Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

March 2, 2012

Topics In This Issue

InfoBytes Blog

Have you had a chance to check out our new InfoBytes Blog? In addition to regular "bytes," the blog will contain additional real-time firm content and commentary on news and developments affecting financial services providers and other financial system participants.

Click here to visit the blog and sign up to receive RSS feeds. Of course, we will continue to publish our weekly InfoBytes newsletter. We hope that you will find this new resource helpful and welcome any feedback, comments, or suggestions you might have on how we can do a better job in sharing critical developments of interest. **www.infobytesblog.com**

Federal Issues

CFPB Expands Complaint-Taking Program to Include Deposit Products. On March 1, the CFPB announced that it is has begun taking complaints regarding bank deposit products. As it has done previously with mortgages and credit cards, the CFPB is asking consumers to submit complaints through its website and other means regarding (i) account opening, closing, and management; (ii) deposits and withdrawals; (iii) debit or ATM cards; (iv) making or receiving payments or transmitting funds; and (v) problems related to low account funds. Banks will be notified when they are the subject of a complaint and the CFPB expects banks to respond to complaints within fifteen days. Consumers can dispute a bank's resolution of a complaint, but the CFPB aims to have each complaint resolved within sixty days. Although not formally announced, the CFPB has, on its website, also created space for consumers to submit complaints regarding student loans and consumer loans, such as auto loans.

FinCEN Seeks Input on Proposed Customer Due Diligence Program, Finalizes Electronic Filing Rule. On February 29, the Financial Crimes Enforcement Network

(FinCEN) released an advance notice of proposed rulemaking (ANPRM) to obtain stakeholder input regarding a proposed customer due diligence regulation that would require covered financial institutions to institute defined programs to identify the real or beneficial owners of customer accounts. The proposed regulation is designed to enhance federal anti-money laundering and counterterrorism efforts. According to FinCEN, financial institutions are not addressing beneficial ownership in a uniform and consistent manner. As a result, FinCEN is beginning a regulatory process that could eventually require banks, broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities to develop customer due diligence programs. The programs would include requirements to (i) conduct initial due diligence and verify customer identities at the time of account opening, (ii) understand the purpose and intended nature of the account, (iii) identify and verify all customers' beneficial owners, and (iv) monitor the customer relationship and conduct additional due diligence as needed. In the ANPRM, FinCEN states that it will consider extending such a program in the future to cover all financial institutions currently subject to FinCEN's anti-money laundering requirements, including casinos, money services businesses, nonbank mortgage lender and originators, and others. Consequently, in addition to input from the types of institutions that would be subject to an initial rulemaking, FinCEN is specifically requesting comments from these additional institutions that may later become subject to the rules. FinCEN is accepting comments on the ANPRM for sixty days from the date of publication in the Federal Register.

On the same day, FinCEN published a final rule mandating electronic filing of nearly all Bank Secrecy Act filings. The rule takes effect July 1, 2012. Although it largely mirrors a September 2011 proposal, it was modified in response to comments received, including a change to provide certain limited hardship exemptions for institutions that cannot begin electronic filing on time.

SEC and CFTC Propose Rules Regarding Detecting Identity Theft. On February 28, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC, together with the SEC, the Commissions) jointly issued proposed rules that would require entities subject to the Commissions' jurisdiction to address identity theft in two ways: (i) financial institutions and creditors would be required to develop and implement a written identity theft prevention program designed to detect, prevent, and mitigate identify theft with either certain existing accounts or opening new accounts, and (ii) credit and debit card issuers subject to the Commissions' jurisdiction would be required to assess the validity of change-of-address notifications under certain circumstances. Section 1088 of the Dodd-Frank Act transferred authority over certain parts of the Fair Credit Reporting Act from the Federal Trade Commission to the Commissions for entities they regulate. The Commissions' proposed rules are substantially similar to rules adopted in 2007 by the FTC and other federal financial regulatory agencies that previously were required to adopt such rules. The proposed rules set out the four elements that regulated entities would be required to include in their identify theft prevention programs: (i) identify relevant red flags, (ii) detect the occurrence of red flags, (iii) respond appropriately to the detected red flags, and (iv) periodically update the program to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft. The Commissions issued jointly proposed guidelines in an appendix to the proposed rules to assist regulated entities in formulating and maintaining a Program that would satisfy the proposed rule requirements. The Commissions are accepting comments on the proposal through May 7, 2012.

