution, (iii) the nature and volume of student complaints, (iv) what benefits are education institutions realizing through affinity relationships, and (v) the extent to which these products are bundled with student identification cards. The CFPB also seeks similar information about other financial products marketed to students. The CFPB is seeking comments from various stakeholders, including students, institutions of higher education, and financial institutions by March 18, 2013.

CFPB Names Acting Deputy Director. On January 31, the CFPB [announced](#) that Steve Antonakes will serve as acting Deputy Director, following the [previously announced departure](#) on the same day by Deputy Director Raj Date. Mr. Antonakes currently serves as the CFPB's Associate Director for Supervision, Enforcement, and Fair Lending. He will retain all the responsibilities of that position while also serving as acting Deputy Director. Mr. Antonakes is a former state financial services regulator who joined the CFPB in November 2010 and [last year was promoted](#) from Assistant Director for Large Bank Supervision. Mr. Date was the first Deputy Director

of the CFPB, and brought to the position his experience as a strategy consultant and bank executive.

Democratic Lawmakers Seek Information Regarding Independent Foreclosure Review Settlements. On January 31, Senator Elizabeth Warren (D-MA) and Representative Elijah Cummings (D-MD), House Oversight Committee Ranking Member, sent a [letter](#) to the Federal Reserve Board and the OCC seeking documents and information regarding the regulators' decision to enter into [settlements](#) with certain mortgage servicers subject to consent orders issued in April 2011 to (i) resolve allegations that the firms engaged in improper mortgage servicing and foreclosure practices and (ii) end the Independent Foreclosure Review process established by the prior consent orders. The lawmakers are seeking (i) all documents regarding the performance of the independent consultants engaged by the servicers to conduct the foreclosure reviews, (ii) all documents created by the servicers or the consultants to update the regulators on the status of the foreclosure review process, (iii) all documents compiled by the regulators indicating the total amount of settlement funds paid to each consultant, (iv) the number of borrowers who requested review, by gender, race, zip code, and property value, (v) the total number of reviews initiated by each contractor, and (vi) the average time each contractor required to complete a review of a borrower's file.

On the same day, House Financial Services Committee Ranking Member Maxine Waters (D-CA) sent [a separate letter](#) requesting that the regulators ensure the final agreements entered in lieu of the foreclosure reviews include certain specific provisions, including (i) reordering of the matrix categories, (ii) requirements that principal reduction be provided as a form of indirect relief, and (iii) appointment of an independent monitor. Representative Waters also seeks information about payments to the consultants and how the regulators decided on the \$8.5 billion settlement amount. Finally, a recent [report](#) noted that Representative Carolyn Maloney (D-NY) initiated her own inquiry into the settlements and payments to the consultants. According to the report, the letter may be used to support a request that the regulators claw back some of the payments made to the consultants.

FTC Announces Mobile Privacy Enforcement Action, Issues Mobile Privacy Staff Report. On February 1, the FTC [announced](#) that it is requiring a social networking application company to pay \$800,000 and make certain compliance enhancements to resolve [allegations](#) that the firm (i) misled and deceived users by automatically collecting and storing personal information from users' mobile device address books even if the users had not selected that option and despite claims that the application collected only certain non-personal user information, and (ii) violated the Children's Online Privacy Protection Act Rule by collecting personal information from approximately 3,000 children under the age of 13 without first getting parents' consent. Pursuant to the [consent decree](#), in addition to the monetary penalty, the company must establish a comprehensive privacy program, and obtain independent privacy assessments every other year for the next 20 years.

Concurrently, the FTC [released](#) a staff report that provides disclosure policy and other guidance to mobile platforms, application developers, advertising networks and analytics companies, and application developer trade associations. For example, the report urges platforms to (i) provide just-in-time disclosures to consumers and obtain affirmative express consent before allowing applications to access sensitive content like geolocation; (ii) consider providing just-in-time disclosures and obtaining affirmative express consent for other content that consumers may find sensitive; and (iii) consider developing icons to depict the transmission of user data. With regard to application developers, the report recommends, for example, that developers (i) provide just-in-time disclosures and obtain affirmative express consent before collecting and sharing sensitive information; and (ii) improve coordination and communication with advertising networks and other third parties that provide services for applications. During a call announcing the report, the FTC

explained that the report is intended to influence industry standards, and that the Commission staff will reference the report for future policymaking. The FTC also noted that the National Telecommunications and Information Agency is developing a code of conduct on mobile application transparency, and, if strong privacy codes are developed, the FTC will view adherence to such codes favorably in connection with its law enforcement work.

