Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

February 3, 2012

Topics In This Issue

Federal Issues

Obama Administration Expands Housing Recovery Plans. On February 1, President Obama unveiled a plan to expand government support for the housing market, including a broad-based refinancing plan. The plan, announced during the President's State of the Union Address, combines changes to existing programs and creation of new initiatives, some of which will require congressional action. First, the President will ask Congress to enact legislation to allow the Federal Housing Administration (FHA) to provide government support for the refinancing of non-Fannie Mae and non-Freddie Mac mortgages. The $5 to $10 billion program would be funded by a fee imposed on the largest financial institutions. For borrowers with Fannie Mae or Freddie Mac loans, the legislation would further streamline existing refinance programs and create incentives for borrowers to accept shorter loan terms to build equity. Second, the administration will continue its work to create new mortgage origination and servicing standards in an effort to create a Homeowner Bill of Rights. Third, the Federal Housing Finance Agency (FHFA) will conduct a pilot program through which it will sell foreclosed properties to be transitioned into rental housing. Finally, the President's upcoming budget will include a national program to put unemployed construction workers back to work refurbishing vacant and foreclosed properties.

The President also highlighted the work of the recently-formed Residential Mortgage-Backed Securities Working Group (see *InfoBytes*, January 27, 2012), and reviewed the success of existing government efforts (*e.g.*, those related to unemployment forbearance). Further, the announcement incorporated a Treasury Department move last week to enhance the Home Affordable Modification Program (HAMP) by (i) extending HAMP's deadline through December 31, 2013, (ii) expanding borrower eligibility for HAMP, and (iii) encouraging use of principal reduction for loans insured or owned by Freddie Mac or Fannie Mae. In response, the FHFA reiterated its opposition to use of principal reduction by Fannie Mae and Freddie Mac. Click here for a copy of the White House

housing plan fact sheet; click here for the Treasury HAMP announcement; click here for the FHFA real estate owned sale announcement; click here for the FHFA's statement on HAMP expansion.

CFPB Releases First Semi-Annual Report, Director Testifies Before Senate Banking Committee. On January 31, the Consumer Financial Protection Bureau (CFPB) released its first semi-annual report to Congress and CFPB Director Richard Cordray appeared before the Senate Banking Committee. The report reviews the CFPB's structure and purpose, and provides a general overview of the CFPB's activities to date. The report also identifies consumer "shopping challenges" by product category (*i.e.*, challenges that consumers face when shopping for mortgages, credit cards, and student loans), and identifies the CFPB's planned activities for the next six months.

Issues raised during the Senate hearing included: (i) prepaid card regulation, (ii) the definition of "abusive" as it is used in the Dodd-Frank Act, (iii) the "ability to pay" rule required by Dodd-Frank, and (iv) treatment of privileged information during the examination process. First, the Director acknowledged the importance of innovation in the card market, but also noted that regulation of credit and debit cards likely have pushed the market towards prepaid cards. He noted legislation sponsored by Senator Menendez to regulate the prepaid card market, and said the Bureau would welcome legislation addressing prepaid card issues. Second, consistent with his statements to the House Financial Services Committee (see *InfoBytes*, January 27, 2012), the Director reported that a rulemaking to further define the term "abusive" is not currently on the CFPB's agenda. Third, Director Cordray did not provide insight into the CFPB's view of the "ability to repay" rule, noting that at this time the Bureau has not prepared a draft rule. Finally, Director Cordray indicated support for a legislative fix to protect legal privileges applicable to documents and information that could be requested by the CFPB during the course of its examinations. Click here for the Senate Banking Committee hearing information, including written testimony; click here for a copy of the CFPB report.

Agencies Release Guidance on ALLL Estimation Practices for Junior Liens. On January 31, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the National Credit Union Administration and the Office of the Comptroller of the Currency (collectively, the agencies), released joint guidance related to allowance for loan and lease losses (ALLL) estimation practices associated with loans and lines of credit secured by junior leans on one- to four-family residential properties. The guidance reiterates, specifically with regard to junior liens, key concepts included in generally accepted accounting principles and existing ALLL supervisory guidance related to the ALLL estimation practices. The agencies provided the guidance to remind regulated financial institutions to monitor all credit quality indicators relevant to credit portfolios and to follow appropriate risk-management principles in managing junior liens. Click here for a copy of the joint press release with a link to the guidance.