Federal Reserve Board Releases Mortgage Servicing Action Plans. On February 27, the Federal Reserve Board (FRB) released final action plans to be implemented by nine financial institutions to correct alleged deficiencies in residential mortgage loan servicing and foreclosure procedures. The FRB also announced that it expects to release plans for additional institutions soon. The plans are required by consent orders issued by the FRB in April 2011, and describe how the institutions will alter their servicing and foreclosure procedures by, among other things, (i) providing each borrower the name of a primary point of contact at the servicer; (ii) establishing limits on foreclosures where loan modifications have been approved; (iii) establishing robust, third-party vendor controls, including local foreclosure counsel; and (iv) strengthening compliance programs. The announcement also included the release of engagement letters between certain servicers and the third-party vendors hired to conduct reviews of foreclosures processed in 2009 and 2010. Those reviews, also required by the April 2011 orders, will determine whether borrowers suffered a financial injury that the institutions will be required to remedy. The release of the action plans follows the agreement by five of the servicers to pay a combined $766.5 million in penalties to the FRB as part of the $25 billion multi-party servicing settlement.

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HUD when seeking government insurance for residential mortgages in violation of the False Claims Act. As part of a settlement agreement the bank also agreed to pay $132.8 million in damages and penalties, and reform its businesses practices. This is the second recent settlement of mortgage-related violations of the False Claims Act. In both cases federal authorities alleged, among other things, that a financial institution participating in the FHA's Direct Lender Program repeatedly and falsely endorsed loans for FHA insurance that did not comply with underwriting requirements. The loans therefore should not have been eligible for government insurance, yet the federal insurance fund was unnecessarily impaired when those borrowers defaulted.

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Fannie Mae Announces Multiple Selling Guide Updates. On February 28, Fannie Mae issued Announcement SEL-2012-02, which describes Selling Guide updates related to the Project Eligibility Review Services (PERS), premium pricing recapture, and the maximum buyup of the mortgage backed securities (MBS) guaranty fees. Regarding PERS, effective April 1, 2012, Fannie Mae is increasing the base fee, eliminating the waiver for projects that require a mandatory review, and eliminating the maximum project review fee limit. The announcement also outlines other PERS fee structure changes. Additionally, the Selling Guide updates a remedy available to Fannie Mae when it has identified a lender as having unusual prepayment behavior. Effective immediately, Fannie Mae will be allowed to request reimbursement for any premium paid in connection with the purchase of a mortgage that is paid in full within 120 days from the whole loan purchase date or from the MBS issue date. Finally, for loans delivered on or after May 28, 2012 with MBS issue dates on or after June 1, 2012, Fannie Mae is increasing the maximum buyup of the guaranty fee of 25 basis points for fixed-rate loans and certain ARMs.

FHFA Announces First Properties Available for Sale in REO Pilot Program. On February 27, the Federal Housing Finance Agency opened for sale the first pool of foreclosed properties currently owned by Fannie Mae to be sold to private firms under the condition that the firms will manage the properties as rental properties for a specified period of time. This first transaction is part of a recently announced pilot program designed to shift the management of certain foreclosed properties to private entities in an effort to reduce taxpayer losses and stabilize neighborhoods and home values. Interested investors must apply to become pre-qualified in order to bid on the pools of properties. At the start, the properties for sale will be located in the hardest-hit markets including, Atlanta, Chicago, Las Vegas, Los Angeles, Phoenix, and parts of Florida.

Courts

First Circuit Upholds Dismissal of Claims Against Third-Party for Failure to Protect Personal Information. On February 28, the U.S. Court of Appeals for the First Circuit upheld the dismissal of a putative class action brought against a securities clearing company for alleged failures to protect certain personal information.

Katz v. Pershing, LLC, No. 11-1983, 2012 WL 612793 (1st Cir. Feb. 28, 2012). In this case, the plaintiff was the customer of a brokerage firm that used defendant Pershing LLC's online clearing system, but the customer had no direct relationship with the defendant. The plaintiff alleged that Pershing had contractual and statutory obligations to encrypt and protect the personal information of brokerage firm customers. Specifically, the plaintiff alleged various contract claims, including one that Pershing's failures constituted a breach of its contract with the brokerage. She also claimed that Pershing violated Massachusetts consumer protection laws. The First Circuit upheld the district court's dismissal, holding that the agreement between the brokerage and the defendant clearing firm did not confer any benefits on the plaintiff - the brokerage's customer. The court stated that the separate contractual agreements between the plaintiff and her brokerage on the one hand, and between the brokerage and the defendant clearing firm on the other, could not be mixed and matched. The court also held, with regard to claims that Pershing violated the state data protection law, that plaintiff's claims of potential harm from unprotected data were purely theoretical and "simply do[] not rise to the level of a reasonably impending threat." As such plaintiff lacked standing to bring the statutory claims. Because the court found that the plaintiff lacked standing, it did not reach the issue of whether the Massachusetts data privacy law provides a private right of action.