FTC Chairman Announces Plans to Step Down. On February 1, the FTC [announced](#) that Chairman John Leibowitz plans to step down on February 15, 2013. Mr. Leibowitz has been a Commissioner since September 2004, and has served as Chairman for the past four years. During his tenure, the FTC has prioritized consumer privacy and financial fraud enforcement and policy development. With regard to privacy initiatives during his time as Chairman, the FTC [issued a landmark report](#) setting forth best privacy practices for all businesses, and [recently updated](#) the Children's Online Privacy Protection Rule.

FTC Releases Debt Buyer Study. On January 30, the FTC [released](#) the results of a first-of-its-kind empirical study of the debt buying industry. The FTC looked at more than 5,000 portfolios of consumer debt with a face value of \$143 billion, the majority of which was credit card debt, but which also included mortgage, medical, utility, telecommunications, and other debt. The [report](#) identifies a number of "key findings" related to (i) prices buyers paid for debt, (ii) information and account documentation that buyers received in the transaction, (iii) consumer disputes of debts, and (iv) debt age and statute of limitations. The FTC believes additional study of small debt buyers is required, as are reviews of debt buyers' litigation practices and the accuracy of the information debt buyers receive and use to collect debts. While the report does not announce any specific policy or enforcement measures, the FTC notes that it continues to receive a high level of complaints about debt collectors, more than for any other industry, and that the sufficiency and accuracy of debt information remains a significant consumer protection concern.

DOJ Announces Departure of Criminal Division Chief. On January 30, the DOJ [announced](#) that Assistant Attorney General for the Criminal Division Lanny Breuer will leave the department on March 1, 2013. Mr. Breuer was confirmed for the position in April 2009. The DOJ press release credits him with taking "significant steps to fight corruption at home and abroad," including by increasing enforcement of the Foreign Corrupt Practices Act, and "protecting the integrity of our banking systems and fighting financial fraud." With regard to the latter, the release cites Mr. Breuer's LIBOR investigation, and his efforts to develop the division's Money Laundering and Bank Integrity Unit to support enforcement of the Bank Secrecy Act.

Senators Challenge DOJ on Post-Financial Crisis Settlements. On January 29, Senators Sherrod Brown (D-OH) and Charles Grassley (R-IA) sent a [letter](#) to U.S. Attorney General Eric Holder complaining that settlements obtained by the DOJ from financial institutions alleged to have contributed to the financial crisis "involve penalties that are disproportionately low," both in relation to the institutions' profits and the amount of harm the institutions are alleged to have caused. The Senators charge that the DOJ's "prosecutorial philosophy", which includes giving consideration to the impact of a prosecution or large penalty against an institution on the broader financial system, erodes public confidence and undermines the department's institutional standing. The Senators seek responses to a series of questions about the DOJ's approach to post-financial crisis enforcement, including its use of outside experts in making decisions regarding prosecution of the largest financial institutions.

SEC Names Acting Enforcement Director. On January 31, the SEC [announced](#) that George Canellos will serve as Acting Director for the Division of Enforcement. Mr. Canellos currently is the Deputy Director of that division, and effective February 8, 2013, will fill the director role vacated by [the departing Robert Khuzami](#). Mr. Canellos was appointed Deputy Director in June 2012 and

according to the release, has been instrumental in developing the division's Cooperation Program, in generating numerous programmatic, policy, and legislative initiatives, and in critical decisions on national priority enforcement actions. He previously served three years as Director of the SEC's New York Regional Office.

OCC Names Acting Head of Large Bank Supervision. On January 30, the OCC [announced](#) that Martin Pfinsgraff will serve as acting Senior Deputy Comptroller for Large Bank Supervision, replacing Michael Brosnan who will become Examiner-in-Charge of an OCC-supervised institution. Mr. Pfinsgraff currently serves as Deputy Comptroller for Credit and Market Risk. He previously held senior positions with iJet International, Prudential Insurance Company, and Prudential Investment Corporation. Darrin Benhart, one of the two Deputy Comptrollers in the Credit and Market Risk Group, will serve as acting Senior Deputy Director for that group.

