

June 14, 2013

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

CFPB Issues Initial Findings from Study of Overdraft Practices. On June 11, the CFPB released a [white paper](#) with initial findings from its study of bank and credit union overdraft practices. The purpose of the study was to provide a factual basis to inform efforts to develop more uniform treatment of overdraft practices across financial institutions. The CFPB reports that (i) customers considered to be heavy overdrafters were more likely to opt-in to overdraft programs and, by opting in, were more likely to pay higher fees and were more likely to have their accounts involuntarily closed, (ii) overdraft practices and costs / closures related to overdraft programs vary widely by institution, and (iii) some policies and practices related to overdrafts are not disclosed or are disclosed only in a technical manner. The CFPB further reported that overdraft fees represent approximately 60 percent of the fee revenue generated by consumer checking accounts, and identified specific practices the CFPB believes raise questions about whether customers can anticipate or compare the cost of overdrafting, including funds availability and order posting practices. The report is based on a review of institution-level data, and the CFPB plans to review account-level data in order to better understand how differences in bank practices affect customers.

CFPB Publishes Additional Mortgage Rule Compliance Guides, Launches Mortgage Rule Implementation Web Page. On June 7, the CFPB published a [loan originator rule compliance guide](#) and a [mortgage servicing rules compliance guide](#). As with other prior guides it has released, the CFPB cautioned that the guides are not substitutes 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 or servicing of mortgage loans. On June 13, the CFPB announced a new [web page](#) that provides, in one location, the various compliance guides and other mortgage rule implementation materials prepared by the CFPB.

House Passes Reverse Mortgage Legislation. On June 12, the U.S. House passed [H.R. 2167](#), the Reverse Mortgage Stabilization Act, which would authorize the HUD Secretary to establish, by

notice or mortgagee letter, any additional or alternative requirements determined necessary to improve the fiscal safety and soundness of the Home Equity Conversion Mortgage (HECM) program. During recent hearings in both the House and Senate, the FHA has sought more flexibility to pursue program changes outside of the formal rulemaking process. A Senate bill, [S. 469](#) is similar to the House version, but in addition would require that HECM mortgages contain terms and provisions for establishing escrow accounts, performing financial assessments, or limiting the amount of any payment made available under the mortgage.

Federal Authorities Announce More Charges in Broker-Dealer Foreign Bribery Case. On June 12, the DOJ and the SEC announced additional charges in a [previously announced case](#) against employees of a U.S. broker-dealer related to an alleged "massive international bribery scheme." The DOJ [unsealed criminal charges](#) against a third employee of the broker-dealer who allegedly arranged bribe payments to a Venezuela state economic development bank official in exchange for financial trading business for the broker-dealer. The SEC, whose routine compliance examination detected the allegedly illegal conduct, [announced](#) parallel civil charges.

Fannie Mae Amends Bifurcated Mortgage Loan Obligations, Announces Miscellaneous Servicing Guide Updates. On June 12, Fannie Mae issued two Servicing Guide Announcements relating to bifurcated mortgages, mortgage payments, valuations, and processing IRS forms. Announcement [SVC 2013-12](#) clarifies and adds numerous obligations for servicers and responsible parties in connection with bifurcated mortgage loans - loans or properties for which the current servicer is not the responsible party for the selling representations and warranties and/or for the prior servicing responsibilities or liabilities. The announcement addresses, among other topics, (i) issuance of repurchase requests and statements, requests for a make whole payment, or requests for indemnification, (ii) remittance of bifurcated repurchase price and appeal process, (iii) hiring of a servicer and a servicer's failure to comply, (iv) mortgage loan files, record retention, and release of records, and (v) disputes between responsible parties and servicers. All of the policy changes in 2013-12 take effect on September 1, 2013. Announcement [SVC 2013-11](#) describes policy changes regarding (i) processing and applying mortgage loan payments, (ii) obtaining a property valuation for Fannie Mae conventional mortgage loan modifications, and (iii) processing IRS Form 4506-T and Form 4506T-EZ. While servicers are encouraged to implement the changes noted in 2013-11 immediately, servicers are not required to do so until October 1, 2013.