Federal Court Holds Combination of Clickwrap Agreement and 30-Day Right to Cancel Letter Made Arbitration Clause Clear to User. Recently, the U.S. District Court for the District of Colorado held that a clickwrap agreement combined with a follow up thirty-day right to cancel letter presented users with an arbitration clause in a reasonably conspicuous manner. Grosvenor v. Qwest Corp., No. 09-02848, 2012 WL 602655 (D. Colo. Feb. 23, 2012). The plaintiff brought suit against his internet service provider (ISP), Qwest Corporation, claiming that Qwest violated a lifetime price guarantee for the service. Qwest moved to compel arbitration. The court held that although the terms were not presented in the clearest manner, they were sufficiently conspicuous and provided an opportunity for a reasonable user to review them. The installation software provided to the plaintiff specifically mentioned the existence of an arbitration clause, directed the plaintiff to the ISP's website to review the agreement, and required that the plaintiff accept the terms before installing the software. The court raised concerns that once directed to the ISP website to review the arbitration terms, the plaintiff was required to click through two pages to find the terms. Despite this, the court stated that, as a matter of law, the multiple clicks requirement does not prevent contractual formation. Moreover, a follow up "Welcome Letter" sent to the plaintiff by the ISP again identified the arbitration clause and provided plaintiff with an opportunity to cancel the service within thirty days. The court decline to determine whether either the clickwrap agreement or the letter would be sufficient on their own, but together they rendered the contractual terms sufficiently clear for a reasonable user. In the end, the court found the arbitration agreement unenforceable on other grounds.

Second Circuit Moves MBS Case Back to New York State Court. On February 27, the United States Court of Appeals for the Second Circuit held that a residential mortgage-backed securities (MBS) case that had been removed from New York state court fell within the securities exception to both original and appellate jurisdiction under the Class Action Fairness Act of 2005 (CAFA). BlackRock Financial Management Inc. v. Segregated Account of Ambac Assurance Corp., No. 11-5309, 2012 WL 611401 (2nd Cir. Feb. 27, 2012). The case arose out of claims that the originator and servicer of MBS breached obligations owed to the trusts. After the trustee reached an $8.5 billion settlement agreement, it initiated an Article 77 proceeding in New York state court to confirm that it had authority to enter the settlement under the trust documents and that entry into the settlement did not violate its duties under the agreements and state law. Certain investors intervened and removed the case to federal court under the Class Action Fairness Act (CAFA). The district court denied a motion to remand to state court on the grounds that the case fell within CAFA's securities exception. On this interlocutory appeal, the court concluded that the case was one that solely involved a claim that "relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security." The court's rationale was that, based on prior precedent, it did not have jurisdiction over claims that were based "either on the terms of the instruments that create and define securities or on the duties imposed on persons who administer securities," although it did have jurisdiction over "claims based on rights arising from independent sources of state law." Because the underlying Article 77 case sought a declaration authorizing the exercise of the trustee's power to enter a settlement, the trustee was seeking construction of its rights under the Pooling and Servicing Agreement (PSA) and an instruction from the court as to whether it complied with its duties and obligations arising under the PSA. Therefore, the court (i) held that the securities exception of CAFA applied, (ii) dismissed the appeal for lack of jurisdiction, (iii) reversed the district court's order, and (iv) directed the district court to vacate its decision and order and remand the case to state court.

New Jersey Supreme Court Holds That Foreclosures Can Proceed Despite Notice Defects. On February 27, the New Jersey Supreme Court held in U.S. Bank, N.A. v. Guillaume, No. 068176, 2012 WL 603307 (N.J. Feb. 27, 2012), that state trial courts are not required to dismiss foreclosure actions if there are defects in the notice of foreclosure, and affirmed the denial of the borrowers' motion to vacate a default judgment of foreclosure. The decision overturned an August ruling from a New Jersey appeals court, Bank of New York v. Laks, 422 N.J. Super. 201 (App. Div. 2011), holding that dismissal was mandatory if a notice did not strictly comply with the requirements of the New Jersey Fair Foreclosure Act. In Guillaume, the borrowers sought to avoid foreclosure in part because the Notice of Intention to Foreclose identified only the servicer's name and contact information and not the name and address of the lender. At the trial level, the court gave the lender an opportunity to cure the defects in the Notice in lieu of dismissal. A panel of the New Jersey Appellate Division affirmed the trial court outcome based on its analysis that listing the name of the loan servicer rather than the name of the lender substantially complied with the statutory requirements. The New Jersey Supreme Court disagreed and held that the Fair Foreclosure Act requires that a Notice of Intention to Foreclose include the name and address of the actual lender, in addition to contact information for any loan servicer with responsibility to collect payments and negotiate resolution of a dispute between the lender and homeowner. Nonetheless the New Jersey Supreme Court determined that dismissal without prejudice was not the exclusive remedy for service of a defective notice and upheld the trial's court authority to craft an appropriate remedy for notice defects. The New Jersey Supreme Court also rejected the homeowners' argument that their original lender's $120 fee overcharge was a TILA violation that entitled them to rescission and held that courts adjudicating TILA claims have discretion to deny rescission if the homeowner cannot tender the full amount due on the loan.