HUD, FHFA Extend Foreclosure Protections for Hurricane Sandy Victims. On January 31, HUD and the FHFA [announced](#) that the FHA, Fannie Mae, and Freddie Mac will extend for an additional 90 days protections against foreclosure actions for borrowers whose properties were damaged or destroyed due to Hurricane Sandy. Those protections were set to expire on January 31, 2013. For borrowers in certain counties, FHA is extending until April 30, 2013 its foreclosure moratorium and eviction suspension. Fannie Mae, through [Lender Letter LL-2013-02](#), and Freddie Mac, through [Bulletin 2013-1](#), also are extending their foreclosure and eviction moratoriums through the end of April.

HUD Announces Reverse Mortgage Program Changes, Increases Mortgage Insurance Premiums, Alters Underwriting Requirements. On January 30, HUD [announced](#) that for FHA case numbers assigned on or after April 1, 2013, FHA will use a consolidated pricing option for its home equity conversion mortgages, as explained in more detail in [Mortgagee Letter 2013-01](#). Separately, HUD also announced that effective April 1, 2013, the mortgage insurance premiums for most new mortgages will increase by 10 basis points, and by 5 basis points for jumbo mortgages. To further support the stability of the Mutual Mortgage Insurance Fund, FHA also issued [Mortgagee Letter 2013-04](#) to require most borrowers to continue paying annual premiums for the life of their mortgage loan, reversing a policy adopted in 2001 under which FHA cancelled premium requirements on loans when the outstanding principal balance reached 78 percent of the original principal balance. FHA also will (i) require lenders to manually underwrite loans for which borrowers have a decision credit score below 620 and a total debt-to-income ratio greater than 43 percent, (ii) increase from 3.5 to 5 percent the minimum down payment for jumbo loans, and (iii) increase its enforcement for FHA-approved lenders with regard to aggressive marketing to borrowers with previous foreclosures. Separately, HUD issued [Mortgagee Letter 2013-02](#), which updates the certification language for all late endorsement requests for reverse mortgages. Finally, through [Mortgagee Letter 2013-03](#), HUD extended to March 15, 2013 the date by which lenders must begin to assess borrowers in default under a new loss mitigation priority order and policies, as outlined in [Mortgagee Letter 2012-22](#).

STATE ISSUES

State AGs Announce Multistate Robo-Signing Settlement. On January 31, the state attorneys general (AGs) for 45 states obtained an agreement from a mortgage servicing and foreclosure vendor, and its former subsidiary, to resolve allegations that the company "robo-signed" foreclosure documents and engaged in other improper default servicing conduct. (See, e.g., announcements from the AGs for [Iowa](#), [Massachusetts](#), and [New York](#).) The agreements require the company to pay a combined \$120 million and finalize substantial revisions to its business and compliance practices. The company also must (i) properly execute documents, (ii) enhance oversight of its

default services, and (iii) review of all third-party fees to ensure that the fees have been earned and are reasonable and accurate. The settlement also prohibits various conduct including, for example, (i) surrogate signing of documents; (ii) notarizing documents outside the presence of a notary; (iii) improper interference with the attorney-client relationship between attorneys and services; and (iv) unreasonable mark-ups or other fees on third party providers' default or foreclosure-related services. The company must review documents executed during the period of January 1, 2008 to December 31, 2010 to determine if any must be re-executed or otherwise corrected. Borrowers also may request review and correction of any documents executed by the company at any time. The Michigan AG [announced](#) a separate agreement with the company on the same day, and three other state AGs previously settled similar allegations against the firm (see, e.g., [Missouri AG settlement](#)).

Maryland AG Establishes Privacy Unit. On January 28, Maryland Attorney General (AG) Doug Gansler [announced](#) a new unit in his office dedicated to online privacy enforcement and policy. The AG stated that the new unit will (i) monitor companies to ensure they are in compliance with state and federal consumer privacy laws, (ii) examine weaknesses in online privacy policies and work alongside major industry stakeholders and privacy advocates to provide outreach and education to businesses and consumers to broaden awareness about privacy rights, and (iii) pursue enforcement actions where appropriate. The unit announced by the AG appears similar to one [formed by California Attorney General Kamala Harris](#), which [recently has been active](#) with regard to mobile application privacy. Last year, AG Gansler [announced](#) "Privacy in the Digital Age" as his central initiative as President of the National Association of Attorneys General.