FDIC Announces Agreement with Canadian Counterpart on Cross-Border Bank Resolution. On June 12, the FDIC [announced](#) the signing of a [memorandum of understanding](#) (MOU) with the Canada Deposit Insurance Corporation to formalize existing efforts between the two regulators to cooperate on effective resolution planning in the event of the failure of large, complex financial institutions that maintain operations in both countries. The MOU provides a framework for the parties to consult and share resources and information when addressing a bank resolution, and contemplates future coordination on related policy issues.

OCC Provides Minority Institutions Flexibility to Raise Capital. On June 11, the OCC [revised](#) its policy statement on minority institutions to make it easier for those institutions to raise capital. The OCC acknowledged that minority institutions may be unable to accept equity investment capital from some investors because their status as a minority institution would be jeopardized if the share of minority ownership fell below 50 percent. In response, the [revised statement](#) adds discretionary language that allows the agency to continue to treat an existing minority institution as such even if it no longer meets the 51 percent ownership criteria provided that the institution (i) primarily serves the credit and economic needs of the community in which it is chartered and (ii) that community is predominantly minority.

OCC Publishes Community Bank Best Practices Booklet, Holds Webinar on Community

Bank Cyber Threats. On June 13, the OCC [published](#) a booklet titled "[A Common Sense Approach to Community Banking](#)," which offers best practices the agency believes distinguish high-performing community banks from those that barely survive or fail. The booklet, which previously was distributed to national banks and federal thrifts and now is available on the OCC's website, focuses on three interrelated areas: (i) risk assessment and management, (ii) strategic planning, and (iii) capital planning. Earlier in the week, the OCC hosted a webinar on cyber threats and vulnerabilities to raise awareness for community banks, and [provided](#) a collection of existing regulatory guidance that addresses actions banks should take to help mitigate the risks associated with information security.

FTC Revises Red Flags Identity Theft Rule Business Guide. On June 12, the FTC [issued](#) revised guidance to help firms comply with its Red Flags Rule, which requires covered firms to monitor for and respond to certain "red flag" warnings of customer identify theft. The updated [guide](#) reflects [changes made](#) to the rule last year to more narrowly define the types of creditor subject to the rule.

NIST Seeks Comments on Cloud Computing Security Document. On June 11, the National Institute of Standards and Technology (NIST) [published](#) a draft [security document](#) that provides a comprehensive security model to supplement other NIST efforts to develop a standard vocabulary and implementation framework for the integration of cloud-based applications across the government. NIST will accept comments on the draft document through July 12, 2013. Although NIST's resources are developed for use by federal agencies, they can influence other policy decisions and may serve as a resource for private firms seeking to understand the benefits and risks of cloud technology.

STATE ISSUES

Nevada Enacts Homeowner's Bill of Rights. On June 3, Nevada enacted a Homeowner's Bill of Rights, [SB 321](#), to establish protections from foreclosure for owner-occupied property securing residential mortgage loans. The Nevada bill, among other things, (i) requires that at least 30 calendar days before recording pre-foreclosure documents or commencing a judicial foreclosure action and at least 30 calendar days after a borrower's default, the mortgage servicer, mortgagee or beneficiary of the deed of trust must provide to the borrower certain information concerning the borrower's account, the available foreclosure prevention alternatives, and a statement of the facts supporting the right of the mortgagee or beneficiary to foreclose, (ii) requires that an institution contact, or attempt to contact, the borrower before filing pre-foreclosure documents or commencing a foreclosure, (iii) prohibits dual tracking, (iv) establishes "single point of contact" rules, and (v) allows borrowers in a judicial foreclosure action to elect to participate in a state foreclosure mediation program. These new requirements apply to notices of default and elections to sell that are recorded on or after October 1, 2013. The bill exempts institutions that foreclosed on 100 or fewer owner-occupied homes in the preceding annual reporting period, as established by their primary regulator.