Federal Court in Oregon Finds Noteholder's Agent Cannot Be Beneficiary Under Deed of Trust. On February 29, the U.S. District Court for the District of Oregon held, in James v. Recontrust Co., No. 3:11-cv-00324-ST (D. Or. Feb. 29, 2012), that under Oregon law the "beneficiary" of a deed of trust (as opposed to a mortgage) in that state is the noteholder - i.e., the lender or the lender's successor - and therefore cannot be the agent of the noteholder, such as an electronic registry system. Oregon law only permits a trustee to conduct a non-judicial foreclosure where all subsequent assignments are recorded in the proper county recorder's office. In this case, because the note was subsequently assigned without having been recorded (because the electronic registry system was thought at the time to be the beneficiary and therefore that recordation was not required) the court ruled that the non-judicial foreclosure route was prohibited under Oregon's statutory regime. However, the court did note that Oregon's judicial foreclosure process remains available in these circumstances.

Nevada Supreme Court Rules MERS Mortgage Assignments Are Valid. On February 24, the Nevada Supreme Court held, in two separate cases, that a Mortgage Electronic Registration System (MERS)-generated mortgage assignment did not invalidate a foreclosure. Davis v. U.S. Bank, N.A., No. 56306, 2012 WL 642544 (Nev. Feb. 24, 2012); Volkes v. BAC Home Loans Servicing, No. 57304, 2012 WL 642673 (Nev. Feb. 24, 2012). In both cases, the court upheld the lower courts' decisions allowing foreclosure certificates to be issued following unsuccessful foreclosure mediation. Appellants had argued that MERS is a sham entity, and therefore any MERS-generated assignments are necessarily invalid. Noting that courts in Nevada and other states have "repeatedly" recognized that MERS serves a legitimate business purpose, the Nevada Supreme Court rejected appellants' arguments that their assignments were invalid merely because they were generated by MERS.

Federal Court Approves for First Time Computer-Assisted Document Review. On February 24, a Southern District of New York Magistrate Judge held that computer-assisted review is an acceptable way to search for electronically stored information. Da Silva Moore v. Publicis Groupe, No. 11-1279, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012). The court explained that computer-assisted coding is the use of sophisticated algorithms to enable the computer to determine relevance, based on interaction with a human reviewer. The court then described traditional e-discovery keyword searches and manual review as, in some cases, "over-inclusive," "quite costly," and "not very effective." In certain cases, the court concluded, computer-assisted review is the better approach. The judge then detailed the factors that favored computer-assisted predictive coding in this case: (i) the parties' agreement to use predictive coding; (ii) the size of the entire data set (more than 3 million documents); (iii) the accuracy of predictive coding compared to traditional methods; (iv) the need for cost effectiveness and proportionality under Rule 26(b)(2)(C); and (v) the "transparent" review process proposed by the defendant.

Miscellany

European Banking Authority Expresses Concerns Regarding New Financial Sector Domain Names. On February 23, the European Banking Authority (EBA)

released a letter it sent to the ICANN Board of Directors expressing concerns about ICANN's June 2011 approval of a new program to allow additional generic top level domains, including ".bank" and ".fin". The new domain names are expected to be available for use later this year. As the European umbrella organization comprised of the heads of each member state's consumer credit regulator, the EBA is broadly tasked with European consumer financial protection. From that standpoint, the letter and an attached comment document ask ICANN to halt the use of the new domain names because they have the potential to increase consumer fraud and decrease data security. Further, the new names may require financial institutions to implement costly and complex legal and commercial initiatives to protect their trademarks from fraud. The EBA does not believe that ICANN's proposals to mitigate these concerns, including a proposed new registration system for the domain names, are insufficient.

Firm News

Andrew Sandler will be speaking at PLI's A Guide to Financial Institutions 2012 Program in New York on March 6, 2012 at 4:00 PM in a session entitled "The New Era of Consumer Protection & Enforcement: The CFPB & Other Initiatives."

Margo Tank and **James Shreve** will be speaking on the panel "Meeting Consumer Protection Requirements in Mobile Payments" at the International Association of Privacy Professionals Global Privacy Summit in Washington, DC on March 7, 2012. The panel will explore the unique and often complex compliance issues for those involved in mobile payments. James Shreve also will be leading the panel "Addressing the Latest Wave of Global Breach Notice Requirements" at the IAPP Summit on March 7. This panel of attorneys from several countries will explore new US and international security breach notification requirements and compliance issues in addressing cross-border incidents.