COURTS

New TCPA Action against Card Issuer Highlights Growing Area of Litigation Risk. On January 29, a credit card holder filed a putative class action against a card issuer that funds consumer retail credit accounts for customers of a major retail chain, alleging that the issuer violated the Telephone Consumer Protection Act in attempting to collect on the card holder's credit card debt. Complaint, *French v. Target Nat'l Bank*, No. 13-233 (S.D. Cal. filed Jan. 29, 2013). The named plaintiff claims that after she fell behind on her payments, the issuer began making numerous calls daily to her personal cell phone, a number she claims not to have provided to the issuer. The issuer allegedly used an "automatic telephone dialing system" to make the calls, which the card holder claims continued even after she notified the issuer that it was not authorized to contact her on her cellular phone, and asked that the calls cease. The card holder alleges that in doing so, the issuer violated the TCPA, which requires express written consent from a consumer prior to receiving calls from an automated dialing system or an artificial or prerecorded voice. On behalf of the proposed class, the card holder is seeking \$500 in statutory damages for each and every alleged negligent violation, and treble damages for each alleged knowing or willful violation. The suit is the latest in a growing number of cases to be filed in recent years, particularly in California, and highlights a significant litigation risk for card issuers and debt collectors.

D.C. Circuit Forces Banking Regulators to Revisit Order Barring Bank Director from Bank Activities. On January 29, the U.S. Court of Appeals for the D.C. Circuit [held](#) that the OCC and the Federal Reserve Board (FRB) improperly prohibited a bank director from participating in future banking activities of several institutions based on an agreement the director made to avoid state-level prosecution on perjury charges. *DeNaples v. OCC*, No. 12-1162, 2013 WL 322531 (D.C. Cir. Jan. 29, 2013). Under Section 19 of the Federal Deposit Insurance Act, banking regulators can prohibit an individual from participating in the affairs of an insured depository institution if the individual has been convicted of certain criminal offenses, or if the individual has entered into a "pretrial diversion or similar program" related to those criminal charges. In this case, the OCC and the FRB determined that a bank director could not participate in the affairs of several institutions

with which he was affiliated because the director entered an agreement with state prosecutors by which the prosecutors withdrew perjury charges in exchange for certain actions taken by the bank director. The agencies determined the agreement constituted a "pretrial diversion or similar program." When the bank director refused to halt his participation, the OCC and the FRB issued cease and desist orders requiring the director to terminate his relationship with the institutions. On appeal, the court held that the regulators applied an improper definition of "pretrial diversion or similar program" when they reasoned that the ordinary meaning of the phrase extends to any conditional agreement to withdraw charges. The court held that the definition must require more than any *quid pro quo*, and that the regulators should consider whether an agreement to avoid charges includes a voluntary agreement for treatment, rehabilitation, restitution or other noncriminal or nonpunitive alternatives. The court vacated the agencies' orders and directed the agencies to determine on remand whether the conditions required by the state-level agreement fit within the parameters of a "pretrial diversion or similar program," as established by the court.

California District Court Holds Song-Beverly Credit Card Act Does Not Prohibit Post-Transaction Collection of Zip Codes, Denies Class Certification. On January 28, the U.S. District Court for the Northern District of California [denied](#) a motion for class certification filed by a group of plaintiffs seeking to challenge, on behalf of similarly situated individuals, a retailer's policy that required cashiers to request consumer zip codes in connection with a purchase transaction. *Gormley v. Nike, Inc.*, No. 11-893, 2013 WL 322538 (N.D. Cal. Jan. 28, 2013). The court held that the named plaintiffs failed to demonstrate typicality because their experiences were inconsistent with the policy they sought to challenge. The court explained that while the policy required cashiers to request zip codes after providing the purchased merchandise and a receipt to the customer, each plaintiff testified that the cashier asked for a zip code prior to providing those items. The court disagreed with the plaintiffs' argument that the timing of the request was irrelevant based on the plaintiffs' assertion that the California Supreme Court held in [Pineda v. Williams-Sonoma Stores Inc.](#) that a request for a card holder's zip code violates the Song-Beverly Credit Card Act. The court explained that *Pineda* only addressed whether zip codes constituted personal identification information, and then chose to follow subsequent district court decisions holding that the Song-Beverly Act prohibits only a request for personal identification information as a condition to completing a credit card transaction.