HUD Issues Final Rule Regarding Sexual Orientation and Gender Equal Access. On January 30, the Department of Housing and Urban Development (HUD) issued a final rule designed to ensure equal access to housing, regardless of sexual orientation, gender identity, or marital status. The rule, which will take effect thirty days after being published in the *Federal Register* (which publication is likely to occur the week of February 6), will (i) prohibit owners and operators of HUD-assisted housing or housing for which financing is insured by HUD from seeking information from applicants about

sexual orientation and gender identity, and require such owners and operators to make housing available without regard to those factors, (ii) prohibit lenders from determining FHA-insured financing eligibility based on sexual orientation or gender identity, and (iii) clarify that otherwise eligible families will have an opportunity to participate in HUD programs, regardless of marital status, sexual orientation, or gender identity. The final rule is substantially similar to the proposed rule published in January 2011. (See *InfoBytes*, February 4, 2011). Click here for a copy of the HUD press release with a link to the final rule.

NCUA Proposes Rule Regarding Loan Workouts and Nonaccrual Policies. On February 1, the National Credit Union Administration (NCUA) published a proposed rule related to the management of loan workouts and nonaccrual policies for loans. The rule as proposed would, for all federally insured credit unions, (i) establish standards for the management of loan workout arrangements and require written workout policies, (ii) revise requirements for reporting troubled debt (TDR) restructured loans, including the calculation and reporting of TDR loan delinquency based on restructured contract terms, (iii) prohibit accruing interest on loans at least ninety days past due (with some exceptions), and (iv) maintain member business workout loans in nonaccrual status until the credit union receives six consecutive payments under the modified loan terms. The NCUA is accepting comments on the proposed rule through March 2, 2012. Click here for a copy of the proposed rule.

NCUA Issues List of Regulations Subject to Regulatory Review. On January 30, the NCUA issued a list of regulations to be reviewed in 2012. The NCUA reviews one third of its rules every year to ensure that the regulations are "clearly articulated and easily understood" and that substantive concerns are considered as well. This year, in the spirit of Executive Order 13579 regarding agency regulatory review, the NCUA is seeking comments to help it modify, streamline, expand, or repeal rules that are not required by statute and would not jeopardize safety and soundness. Rules under review this year include, for example, those covering (i) corporate credit unions, (ii) unfair or deceptive acts or practices, (iii) Truth in Savings, (iv) investment and deposit activities, and (v) bank conversions and mergers. The NCUA is accepting comments on the listed regulations through August 3, 2012. Click here for a copy of the NCUA press release with link to the list of regulations under review.

Fannie Mae Announces Multiple Selling Guide Updates. On January 31, Fannie Mae issued Selling Guide Announcement SEL-2012-01, which provides updates and changes regarding (i) Construction-to-Permanent Financing; (ii) effective quality control plans, and (iii) other miscellaneous Guide topics. The changes to the Construction-to-Permanent Financing provisions aim to more closely align the policies related to such financing with standard requirements for other refinance transactions. The updates to the requirements for the lender to have an effective quality control plan do not establish any new policies, but seek to clarify requirements for lenders' post-closing quality control process. These and most of the other updates provided in the Announcement are effective immediately. Click here for a copy of the Fannie Mae Announcement.

Freddie Mac Issues Selling Bulletin Regarding ULDD Update. On January 31, Freddie Mac issued Bulletin 2012-3 to formally extend the Uniform Loan Delivery Dataset (ULDD) implementation schedule, consistent with an earlier announcement (see *InfoBytes*, December 16, 2011). ULDD

mandatory compliance is now required for all loans submitted to Freddie Mac on or after July 23, 2012 (previously March 19, 2012). To provide a transition period, Freddie Mac will update its system for the ULDD data points on April 23, 2012 (previously January 23, 2012). The Bulletin also alerts sellers as to the Single-Family Seller/Servicer Guide updates requiring new ULDD data points for all mortgages with application received dates on or after August 1, 2012 that are delivered on or after November 26, 2012. Lastly, the Bulletin notifies sellers that Appendix A of the Implementation Guide for Loan Delivery Data has been updated to reflect these changes. Click here for a copy of the Freddie Mac Bulletin.