David Baris and **Noel Gruber** will be speaking on March 13, 2012 at the ICBA 2012 Annual Convention in Nashville, Tennessee in a session entitled "How Do Publicly Held Community Banks and Holding Companies Comply?"

James Parkinson will be chairing a panel at the International Bar Association's 10th Annual Anti-Corruption Conference in Paris, France on March 13 and 14, 2012. The panel is entitled: "The Privileged Profession: Risks faced by legal professionals advising in international transactions."

Donna Wilson will be participating in a CLE webinar entitled "Consumer Finance Class Actions: FCRA and FACTA: Leveraging New Developments in Certification, Damages and Preemption" on March 21, from 1:00pm-2:30pm EDT.

David Baris will be speaking in the ABA Business Law Section CLE panel, "Dealing with Enforcement Actions and Insider Liability," in Las Vegas on March 23, 2012.

Jonice Gray Tucker will be speaking at the ABA Business Law Section's Spring Meeting in Las Vegas on March 23, 2012 on a panel entitled "The CFPB Approaches One Year: Experiences and Exposures." The panel will include speakers from PNC Financial Services Group, PayPal, Treliant Risk Advisors, the Consumer Federation of America, and the Federal Trade Commission.

Andrew Sandler will moderate a panel at the American Conference Institute's 8th National Forum on Residential Mortgage Litigation and Regulatory Enforcement on March 29, 2012 in

Washington, DC. The panel is titled, "Complying With and Responding to New and Emerging Federal and State Enforcement Actions."

David Baris will be speaking at the 2012 Virginia Bank Directors Symposium on March 29, 2012 in Tysons Corner, Virginia. Mr. Baris will discuss how bank directors can minimize their risk of personal liability.

David Baris will be speaking at the NACD/AABD Bank Director Workshop on April 12, 2012 in Fort Lauderdale, Florida. The topic of the presentation is "Bank Director Liability and Practical Steps to Minimize It."

Donna Wilson will be moderating a panel entitled "BANKS UNDER SIEGE: The Civil, Criminal, Regulatory and Insurance Fallout from Mortgage Foreclosures and Bank Failures" at the ABA Section of Litigation annual meeting in Washington DC, April 18-21, 2012.

David Krakoff will be speaking at ACI's 27th National Conference on the Foreign Corrupt Practices Act in New York, NY on April 17, 2012. Mr. Krakoff's session will focus on defending executives in FCPA investigations.

James Parkinson will be speaking at a PLI program seminar entitled "Foreign Corrupt Practices Act 2012" in San Francisco, California on April 17, 2012 and in New York, New York on May 4, 2012.

Andrew Sandler will be speaking at the 2012 Marquis National Compliance Conference in Fort Worth, Texas on April 18, 2012. Mr. Sandler's session will cover the view from Washington, DC on CRA, HMDA, and Fair Lending.

David Krakoff will be speaking at the ALI-ABA Environmental Crimes Conference in Washington, DC on April 26, 2012. Mr. Krakoff's session will discuss the key issues at the outset of an environmental criminal action.

Mortgages

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released final action plans to be implemented by nine financial institutions to correct alleged deficiencies in residential mortgage loan servicing and foreclosure procedures. The FRB also announced that it expects to release plans for additional institutions soon. The plans are required by consent orders issued by the FRB in April 2011, and describe how the institutions will alter their servicing and foreclosure procedures by, among other things, (i) providing each borrower the name of a primary point of contact at the servicer; (ii) establishing limits on foreclosures where loan modifications have been approved; (iii) establishing robust, third-party vendor controls, including local foreclosure counsel; and (iv) strengthening compliance programs. The announcement also included the release of engagement letters between certain servicers and the third-party vendors hired to conduct reviews of foreclosures processed in 2009 and 2010. Those reviews, also required by the April 2011 orders, will determine whether borrowers suffered a financial injury that the institutions will be required to remedy. The release of the action plans follows the agreement by five of the servicers to pay a combined $766.5 million in penalties to the FRB as part of the $25 billion multi-party servicing settlement.

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FHFA Announces First Properties Available for Sale in REO Pilot Program. On February 27, the Federal Housing Finance Agency opened for sale the first pool of foreclosed properties currently owned by Fannie Mae to be sold to private firms under the condition that the firms will manage the properties as rental properties for a specified period of time. This first transaction is part of a recently announced pilot program designed to shift the management of certain foreclosed properties to private entities in an effort to reduce taxpayer losses and stabilize neighborhoods and home values. Interested investors must apply to become pre-qualified in order to bid on the pools of properties. At the start, the properties for sale will be located in the hardest-hit markets including, Atlanta, Chicago, Las Vegas, Los Angeles, Phoenix, and parts of Florida.