FIRM NEWS

Complimentary Webinar - Privacy and Data Security: Planning for a Security Breach

BuckleySandler LLP will host a webinar on Thursday, February 14, 2013, from 2:00-3:00 PM ET, to help counsel prepare their organizations to meet the legal challenges associated with handling personal information. Join attorneys from [BuckleySandler's Privacy and Data Security Group](#) as they discuss planning for a security breach, including who needs to be involved, proactive steps you can take, the litigation and other risks posed by such breaches, and mitigating those risks. They will also summarize the trends of 2012 and identify those for 2013. **Click [here](#) to register.**

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

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

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

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

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

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

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

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

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

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

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

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

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

FIRM PUBLICATIONS

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

[Amanda Raines](#) and [A.J. Dhaliwal](#) published "[Petitions to Modify or Set Aside CFPB Civil Investigative Demands \(CIDs\): Analysis of Recent Decisions](#)" on January 29, 2013, as part of the LexisNexis 2013 Emerging Issues commentary series.

About BuckleySandler LLP (www.buckleysandler.com)

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

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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](#).

For back issues of InfoBytes, please see: <http://www.buckleysandler.com/infobytes/infobytes>.

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MORTGAGES

State AGs Announce Multistate Robo-Signing Settlement. On January 31, the state attorneys general (AGs) for 45 states obtained an agreement from a mortgage servicing and foreclosure vendor, and its former subsidiary, to resolve allegations that the company "robo-signed" foreclosure documents and engaged in other improper default servicing conduct. (See, e.g., announcements from the AGs for [Iowa](#), [Massachusetts](#), and [New York](#).) The agreements require the company to pay a combined \$120 million and finalize substantial revisions to its business and compliance practices. The company also must (i) properly execute documents, (ii) enhance oversight of its default services, and (iii) review of all third-party fees to ensure that the fees have been earned and are reasonable and accurate. The settlement also prohibits various conduct including, for example, (i) surrogate signing of documents; (ii) notarizing documents outside the presence of a notary; (iii) improper interference with the attorney-client relationship between attorneys and services; and (iv) unreasonable mark-ups or other fees on third party providers' default or foreclosure-related services. The company must review documents executed during the period of January 1, 2008 to December 31, 2010 to determine if any must be re-executed or otherwise corrected. Borrowers also

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BANKING

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CONSUMER FINANCE

CFPB Launches Inquiry into Financial Products Marketed through Higher Learning Institutions. On January 31, the CFPB issued a [notice and request for comment](#) about how current and future arrangements between institutions of higher education and financial institutions could be structured "to promote positive financial decision-making among young consumers." The inquiry also is designed to help the CFPB "develop a clearer picture of the financial products and services that are being offered to college students, as well as consumers' experiences using those products

and services." Specifically, with regard to campus affinity relationships, the CFPB wants to know, among other things, (i) what types of campus affinity products are being offered to students, what features do they have, how are they being marketed, and what are their terms and conditions, including fees, (ii) what information about students is being provided to the education institution, (iii) the nature and volume of student complaints, (iv) what benefits are education institutions realizing through affinity relationships, and (v) the extent to which these products are bundled with student identification cards. The CFPB also seeks similar information about other financial products marketed to students. The CFPB is seeking comments from various stakeholders, including students, institutions of higher education, and financial institutions by March 18, 2013.

CFPB Names Acting Deputy Director. On January 31, the CFPB [announced](#) that Steve Antonakes will serve as acting Deputy Director, following the [previously announced departure](#) on the same day by Deputy Director Raj Date. Mr. Antonakes currently serves as the CFPB's Associate Director for Supervision, Enforcement, and Fair Lending. He will retain all the responsibilities of that position while also serving as acting Deputy Director. Mr. Antonakes is a former state financial services regulator who joined the CFPB in November 2010 and [last year was promoted](#) from Assistant Director for Large Bank Supervision. Mr. Date was the first Deputy Director of the CFPB, and brought to the position his experience as a strategy consultant and bank executive.

FTC Releases Debt Buyer Study. On January 30, the FTC [released](#) the results of a first-of-its-kind empirical study of the debt buying industry. The FTC looked at more than 5,000 portfolios of consumer debt with a face value of \$143 billion, the majority of which was credit card debt, but which also included mortgage, medical, utility, telecommunications, and other debt. The [report](#) identifies a number of "key findings" related to (i) prices buyers paid for debt, (ii) information and account documentation that buyers received in the transaction, (iii) consumer disputes of debts, and (iv) debt age and statute of limitations. The FTC believes additional study of small debt buyers is required, as are reviews of debt buyers' litigation practices and the accuracy of the information debt buyers receive and use to collect debts. While the report does not announce any specific policy or enforcement measures, the FTC notes that it continues to receive a high level of complaints about debt collectors, more than for any other industry, and that the sufficiency and accuracy of debt information remains a significant consumer protection concern.