Florida Enacts Fast-Track Foreclosure Bill. On June 7, Florida enacted [HB 87](#) to immediately expedite the state's judicial foreclosure process, including with regard to pending cases. The bill amends the state's alternative foreclosure procedure to, among other things, (i) allow any lienholder, not only the mortgagee, to initiate the procedure, and (ii) establish new fast-track court procedures. The bill also (i) reduces the statute of limitations for deficiency judgments on a foreclosure action from five years to one year, (ii) requires the foreclosing party to provide information upon case filing regarding a lost, destroyed, or stolen promissory note, (iii) defines "adequate protections" in cases where there is a lost, destroyed, or stolen note, and (iv) adds

protections for purchasers of property at a foreclosure sale. The bill took effect immediately.

Florida Adjusts Consumer Loan Allowable Interest Rate Tiers. On June 10, Florida enacted [SB 282](#), which amends the Florida Consumer Finance Act to increase by \$1,000 the tiered principal amounts subject to maximum allowable interest rates. For loans entered after July 1, 2013, lenders can charge for certain consumer loans up to 30 percent interest on the first \$3,000, up to 24 percent on \$3,001 to \$4,000, and up to 18 percent over \$4,000. The bill also increases from \$10 to \$15 the maximum amount that lenders can charge for payments at least 10 days delinquent.

Maine Simplifies Credit Reporting Law. This week, Maine enacted a bill to simplify the state's credit reporting law. The bill, [SP 504](#), was [drafted by the Bureau of Consumer Protection](#) to ease compliance burden primarily by eliminating provisions mirroring the federal Fair Credit Reporting Act (FCRA), and instead incorporating the federal FCRA and its implementing regulations. The bill retains and reorganizes existing additional state credit reporting consumer protections.

COURTS

Massachusetts Supreme Court Holds That Courts May Invalidate Certain Arbitration Agreements With Class Action Waivers. On June 12, the Massachusetts Supreme Judicial Court (SJC) [held](#) that courts may invalidate an arbitration agreement that includes a class action waiver where the plaintiff demonstrates that his or her claim effectively cannot be pursued in individual arbitration. *Feeney v. Dell, Inc.*, No. SJC-11133, 2013 WL 2479603 (Mass. Jun. 12, 2013). In this case, the court determined that the plaintiffs could not effectively pursue their statutory claim under the individual claim arbitration process given the complexity of their claims and the small amounts of individual damages. The SJC therefore affirmed the trial court's order invalidating the agreement. According to the SJC, the Supreme Court's holding in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), left open the possibility that an arbitration agreement may be invalidated if the agreement effectively prevents the claimant from vindicating his or her statutory cause of action. Still, the SJC's decision arguably conflicts with several decisions in the federal courts of appeal that question that the continuing vitality of the "vindication of rights" doctrine following *Concepcion*. The decision also addresses an issue currently before the Supreme Court in *American Express Co. v. Italian Colors Restaurant*, No. 12-133 (S. Ct. argument heard Feb. 27, 2013).

U.S. Supreme Court Refuses to Vacate Arbitrator's Decision Allowing Class Arbitration. On June 10, the U.S. Supreme Court [held](#) that the Federal Arbitration Act (FAA) does not permit a court to vacate an arbitrator's decision to allow class arbitration where the parties authorized the arbitrator to decide the issue. *Oxford Health Plans LLC v. Sutter*, No. 12-135, 569 U.S. ____ (2013). In this case, a health insurance company sought to overturn an arbitrator's holding that the contract between the company and a doctor claiming the insurer failed to fully pay him and similarly situated doctors authorized class arbitration of the claims. The parties agreed that the arbitrator should decide the issue, but in seeking to overturn the decision, the insurer argued that the arbitrator exceeded his authority under the FAA. Citing the narrow standard of judicial review under the relevant FAA provision and the "heavy burden" a party bears under that provision, the Court held that the parties' agreement to allow the arbitrator to decide the issue of class arbitration of the claims is sufficient to show that he did not exceed his powers. The insurer argued that the Court's holding in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) that an arbitration panel exceeded its powers when it ordered a party to submit to class arbitration should apply here. The Court rejected that argument, explaining that in *Stolt-Nielsen* the Court overturned the arbitral decision because it lacked any contractual basis for requiring class procedures, whereas in this case, the arbitrator construed the parties' contract at their request.