New Jersey Supreme Court Holds That Foreclosures Can Proceed Despite Notice Defects. On February 27, the New Jersey Supreme Court held in U.S. Bank, N.A. v. Guillaume, No. 068176, 2012 WL 603307 (N.J. Feb. 27, 2012), that state trial courts are not required to dismiss foreclosure actions if there are defects in the notice of foreclosure, and affirmed the denial of the borrowers' motion to vacate a default judgment of foreclosure. The decision overturned an August ruling from a New Jersey appeals court, Bank of New York v. Laks, 422 N.J. Super. 201 (App. Div. 2011), holding that dismissal was mandatory if a notice did not strictly comply with the requirements of the New Jersey Fair Foreclosure Act. In Guillaume, the borrowers sought to avoid foreclosure in part because the Notice of Intention to Foreclose identified only the servicer's name and contact information and not the name and address of the lender. At the trial level, the court gave the lender an opportunity to cure the defects in the Notice in lieu of dismissal. A panel of the New Jersey Appellate Division affirmed the trial court outcome based on its analysis that listing the name of the loan servicer rather than the name of the lender substantially complied with the statutory requirements. The New Jersey Supreme Court disagreed and held that the Fair Foreclosure Act requires that a Notice of Intention to Foreclose include the name and address of the actual lender, in addition to contact information for any loan servicer with responsibility to collect payments and negotiate resolution of a dispute between the lender and homeowner. Nonetheless the New Jersey Supreme Court determined that dismissal without prejudice was not the exclusive remedy for service of a defective notice and upheld the trial's court authority to craft an appropriate remedy for notice defects. The New Jersey Supreme Court also rejected the homeowners' argument that their original lender's $120 fee overcharge was a TILA violation that entitled them to rescission and held that courts adjudicating TILA claims have discretion to deny rescission if the homeowner cannot tender the full amount due on the loan.

Federal Court in Oregon Finds Noteholder's Agent Cannot Be Beneficiary Under Deed of Trust. On February 29, the U.S. District Court for the District of Oregon held, in James v. Recontrust Co., No. 3:11-cv-00324-ST (D. Or. Feb. 29, 2012), that under Oregon law the "beneficiary" of a deed of trust (as opposed to a mortgage) in that state is the noteholder - i.e., the lender or the lender's successor - and therefore cannot be the agent of the noteholder, such as an electronic registry system. Oregon law only permits a trustee to conduct a non-judicial foreclosure where all subsequent assignments are recorded in the proper county recorder's office. In this case, because the note was subsequently assigned without having been recorded (because the electronic registry system was thought at the time to be the beneficiary and therefore that recordation was not required) the court ruled that the non-judicial foreclosure route was prohibited under Oregon's statutory regime. However, the court did note that Oregon's judicial foreclosure process remains available in these circumstances.

Nevada Supreme Court Rules MERS Mortgage Assignments Are Valid. On February 24, the Nevada Supreme Court held, in two separate cases, that a Mortgage Electronic Registration System (MERS)-generated mortgage assignment did not invalidate a foreclosure. Davis v. U.S. Bank, N.A., No. 56306, 2012 WL 642544 (Nev. Feb. 24, 2012);

Volkes v. BAC Home Loans Servicing, No. 57304, 2012 WL 642673 (Nev. Feb. 24, 2012). In both cases, the court upheld the lower courts' decisions allowing foreclosure certificates to be issued following unsuccessful foreclosure mediation. Appellants had argued that MERS is a sham entity, and therefore any MERS-generated assignments are necessarily invalid. Noting that courts in Nevada and other states have "repeatedly" recognized that MERS serves a legitimate business purpose, the Nevada Supreme Court rejected appellants' arguments that their assignments were invalid merely because they were generated by MERS.

Banking

CFPB Expands Complaint-Taking Program to Include Deposit Products. On March 1,

the CFPB announced that it is has begun taking complaints regarding bank deposit products. As it has done previously with mortgages and credit cards, the CFPB is asking consumers to submit complaints through its website and other means regarding (i) account opening, closing, and management; (ii) deposits and withdrawals; (iii) debit or ATM cards; (iv) making or receiving payments or transmitting funds; and (v) problems related to low account funds. Banks will be notified when they are the subject of a complaint and the CFPB expects banks to respond to complaints within fifteen days. Consumers can dispute a bank's resolution of a complaint, but the CFPB aims to have each complaint resolved within sixty days. Although not formally announced, the CFPB has, on its website, also created space for consumers to submit complaints regarding student loans and consumer loans, such as auto loans.