SECURITIES

SEC Names Acting Enforcement Director. On January 31, the SEC [announced](#) that George Canellos will serve as Acting Director for the Division of Enforcement. Mr. Canellos currently is the Deputy Director of that division, and effective February 8, 2013, will fill the director role vacated by [the departing Robert Khuzami](#). Mr. Canellos was appointed Deputy Director in June 2012 and, according to the release, has been instrumental in developing the division's Cooperation Program, in generating numerous programmatic, policy, and legislative initiatives, and in critical decisions on national priority enforcement actions. He previously served three years as Director of the SEC's New York Regional Office.

CREDIT CARDS

New TCPA Action against Card Issuer Highlights Growing Area of Litigation Risk. On January 29, a credit card holder filed a putative class action against a card issuer that funds consumer retail credit accounts for customers of a major retail chain, alleging that the issuer violated the Telephone Consumer Protection Act in attempting to collect on the card holder's credit card debt. Complaint,

French v. Target Nat'l Bank, No. 13-233 (S.D. Cal. filed Jan. 29, 2013). The named plaintiff claims that after she fell behind on her payments, the issuer began making numerous calls daily to her personal cell phone, a number she claims not to have provided to the issuer. The issuer allegedly used an "automatic telephone dialing system" to make the calls, which the card holder claims continued even after she notified the issuer that it was not authorized to contact her on her cellular phone, and asked that the calls cease. The card holder alleges that in doing so, the issuer violated the TCPA, which requires express written consent from a consumer prior to receiving calls from an automated dialing system or an artificial or prerecorded voice. On behalf of the proposed class, the card holder is seeking \$500 in statutory damages for each and every alleged negligent violation, and treble damages for each alleged knowing or willful violation. The suit is the latest in a growing number of cases to be filed in recent years, particularly in California, and highlights a significant litigation risk for card issuers and debt collectors.

E-COMMERCE

FTC Announces Mobile Privacy Enforcement Action, Issues Mobile Privacy Staff Report. On February 1, the FTC [announced](#) that it is requiring a social networking application company to pay \$800,000 and make certain compliance enhancements to resolve [allegations](#) that the firm (i) misled and deceived users by automatically collecting and storing personal information from users' mobile device address books even if the users had not selected that option and despite claims that the application collected only certain non-personal user information, and (ii) violated the Children's Online Privacy Protection Act Rule by collecting personal information from approximately 3,000 children under the age of 13 without first getting parents' consent. Pursuant to the [consent decree](#), in addition to the monetary penalty, the company must establish a comprehensive privacy program, and obtain independent privacy assessments every other year for the next 20 years.

Concurrently, the FTC [released](#) a staff report that provides disclosure policy and other guidance to mobile platforms, application developers, advertising networks and analytics companies, and application developer trade associations. For example, the report urges platforms to (i) provide just-in-time disclosures to consumers and obtain affirmative express consent before allowing applications to access sensitive content like geolocation; (ii) consider providing just-in-time disclosures and obtaining affirmative express consent for other content that consumers may find sensitive; and (iii) consider developing icons to depict the transmission of user data. With regard to application developers, the report recommends, for example, that developers (i) provide just-in-time disclosures and obtain affirmative express consent before collecting and sharing sensitive information; and (ii) improve coordination and communication with advertising networks and other third parties that provide services for applications. During a call announcing the report, the FTC explained that the report is intended to influence industry standards, and that the Commission staff will reference the report for future policymaking. The FTC also noted that the National Telecommunications and Information Agency is developing a code of conduct on mobile application transparency, and, if strong privacy codes are developed, the FTC will view adherence to such codes favorably in connection with its law enforcement work.

PRIVACY/DATA SECURITY

FTC Announces Mobile Privacy Enforcement Action, Issues Mobile Privacy Staff Report. On February 1, the FTC [announced](#) that it is requiring a social networking application company to pay \$800,000 and make certain compliance enhancements to resolve [allegations](#) that the firm (i) misled and deceived users by automatically collecting and storing personal information from users' mobile device address books even if the users had not selected that option and despite claims that the

application collected only certain non-personal user information, and (ii) violated the Children's Online Privacy Protection Act Rule by collecting personal information from approximately 3,000 children under the age of 13 without first getting parents' consent. Pursuant to the [consent decree](#), in addition to the monetary penalty, the company must establish a comprehensive privacy program, and obtain independent privacy assessments every other year for the next 20 years.