Eleventh Circuit Holds Bank Accounts Containing Commingled Criminal, Non-Criminal Funds Are Not Subject to Forfeiture as "Proceeds" of the Crime. On June 12, the U.S. Court of Appeals for the Eleventh Circuit [held](#) that bank accounts in which funds traceable to the defendant's criminal activity were commingled with funds unrelated to such activity were not subject to forfeiture as "proceeds" of the criminal activity. *In re Rothstein, Rosenfeldt, Adler, P.A.*, 2013 WL 2494980, No. 11-10676 (11th Cir. June 12, 2013). The defendant pleaded guilty to violating the Racketeer Influenced and Corrupt Organizations Act by using his law firm to perpetrate a Ponzi scheme over a four-year period. Funds traceable to the criminal activity were deposited in the law firm's bank accounts, where they were commingled with funds earned from the law firm's substantial legitimate activities. The trustee of the law firm's bankruptcy estate appealed a trial court order granting the government's request that the firm's bank accounts be forfeited as the "proceeds" of the criminal activity. The Eleventh Circuit reversed, noting that the government must establish the "requisite nexus between the property and the offense," which requires that the tainted and untainted property be distinguishable "without difficulty." The government was unable to clearly distinguish between the tainted and untainted funds, in part because of the size and number of transactions in the bank accounts. Because the government could not establish that the bank accounts were the proceeds of the criminal activity, the court remanded to allow the government to pursue forfeiture of "substitute assets."

FIRM NEWS

[Andrea Lee Negroni](#) will present an update on regulatory issues affecting mortgage banking at the [60th Annual Convention](#) of the Florida Mortgage Bankers Association being held from June 19-21, 2013, in St Petersburg, FL.

[Jonice Gray Tucker](#) will moderate a Regulatory "Super Session" at the California Mortgage Bankers Association's [Western States Loan Servicing Conference](#) on August 4, 2013, in Las Vegas, Nevada. The panel will focus the changing regulatory landscape for mortgage servicers and practical tips for compliance.

[Jonice Gray Tucker](#) will moderate a panel at the [American Bar Association Annual Meeting](#) entitled: Knowing is Half the Battle: The CFPB's Mortgage Rules, HUD's Disparate Impact Rule, and More. Speakers will include BuckleySandler partner [Joseph Reilly](#), David Berenbaum (NCR), Ken Markison (MBA), and David Stein (Promontory). The panel will be held on August 10, 2013, in San Francisco, CA

[Donna Wilson](#) will speak at ACI's [12th National Forum on Residential Mortgage Litigation and Regulatory Enforcement](#), on September 26, 2013 in Dallas, TX. Ms. Wilson's panel is titled, "Responding to Stepped Up Litigation and Enforcement Being Brought at the State Level, With an Emphasis on California, Florida, New York, Illinois, Texas, and Nevada."

[Thomas Sporkin](#) will participate on a panel on whistleblowers at the American Bar Association's [Securities Fraud 2013 Conference](#) in New Orleans, LA, October 24-25, 2013.

FIRM PUBLICATIONS

[Benjamin Saul](#), [Valerie Hletko](#), [Liana Prieto](#), and [Shara Chang](#) published the Fair Lending Litigation chapter in [Litigation Services Handbook: The Role of the Financial Expert](#), 2013 Cumulative Supplement (5th Edition).