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Click here for a copy of the emergency rules.

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New Jersey Updates Title Recordation Laws. On January 17, New Jersey enacted a 2010-2011 session bill, A2565, to modernize the state's title recordation laws to permit the use of electronic documents and to reorganize and streamline the state's recordation requirements. Given that the federal E-sign Act and the New Jersey Uniform Electronic Transactions Act both authorize the acceptance of electronic alternatives to paper documents and encourage the development of systems that accept electronic documents, the bill updates state law to, for example, (i) broaden the definition of "document" and "recorded" to allow for electronic recordation; (ii) delete statutory references to separate sets of books or separate databases for different kinds of documents; (iii) remove requirements for marginal notation of documents; and (iv) require development of standard formats for electronic documents. Click here for a copy of A2565.

Courts

New York AG Files Suit Against MERS and Servicers Alleging Deceptive and Fraudulent Foreclosure Practices. On February 3, New York Attorney General Eric Schneiderman filed a lawsuit against MERS and several major banks, challenging the MERS system and alleging that the defendants engaged in fraudulent and deceptive foreclosure practices in violation of state law. Among the allegedly illegal practices, the New York Attorney General claims that the defendants (i) initiated thousands of foreclosure proceedings without proper standing, (ii) submitted in court deceptive and invalid mortgage assignments, (iii) misled borrowers by submitting in court defective mortgage assignments executed by untrained and unsupervised certifying officers and assignments that were automatically generated (*i.e.,* "robosigned"), (iv) created a system that deliberately obscures the chain of title for a loan or hides the current note-holder. The Attorney General is seeking (i) an injunction to stop the practices recited in the complaint, (ii) disgorgement of all profits obtained in connection with those practices, and (iii) payment of other damages and civil penalties.

Click here for a copy of the Attorney General's press release with a link to the complaint.

Illinois AG Files Suit Alleging Improper Recording of Mortgage Assignments. On February 2, Illinois Attorney General Lisa Madigan filed a lawsuit in Cook County Circuit Court alleging that a Florida-based company that prepares documents for use in default servicing and foreclosure actions filed faulty documents with Illinois county recorders. According to a press release issued by the Attorney General, the defendant processes and records mortgage assignments that are used in foreclosure proceedings by some of the largest mortgage lenders and servicers. The defendant's activities in Illinois purportedly violate the state consumer protection statutes, and are alleged to have contributed to the state's mortgage crisis. The state is seeking an order requiring that the company (i) review and correct all documents it unlawfully created and recorded in Illinois, (ii) disgorge all financial gains obtained in connection with the allegedly unlawful practices, and (iii) pay civil penalties. Click here for a copy of the Attorney General's press release.

Florida Appeals Court Denies Request to Certify Question Important to State Foreclosure Investigation. On February 1, the Florida Fourth District Court of Appeal denied Florida Attorney General Pam Bondi's request to certify to the Florida Supreme Court the question of whether the creation of invalid assignments of mortgages by a law firm and subsequent use of such documents to foreclose constitutes an unfair and deceptive practice under Florida law that may be investigated by the Attorney General. In April 2011, the Fourth District ruled that the Attorney General's office did not have authority to subpoena records from one of the law firms under investigation. Because the Attorney General cannot appeal that decision to the Florida Supreme Court, it sought certification of the issue as one of great public importance. (See *InfoBytes*, January 6, 2012). With that request now denied, the Attorney General must reassess its pending investigations of law firms alleged to have engaged in foreclosure misconduct. Click here for a copy of the Attorney General's press release.