FinCEN Seeks Input on Proposed Customer Due Diligence Program, Finalizes Electronic Filing Rule. On February 29, the Financial Crimes Enforcement Network (FinCEN) released an advance notice of proposed rulemaking (ANPRM) to obtain stakeholder input regarding a proposed customer due diligence regulation that would require covered financial institutions to institute defined programs to identify the real or beneficial owners of customer accounts. The proposed regulation is designed to enhance federal anti-money laundering and counterterrorism efforts. According to FinCEN, financial institutions are not addressing beneficial ownership in a uniform and consistent manner. As a result, FinCEN is beginning a regulatory process that could eventually require banks, broker-dealers, mutual funds, futures commission merchants, and introducing brokers in commodities to develop customer due diligence programs. The programs would include requirements to (i) conduct initial due diligence and verify customer identities at the time of account opening, (ii) understand the purpose and intended nature of the account, (iii) identify and verify all customers' beneficial owners, and (iv) monitor the customer relationship and conduct additional due diligence as needed. In the ANPRM, FinCEN states that it will consider extending such a program in the future to cover all financial institutions currently subject to FinCEN's anti-money laundering requirements, including casinos, money services businesses, nonbank mortgage lender and originators, and others. Consequently, in addition to input from the types of institutions that would be subject to an initial rulemaking, FinCEN is specifically requesting comments from these additional institutions that may later become subject to the rules. FinCEN is accepting comments on the ANPRM for sixty days from the date of publication in the Federal Register.

On the same day, FinCEN published a final rule mandating electronic filing of nearly all Bank Secrecy Act filings. The rule takes effect July 1, 2012. Although it largely mirrors a September 2011 proposal, it was modified in response to comments received, including a change to provide certain limited hardship exemptions for institutions that cannot begin electronic filing on time.

Securities

Second Circuit Moves MBS Case Back to New York State Court. On February 27, the United States Court of Appeals for the Second Circuit held that a residential mortgage-backed securities (MBS) case that had been removed from New York state court fell within the securities exception to both original and appellate jurisdiction under the Class Action Fairness Act of 2005 (CAFA).

BlackRock Financial Management Inc. v. Segregated Account of Ambac Assurance Corp., No. 11-5309, 2012 WL 611401 (2nd Cir. Feb. 27, 2012). The case arose out of claims that the originator and servicer of MBS breached obligations owed to the trusts. After the trustee reached an $8.5 billion settlement agreement, it initiated an Article 77 proceeding in New York state court to confirm that it had authority to enter the settlement under the trust documents and that entry into the settlement did not violate its duties under the agreements and state law. Certain investors intervened and removed the case to federal court under the Class Action Fairness Act (CAFA). The district court denied a motion to remand to state court on the grounds that the case fell within CAFA's securities exception. On this interlocutory appeal, the court concluded that the case was one that solely involved a claim that "relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security." The court's rationale was that, based on prior precedent, it did not have jurisdiction over claims that were based "either on the terms of the instruments that create and define securities or on the duties imposed on persons who administer securities," although it did have jurisdiction over "claims based on rights arising from independent sources of state law." Because the underlying Article 77 case sought a declaration authorizing the exercise of the trustee's power to enter a settlement, the trustee was seeking construction of its rights under the Pooling and Servicing Agreement (PSA) and an instruction from the court as to whether it complied with its duties and obligations arising under the PSA. Therefore, the court (i) held that the securities exception of CAFA applied, (ii) dismissed the appeal for lack of jurisdiction, (iii) reversed the district court's order, and (iv) directed the district court to vacate its decision and order and remand the case to state court.

Litigation

Federal Court Approves for First Time Computer-Assisted Document Review. On February 24, a Southern District of New York Magistrate Judge held that computer-assisted review is an acceptable way to search for electronically stored information.

Da Silva Moore v. Publicis Groupe, No. 11-1279, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012). The court explained that computer-assisted coding is the use of sophisticated algorithms to enable the computer to determine relevance, based on interaction with a human reviewer. The court then described traditional e-discovery keyword searches and manual review as, in some cases, "over-inclusive," "quite costly," and "not very effective." In certain cases, the court concluded, computer-assisted review is the better approach. The judge then detailed the factors that favored computer-assisted predictive coding in this case: (i) the parties' agreement to use predictive coding; (ii) the size of the entire data set (more than 3 million documents); (iii) the accuracy of predictive coding compared to traditional methods; (iv) the need for cost effectiveness and proportionality under Rule 26(b)(2)(C); and (v) the "transparent" review process proposed by the defendant.

E-Commerce

Federal Court Holds Combination of Clickwrap Agreement and 30-Day Right to Cancel Letter Made Arbitration Clause Clear to User. Recently, the U.S. District Court for the District of Colorado held that a clickwrap agreement combined with a follow up thirty-day right to cancel letter presented users with an arbitration clause in a reasonably conspicuous manner.