[Jeremiah Buckley](#) authored "[Help the Fed Get Out of the Mortgage Business](#)" for American Banker on May 7, 2013.

[Benjamin Saul](#) published "[Private Student Lenders and Servicers Face CFPB Scrutiny](#)," on May 20, 2013, in the Westlaw Journal of Bank & Lender Liability.

[Benjamin Klubes](#), [Michelle Rogers](#), and [Katherine Halliday](#) published "[HAMP Risk on the Rise: A Complicated Regulatory Scheme Under the Spotlight](#)," on June 5, 2013 in Bloomberg Law.

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](#)).

Please visit us at the following locations:

Washington: 1250 24th Street NW, Suite 700, Washington, DC 20037, (202) 349-8000

New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400

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](#).

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

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.

© 2013 BuckleySandler LLP. All rights reserved.

MORTGAGES

CFPB Publishes Additional Mortgage Rule Compliance Guides, Launches Mortgage Rule Implementation Web Page. On June 7, the CFPB published a [loan originator rule compliance guide](#) and a [mortgage servicing rules compliance guide](#). As with other prior guides it has released, the CFPB cautioned that the guides are not substitutes 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 or servicing of mortgage loans. On June 13, the CFPB announced a new [web page](#) that provides, in one location, the various compliance guides and other mortgage rule implementation materials prepared by the CFPB.

House Passes Reverse Mortgage Legislation. On June 12, the U.S. House passed [H.R. 2167](#), the Reverse Mortgage Stabilization Act, which would authorize the HUD Secretary to establish, by notice or mortgage letter, any additional or alternative requirements determined necessary to

improve the fiscal safety and soundness of the Home Equity Conversion Mortgage (HECM) program. During recent hearings in both the House and Senate, the FHA has sought more flexibility to pursue program changes outside of the formal rulemaking process. A Senate bill, [S. 469](#) is similar to the House version, but in addition would require that HECM mortgages contain terms and provisions for establishing escrow accounts, performing financial assessments, or limiting the amount of any payment made available under the mortgage.

Fannie Mae Amends Bifurcated Mortgage Loan Obligations, Announces Miscellaneous Servicing Guide Updates. On June 12, Fannie Mae issued two Servicing Guide Announcements relating to bifurcated mortgages, mortgage payments, valuations, and processing IRS forms. Announcement [SVC 2013-12](#) clarifies and adds numerous obligations for servicers and responsible parties in connection with bifurcated mortgage loans - loans or properties for which the current servicer is not the responsible party for the selling representations and warranties and/or for the prior servicing responsibilities or liabilities. The announcement addresses, among other topics, (i) issuance of repurchase requests and statements, requests for a make whole payment, or requests for indemnification, (ii) remittance of bifurcated repurchase price and appeal process, (iii) hiring of a servicer and a servicer's failure to comply, (iv) mortgage loan files, record retention, and release of records, and (v) disputes between responsible parties and servicers. All of the policy changes in 2013-12 take effect on September 1, 2013. Announcement [SVC 2013-11](#) describes policy changes regarding (i) processing and applying mortgage loan payments, (ii) obtaining a property valuation for Fannie Mae conventional mortgage loan modifications, and (iii) processing IRS Form 4506-T and Form 4506T-EZ. While servicers are encouraged to implement the changes noted in 2013-11 immediately, servicers are not required to do so until October 1, 2013.