D.C. Federal Judge Declares Mistrial For Three Remaining Defendants In Second FCPA Sting Case Trial. On January 31, Judge Richard Leon of the U.S. District Court for the District of Columbia declared a mistrial after a federal jury failed to reach a unanimous verdict on foreign bribery charges

against John Mushriqui, Jeana Mushriqui, and Marc Morales, in one of the highest profile Foreign Corrupt Practices Act (FCPA) cases ever brought by the DOJ. BuckleySandler represented John Mushriqui at the nearly four-month jury trial. One day prior to the court declaring a mistrial, the jury acquitted two other defendants of the same charges. At the end of 2011, following the close of the prosecution's evidence, Judge Leon acquitted all defendants of related conspiracy charges, sending one defendant home entirely, and acquitted the Mushriquis of two of the five substantive FCPA charges pending against them. The defendants were charged with paying bribes to a purported government official from the country of Gabon, in connection with contracts to supply Gabon with military and law enforcement products. The Federal Bureau of Investigation's sting operation resulted in the arrests of twenty-two individuals at an industry trade show in Las Vegas in 2010. The first trial of four other defendants also ended in a mistrial in July 2011. Between the two trials regarding the Gabon deal sting, three defendants have been acquitted and seven have proceeded to a hung jury. Click here for a report regarding these recent case developments.

Two Federal Appeals Courts Address Enforceability of Arbitration Agreements. This week, the U.S. Courts of Appeals for the Second and Eleventh Circuits issued rulings regarding the enforceability of arbitration clauses in customer agreements. On January 31, the Eleventh Circuit, on remand from the U.S. Supreme Court, reversed its earlier unpublished decision that affirmed a district court ruling allowing a consumer class action to proceed against a bank because the class action waiver in the arbitration agreement at issue was substantively unconscionable. The underlying case involves allegations that the bank improperly ordered customer transactions in order to maximize overdraft fees. The bank sought to enforce the arbitration clause in its customer agreement. Given the U.S. Supreme Court's holding in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which held that the Federal Arbitration Act establishes a broad policy requiring arbitration of such disputes, and preempts state law that may allow class actions despite customer arbitration agreements, the Eleventh Circuit vacated its earlier decision and remanded the case to the district court for further proceedings and reconsideration of the bank's original motion to compel arbitration.

On February 1, the Second Circuit decided not to enforce an arbitration agreement, notwithstanding the Supreme Court's decision in *Concepcion*. In this case, merchants sued a credit card provider arguing that the card provider's interchange fee system violated federal antitrust laws. The card company moved to compel arbitration and enforce a class action waiver provision in the merchant agreement. The Second Circuit vacated a district court decision to enforce the arbitration agreement. That decision in turn was vacated by the Supreme Court and remanded. The Second Circuit, though, did not find that *Concepcion* altered its original analysis, and the Second Circuit again held that the class action waiver agreement was unenforceable in this case because the practical effect would be to preclude the merchants' ability to pursue statutory rights, an issue not addressed by *Concepcion*. Consistent with prior Supreme Court case law untouched by *Concepcion*, the merchants proved as a matter of law that the costs of individual arbitration with the lender would be so costly as to deprive them of statutory protections granted by the antitrust laws. Click here for a copy of the Eleventh Circuit decision; click here for the Second Circuit decision.

Third Circuit Upholds District Court's Order Enjoining Full Enforcement of New Jersey Gift Card Escheat Law. Recently, the U.S. Court of Appeals for the Third Circuit affirmed the district court's decision to enjoin New Jersey from fully applying and enforcing its gift card escheat law. *N.J. Retail Merchs. Assoc. v. Sidamon-Eristoff*, No. 10-4551 2012 WL 19385 (3d Cir. Jan. 5, 2012). Retailers challenged the constitutionality of a 2010 amendment to New Jersey's unclaimed property statute that provided for the custodial escheat of store valued cards (SVCs or gift cards). Under New Jersey's Chapter 25, SVCs are presumed to be abandoned after two years of inactivity and issuers are required to transfer to the state the remaining value on the SVCs at the end of the two-year abandonment period. In addition, issuers are required to obtain the name and address of the purchaser or owner of each SVC issued or sold and, at a minimum, maintain a record of the zip code of the owner or purchaser, and there is a presumption that the address of the owner or purchaser is the same as the address of the place where the SVC was purchased or issued. This latter provision has the effect of causing unused funds to escheat to New Jersey, rather than to the state where the card issuer is domiciled, when the last known address of the purchaser is unknown. In response to challenges under the Supremacy Clause, the Due Process Clause, the Commerce Clause, the Contract Clause, and the Takings Clause of the U.S. Constitution, the Third Circuit upheld the district court's preliminary injunction enjoining the retroactive application of Chapter 25 to SVCs redeemable for merchandise or services that were issued before Chapter 25's enactment. It also upheld the district court's preliminary injunction enjoining the prospective enforcement of the place-of-purchase presumption. The court, however, declined to prospectively enjoin the data collection provision or the two-year abandonment provision, finding that SVC issuers failed to show a reasonable likelihood of success on the merits of these claims and that the data collection provision is severable from the place-of-purchase provision. Click here for a copy of the court's opinion.