Grosvenor v. Qwest Corp., No. 09-02848, 2012 WL 602655 (D. Colo. Feb. 23, 2012). The plaintiff brought suit against his internet service provider (ISP), Qwest Corporation, claiming that Qwest violated a lifetime price guarantee for the service. Qwest moved to compel arbitration. The court held that although the terms were not presented in the clearest manner, they were sufficiently conspicuous and provided an opportunity for a reasonable user to review them. The installation software provided to the plaintiff specifically mentioned the existence of an arbitration clause, directed the plaintiff to the ISP's website to review the agreement, and required that the plaintiff accept the terms before installing the software. The court raised concerns that once directed to the ISP website to review the arbitration terms, the plaintiff was required to click through two pages to find the terms. Despite this, the court stated that, as a matter of law, the multiple clicks requirement does not prevent contractual formation. Moreover, a follow up "Welcome Letter" sent to the plaintiff by the ISP again identified the arbitration clause and provided plaintiff with an opportunity to cancel the service within thirty days. The court decline to determine whether either the clickwrap agreement or the letter would be sufficient on their own, but together they rendered the contractual terms sufficiently clear for a reasonable user. In the end, the court found the arbitration agreement unenforceable on other grounds.

European Banking Authority Expresses Concerns Regarding New Financial Sector Domain Names. On February 23, the European Banking Authority (EBA) released a letter it sent to the ICANN Board of Directors expressing concerns about ICANN's June 2011 approval of a new program to allow additional generic top level domains, including ".bank" and ".fin". The new domain names are expected to be available for use later this year. As the European umbrella organization comprised of the heads of each member state's consumer credit regulator, the EBA is broadly tasked with European consumer financial protection. From that standpoint, the letter and an attached comment document ask ICANN to halt the use of the new domain names because they have the potential to increase consumer fraud and decrease data security. Further, the new names may require financial institutions to implement costly and complex legal and commercial initiatives to protect their trademarks from fraud. The EBA does not believe that ICANN's proposals to mitigate these concerns, including a proposed new registration system for the domain names, are insufficient.

Privacy/Data Security

SEC and CFTC Propose Rules Regarding Detecting Identity Theft. On February 28, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC, together with the SEC, the Commissions)

jointly issued proposed rules that would require entities subject to the Commissions' jurisdiction to address identity theft in two ways: (i) financial institutions and creditors would be required to develop and implement a written identity theft prevention program designed to detect, prevent, and mitigate identify theft with either certain existing accounts or opening new accounts, and (ii) credit and debit card issuers subject to the Commissions' jurisdiction would be required to assess the validity of change-of-address notifications under certain circumstances. Section 1088 of the Dodd-Frank Act transferred authority over certain parts of the Fair Credit Reporting Act from the Federal Trade Commission to the Commissions for entities they regulate. The Commissions' proposed rules are substantially similar to rules adopted in 2007 by the FTC and other federal financial regulatory agencies that previously were required to adopt such rules. The proposed rules set out the four elements that regulated entities would be required to include in their identify theft prevention programs: (i) identify relevant red flags, (ii) detect the occurrence of red flags, (iii) respond appropriately to the detected red flags, and (iv) periodically update the program to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft. The Commissions issued jointly proposed guidelines in an appendix to the proposed rules to assist regulated entities in formulating and maintaining a Program that would satisfy the proposed rule requirements. The Commissions are accepting comments on the proposal through May 7, 2012.

First Circuit Upholds Dismissal of Claims Against Third-Party for Failure to Protect Personal Information. On February 28, the U.S. Court of Appeals for the First Circuit upheld the dismissal of a putative class action brought against a securities clearing company for alleged failures to protect certain personal information. Katz v. Pershing, LLC, No. 11-1983, 2012 WL 612793 (1st Cir. Feb. 28, 2012). In this case, the plaintiff was the customer of a brokerage firm that used defendant Pershing LLC's online clearing system, but the customer had no direct relationship with the defendant. The plaintiff alleged that Pershing had contractual and statutory obligations to encrypt and protect the personal information of brokerage firm customers. Specifically, the plaintiff alleged various contract claims, including one that Pershing's failures constituted a breach of its contract with the brokerage. She also claimed that Pershing violated Massachusetts consumer protection laws. The First Circuit upheld the district court's dismissal, holding that the agreement between the brokerage and the defendant clearing firm did not confer any benefits on the plaintiff - the brokerage's customer. The court stated that the separate contractual agreements between the plaintiff and her brokerage on the one hand, and between the brokerage and the defendant clearing firm on the other, could not be mixed and matched. The court also held, with regard to claims that Pershing violated the state data protection law, that plaintiff's claims of potential harm from unprotected data were purely theoretical and "simply do[] not rise to the level of a reasonably impending threat." As such plaintiff lacked standing to bring the statutory claims. Because the court found that the plaintiff lacked standing, it did not reach the issue of whether the Massachusetts data privacy law provides a private right of action.