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FTC Chairman Announces Plans to Step Down. On February 1, the FTC [announced](#) that Chairman John Leibowitz plans to step down on February 15, 2013. Mr. Leibowitz has been a Commissioner since September 2004, and has served as Chairman for the past four years. During his tenure, the FTC has prioritized consumer privacy and financial fraud enforcement and policy development. With regard to privacy initiatives during his time as Chairman, the FTC [issued a landmark report](#) setting forth best privacy practices for all businesses, and [recently updated](#) the Children's Online Privacy Protection Rule.

Maryland AG Establishes Privacy Unit. On January 28, Maryland Attorney General (AG) Doug Gansler [announced](#) a new unit in his office dedicated to online privacy enforcement and policy. The AG stated that the new unit will (i) monitor companies to ensure they are in compliance with state and federal consumer privacy laws, (ii) examine weaknesses in online privacy policies and work alongside major industry stakeholders and privacy advocates to provide outreach and education to businesses and consumers to broaden awareness about privacy rights, and (iii) pursue enforcement actions where appropriate. The unit announced by the AG appears similar to one [formed by California Attorney General Kamala Harris](#), which [recently has been active](#) with regard to mobile application privacy. Last year, AG Gansler [announced](#) "Privacy in the Digital Age" as his central initiative as President of the National Association of Attorneys General.

California Federal District Court Holds Song-Beverly Credit Card Act Does Not Prohibit Post-Transaction Collection of Zip Codes, Denies Class Certification. On January 28, the U.S. District Court for the Northern District of California [denied](#) a motion for class certification filed by a group of plaintiffs seeking to challenge, on behalf of similarly situated individuals, a retailer's policy that required cashiers to request consumer zip codes in connection with a purchase transaction. *Gormley v. Nike, Inc.*, No. 11-893, 2013 WL 322538 (N.D. Cal. Jan. 28, 2013). The court held that the named plaintiffs failed to demonstrate typicality because their experiences were inconsistent with the policy they sought to challenge. The court explained that while the policy required cashiers to request zip codes after providing the purchased merchandise and a receipt to the customer, each plaintiff testified that the cashier asked for a zip code prior to providing those items. The court

disagreed with the plaintiffs' argument that the timing of the request was irrelevant based on the plaintiffs' assertion that the California Supreme Court held in [Pineda v. Williams-Sonoma Stores Inc.](#) that a request for a card holder's zip code violates the Song-Beverly Credit Card Act. The court explained that *Pineda* only addressed whether zip codes constituted personal identification information, and then chose to follow subsequent district court decisions holding that the Song-Beverly Act prohibits only a request for personal identification information as a condition to completing a credit card transaction.

CRIMINAL ENFORCEMENT

DOJ Announces Departure of Criminal Division Chief. On January 30, the DOJ [announced](#) that Assistant Attorney General for the Criminal Division Lanny Breuer will leave the department on March 1, 2013. Mr. Breuer was confirmed for the position in April 2009. The DOJ press release credits him with taking "significant steps to fight corruption at home and abroad," including by increasing enforcement of the Foreign Corrupt Practices Act, and "protecting the integrity of our banking systems and fighting financial fraud." With regard to the latter, the release cites Mr. Breuer's LIBOR investigation, and his efforts to develop the division's Money Laundering and Bank Integrity Unit to support enforcement of the Bank Secrecy Act.

Senators Challenge DOJ on Post-Financial Crisis Settlements. On January 29, Senators Sherrod Brown (D-OH) and Charles Grassley (R-IA) sent a [letter](#) to U.S. Attorney General Eric Holder complaining that settlements obtained by the DOJ from financial institutions alleged to have contributed to the financial crisis "involve penalties that are disproportionately low," both in relation to the institutions' profits and the amount of harm the institutions are alleged to have caused. The Senators charge that the DOJ's "prosecutorial philosophy", which includes giving consideration to the impact of a prosecution or large penalty against an institution on the broader financial system, erodes public confidence and undermines the department's institutional standing. The Senators seek responses to a series of questions about the DOJ's approach to post-financial crisis enforcement, including its use of outside experts in making decisions regarding prosecution of the largest financial institutions.

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