FTC Settles Claims Against Negative-Option Sales Operators. On February 1, the Federal Trade Commission (FTC) announced a settlement with two individuals alleged to have operated businesses that improperly collected consumer information and then used that data to enroll consumers in negative-option programs that promised to match consumers with payday lenders. The FTC claimed the operators enrolled consumers in the payday lender matching program without consumer consent and refused to provide promised refunds. Under the settlement agreement, the individuals must pay nearly $10 million and will be prohibited from marketing secured loan products. The agreement also bars the individuals from making certain misrepresentations and prohibits the conduct at issue. Click here for a copy of the FTC announcement of this settlement.

FTC and DOJ Obtain Settlement of Claims Against Debt Buyer. On January 30, the FTC and the DOJ announced that a Michigan-based debt buyer had agreed to pay a $2.5 million civil penalty to settle allegations of misconduct in connection with the company's debt collection activities. The FTC alleged that the debt buyer violated the FTC Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act by, among other things, (i) misrepresenting without substantiation that consumers owed a debt, (ii) failing to disclose that certain time-barred debt did not have to be repaid, (iii) knowingly providing false information to credit reporting agencies, and (iv) failing to investigate disputes raised by credit reporting agencies. In addition to paying the civil penalty, the company must address the failures and misconduct alleged by the FTC. For example, it must inform consumers when a debt is too old to be legally enforceable. Further, the company is prohibited from engaging in

certain conduct, such as placing debt on consumer credit reports without notifying the consumer. Concurrent with the announcement, the FTC released a publication to help consumers understand their rights with regard to time-barred debt. Click here for a copy of the FTC press release with a link to the publication; click here for the DOJ press release.

Miscellany

SPeRS Announces Release of Updated E-Commerce Compliance Guidelines. Recently, the Standards and Procedures for Electronic Records and Signatures version 2.0 (SPeRS 2.0) was released. This new version of SPeRS reflects current e-commerce business practices and updates applicable electronic record and signature case law and federal regulatory developments since SPeRS was originally published in 2003. The update also examines nationwide developments in the evolving area of electronic notarization laws. SPeRS is a technology-neutral set of guidelines and strategies for industry use in designing and implementing systems for electronic transactions under the federal Electronic Signatures in Global and National Commerce Act (ESIGN) and state adoptions of the Uniform Electronic Transactions Act (UETA). SPeRS 2.0 updates the groundbreaking guidance contained in SPeRS 1.0, developed by a broad cross-section of leading financial service companies and trade associations. More information about SPeRS is available at

www.spers.org.

Firm News

James Parkinson will be speaking on a panel at the ACI Latin America Summit on Anti-Corruption held in Sao Paulo, Brazil on February 8, 2012. The panel is entitled: "Assessing the Risk of Personal Liability in Bribery Investigations."

David Krakoff will be participating in a panel at the International Association of Defense Counsel's Midyear Meeting in Palms Springs, California on February 15, 2012. The panel is entitled "Worldwide Enforcement of Anti-Corruption Laws-Navigating the International Business Minefield."

James Shreve will be participating in the panel "When the Cloud Goes Bust: Data Breaches in the Cloud" on February 28, 2012 at the RSA Conference in San Francisco, CA. The panel will examine unique issues that may arise when a data security breach involves a company's data stored in a cloud and provide guidance on addressing cloud security breach incidents.