Nevada Enacts Homeowner's Bill of Rights. On June 3, Nevada enacted a Homeowner's Bill of Rights, [SB 321](#), to establish protections from foreclosure for owner-occupied property securing residential mortgage loans. The Nevada bill, among other things, (i) requires that at least 30 calendar days before recording pre-foreclosure documents or commencing a judicial foreclosure action and at least 30 calendar days after a borrower's default, the mortgage servicer, mortgagee or beneficiary of the deed of trust must provide to the borrower certain information concerning the borrower's account, the available foreclosure prevention alternatives, and a statement of the facts supporting the right of the mortgagee or beneficiary to foreclose, (ii) requires that an institution contact, or attempt to contact, the borrower before filing pre-foreclosure documents or commencing a foreclosure, (iii) prohibits dual tracking, (iv) establishes "single point of contact" rules, and (v) allows borrowers in a judicial foreclosure action to elect to participate in a state foreclosure mediation program. These new requirements apply to notices of default and elections to sell that are recorded on or after October 1, 2013. The bill exempts institutions that foreclosed on 100 or fewer owner-occupied homes in the preceding annual reporting period, as established by their primary regulator.

Florida Enacts Fast-Track Foreclosure Bill. On June 7, Florida enacted [HB 87](#) to immediately expedite the state's judicial foreclosure process, including with regard to pending cases. The bill amends the state's alternative foreclosure procedure to, among other things, (i) allow any lienholder, not only the mortgagee, to initiate the procedure, and (ii) establish new fast-track court procedures. The bill also (i) reduces the statute of limitations for deficiency judgments on a foreclosure action from five years to one year, (ii) requires the foreclosing party to provide information upon case filing regarding a lost, destroyed, or stolen promissory note, (iii) defines "adequate protections" in cases where there is a lost, destroyed, or stolen note, and (iv) adds protections for purchasers of property at a foreclosure sale. The bill took effect immediately.

BANKING

CFPB Issues Initial Findings from Study of Overdraft Practices. On June 11, the CFPB released a [white paper](#) with initial findings from its study of bank and credit union overdraft practices. The purpose of the study was to provide a factual basis to inform efforts to develop more uniform treatment of overdraft practices across financial institutions. The CFPB reports that (i) customers considered to be heavy overdrafters were more likely to opt-in to overdraft programs and, by opting in, were more likely to pay higher fees and were more likely to have their accounts involuntarily closed, (ii) overdraft practices and costs / closures related to overdraft programs vary widely by institution, and (iii) some policies and practices related to overdrafts are not disclosed or are disclosed only in a technical manner. The CFPB further reported that overdraft fees represent approximately 60 percent of the fee revenue generated by consumer checking accounts, and identified specific practices the CFPB believes raise questions about whether customers can anticipate or compare the cost of overdrafting, including funds availability and order posting practices. The report is based on a review of institution-level data, and the CFPB plans to review account-level data in order to better understand how differences in bank practices affect customers.

FDIC Announces Agreement with Canadian Counterpart on Cross-Border Bank Resolution.

On June 12, the FDIC [announced](#) the signing of a [memorandum of understanding](#) (MOU) with the Canada Deposit Insurance Corporation to formalize existing efforts between the two regulators to cooperate on effective resolution planning in the event of the failure of large, complex financial institutions that maintain operations in both countries. The MOU provides a framework for the parties to consult and share resources and information when addressing a bank resolution, and contemplates future coordination on related policy issues.

OCC Provides Minority Institutions Flexibility to Raise Capital. On June 11, the OCC [revised](#) its policy statement on minority institutions to make it easier for those institutions to raise capital. The OCC acknowledged that minority institutions may be unable to accept equity investment capital from some investors because their status as a minority institution would be jeopardized if the share of minority ownership fell below 50 percent. In response, the [revised statement](#) adds discretionary language that allows the agency to continue to treat an existing minority institution as such even if it no longer meets the 51 percent ownership criteria provided that the institution (i) primarily serves the credit and economic needs of the community in which it is chartered and (ii) that community is predominantly minority.

OCC Publishes Community Bank Best Practices Booklet, Holds Webinar on Community Bank Cyber Threats. On June 13, the OCC [published](#) a booklet titled "[A Common Sense Approach to Community Banking](#)," which offers best practices the agency believes distinguish high-performing community banks from those that barely survive or fail. The booklet, which previously was distributed to national banks and federal thrifts and now is available on the OCC's website, focuses on three interrelated areas: (i) risk assessment and management, (ii) strategic planning, and (iii) capital planning. Earlier in the week, the OCC hosted a webinar on cyber threats and vulnerabilities to raise awareness for community banks, and [provided](#) a collection of existing regulatory guidance that addresses actions banks should take to help mitigate the risks associated with information security.

CONSUMER FINANCE

Florida Adjusts Consumer Loan Allowable Interest Rate Tiers. On June 10, Florida enacted [SB 282](#), which amends the Florida Consumer Finance Act to increase by \$1,000 the tiered principal amounts subject to maximum allowable interest rates. For loans entered after July 1, 2013, lenders

can charge for certain consumer loans up to 30 percent interest on the first \$3,000, up to 24 percent on \$3,001 to \$4,000, and up to 18 percent over \$4,000. The bill also increases from \$10 to \$15 the maximum amount that lenders can charge for payments at least 10 days delinquent.

Maine Simplifies Credit Reporting Law. This week, Maine enacted a bill to simplify the state's credit reporting law. The bill, [SP 504](#), was [drafted by the Bureau of Consumer Protection](#) to ease compliance burden primarily by eliminating provisions mirroring the federal Fair Credit Reporting Act (FCRA), and instead incorporating the federal FCRA and its implementing regulations. The bill retains and reorganizes existing additional state credit reporting consumer protections.

Massachusetts Supreme Court Holds That Courts May Invalidate Certain Arbitration Agreements With Class Action Waivers. On June 12, the Massachusetts Supreme Judicial Court (SJC) [held](#) that courts may invalidate an arbitration agreement that includes a class action waiver where the plaintiff demonstrates that his or her claim effectively cannot be pursued in individual arbitration. *Feeney v. Dell, Inc.*, No. SJC-11133, 2013 WL 2479603 (Mass. Jun. 12, 2013). In this case, the court determined that the plaintiffs could not effectively pursue their statutory claim under the individual claim arbitration process given the complexity of their claims and the small amounts of individual damages. The SJC therefore affirmed the trial court's order invalidating the agreement. According to the SJC, the Supreme Court's holding in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), left open the possibility that an arbitration agreement may be invalidated if the agreement effectively prevents the claimant from vindicating his or her statutory cause of action. Still, the SJC's decision arguably conflicts with several decisions in the federal courts of appeal that question that the continuing vitality of the "vindication of rights" doctrine following *Concepcion*. The decision also addresses an issue currently before the Supreme Court in *American Express Co. v. Italian Colors Restaurant*, No. 12-133 (S. Ct. argument heard Feb. 27, 2013).

U.S. Supreme Court Refuses to Vacate Arbitrator's Decision Allowing Class Arbitration. On June 10, the U.S. Supreme Court [held](#) that the Federal Arbitration Act (FAA) does not permit a court to vacate an arbitrator's decision to allow class arbitration where the parties authorized the arbitrator to decide the issue. *Oxford Health Plans LLC v. Sutter*, No. 12-135, 569 U.S. ____ (2013). In this case, a health insurance company sought to overturn an arbitrator's holding that the contract between the company and a doctor claiming the insurer failed to fully pay him and similarly situated doctors authorized class arbitration of the claims. The parties agreed that the arbitrator should decide the issue, but in seeking to overturn the decision, the insurer argued that the arbitrator exceeded his authority under the FAA. Citing the narrow standard of judicial review under the relevant FAA provision and the "heavy burden" a party bears under that provision, the Court held that the parties' agreement to allow the arbitrator to decide the issue of class arbitration of the claims is sufficient to show that he did not exceed his powers. The insurer argued that the Court's holding in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) that an arbitration panel exceeded its powers when it ordered a party to submit to class arbitration should apply here. The Court rejected that argument, explaining that in *Stolt-Nielsen* the Court overturned the arbitral decision because it lacked any contractual basis for requiring class procedures, whereas in this case, the arbitrator construed the parties' contract at their request.

SECURITIES

Federal Authorities Announce More Charges in Broker-Dealer Foreign Bribery Case. On June 12, the DOJ and the SEC announced additional charges in a [previously announced case](#) against employees of a U.S. broker-dealer related to an alleged "massive international bribery scheme." The DOJ [unsealed criminal charges](#) against a third employee of the broker-dealer who allegedly arranged bribe payments to a Venezuela state economic development bank official in exchange for

financial trading business for the broker-dealer. The SEC, whose routine compliance examination detected the allegedly illegal conduct, [announced](#) parallel civil charges.

PRIVACY/DATA SECURITY

FTC Revises Red Flags Identity Theft Rule Business Guide. On June 12, the FTC [issued](#) revised guidance to help firms comply with its Red Flags Rule, which requires covered firms to monitor for and respond to certain "red flag" warnings of customer identify theft. The updated [guide](#) reflects [changes made](#) to the rule last year to more narrowly define the types of creditor subject to the rule.

NIST Seeks Comments on Cloud Computing Security Document. On June 11, the National Institute of Standards and Technology (NIST) [published](#) a draft [security document](#) that provides a comprehensive security model to supplement other NIST efforts to develop a standard vocabulary and implementation framework for the integration of cloud-based applications across the government. NIST will accept comments on the draft document through July 12, 2013. Although NIST's resources are developed for use by federal agencies, they can influence other policy decisions and may serve as a resource for private firms seeking to understand the benefits and risks of cloud technology.

CRIMINAL ENFORCEMENT

Eleventh Circuit Holds Bank Accounts Containing Commingled Criminal, Non-Criminal Funds Are Not Subject to Forfeiture as "Proceeds" of the Crime. On June 12, the U.S. Court of Appeals for the Eleventh Circuit [held](#) that bank accounts in which funds traceable to the defendant's criminal activity were commingled with funds unrelated to such activity were not subject to forfeiture as "proceeds" of the criminal activity. *In re Rothstein, Rosenfeldt, Adler, P.A.*, 2013 WL 2494980, No. 11-10676 (11th Cir. June 12, 2013). The defendant pleaded guilty to violating the Racketeer Influenced and Corrupt Organizations Act by using his law firm to perpetrate a Ponzi scheme over a four-year period. Funds traceable to the criminal activity were deposited in the law firm's bank accounts, where they were commingled with funds earned from the law firm's substantial legitimate activities. The trustee of the law firm's bankruptcy estate appealed a trial court order granting the government's request that the firm's bank accounts be forfeited as the "proceeds" of the criminal activity. The Eleventh Circuit reversed, noting that the government must establish the "requisite nexus between the property and the offense," which requires that the tainted and untainted property be distinguishable "without difficulty." The government was unable to clearly distinguish between the tainted and untainted funds, in part because of the size and number of transactions in the bank accounts. Because the government could not establish that the bank accounts were the proceeds of the criminal activity, the court remanded to allow the government to pursue forfeiture of "substitute assets."

Federal Authorities Announce More Charges in Broker-Dealer Foreign Bribery Case. On June 12, the DOJ and the SEC announced additional charges in a [previously announced case](#) against employees of a U.S. broker-dealer related to an alleged "massive international bribery scheme." The DOJ [unsealed criminal charges](#) against a third employee of the broker-dealer who allegedly arranged bribe payments to a Venezuela state economic development bank official in exchange for financial trading business for the broker-dealer. The SEC, whose routine compliance examination detected the allegedly illegal conduct, [announced](#) parallel civil charges.

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

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

Email: infobytes@buckleysandler.com

For back issues of INFOBYTES (or other BuckleySandler LLP publications), visit <http://www.buckleysandler.com/infobytes/infobytes>