Margo Tank will be participating in a panel at the NACHA - The Electronic Payments Association's Internet Council Meeting in Tampa, Florida on February 29, 2012. The panel will explore the beneficial and harmful effects of data collection and usage, particularly as enabled by a mobile wallet.

Donna Wilson will be speaking at the ABA Section of Litigation Insurance Coverage CLE Seminar held at the Loews Ventana Canyon Resort in Tucson, Arizona from March 1-3, 2012. Ms. Wilson will be representing the defense counsel perspective in a plenary session panel entitled "The Credit Crisis

and D&O Insurance Coverage: Challenges facing Insureds, Insurers, and Regulators" on March 1 from 1:00 PM to 2:10 PM.

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 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."

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

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."

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.

Firm Publications

Kirk Jensen and **Jeffrey Naimon** published an article entitled, "The Fair Housing Act, Disparate Impact Claims, and *Magner v. Gallagher*: An Opportunity to Return to the Primacy of the Statutory Text" in the February 2012 volume of *The Banking Law Journal*. The authors discuss the text of the Fair Housing Act, its legislative history, and the past federal appellate court decisions holding that the FHA permits disparate impact claims. They argue that recent Supreme Court decisions cast doubt on the past federal appellate court decisions, and show that the statutory text of the FHA, unlike the text of some other civil rights laws, does not permit disparate impact claims. They also discuss the case currently pending before the Court in which the Court may address for the first time whether the FHA permits disparate impact claims. Click here for a copy of the full article.

Mortgages

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New York Amends Mortgage Origination Law Regarding Payments to Home Improvement Contractors. On January 27, New York enacted AB 8909, which changes the state banking law to exclude from existing payment restrictions certain home improvement loans insured by the Federal Housing Administration (FHA). Current state law prohibits mortgage brokers from directly paying home improvement contractors, which conflicts with FHA guidelines that allow a home improvement contractor to be paid directly by a mortgage broker. Under state law as amended by AB 8909, such direct payment will be permitted for specified FHA loans. Click here for a copy of AB 8909.

New York AG Files Suit Against MERS and Servicers Alleging Deceptive and Fraudulent Foreclosure Practices. On February 3, New York Attorney General Eric Schneiderman filed a lawsuit against MERS and several major banks, challenging the MERS system and alleging that the defendants engaged in fraudulent and deceptive foreclosure practices in violation of state law. Among the allegedly illegal practices, the New York Attorney General claims that the defendants (i) initiated thousands of foreclosure proceedings without proper standing, (ii) submitted in court deceptive and invalid mortgage assignments, (iii) misled borrowers by submitting in court defective mortgage assignments executed by untrained and unsupervised certifying officers and assignments that were automatically generated (*i.e.,* "robosigned"), (iv) created a system that deliberately obscures the chain of title for a loan or hides the current note-holder. The Attorney General is seeking (i) an injunction to stop the practices recited in the complaint, (ii) disgorgement of all profits obtained in connection with those practices, and (iii) payment of other damages and civil penalties. Click here for a copy of the Attorney General's press release with a link to the complaint.

Illinois AG Files Suit Alleging Improper Recording of Mortgage Assignments. On February 2, Illinois Attorney General Lisa Madigan filed a lawsuit in Cook County Circuit Court alleging that a Florida-based company that prepares documents for use in default servicing and foreclosure actions filed faulty documents with Illinois county recorders. According to a press release issued by the Attorney General, the defendant processes and records mortgage assignments that are used in

foreclosure proceedings by some of the largest mortgage lenders and servicers. The defendant's activities in Illinois purportedly violate the state consumer protection statutes, and are alleged to have contributed to the state's mortgage crisis. The state is seeking an order requiring that the company (i) review and correct all documents it unlawfully created and recorded in Illinois, (ii) disgorge all financial gains obtained in connection with the allegedly unlawful practices, and (iii) pay civil penalties. Click here for a copy of the Attorney General's press release.

Florida Appeals Court Denies Request to Certify Question Important to State Foreclosure Investigation. On February 1, the Florida Fourth District Court of Appeal denied Florida Attorney General Pam Bondi's request to certify to the Florida Supreme Court the question of whether the creation of invalid assignments of mortgages by a law firm and subsequent use of such documents to foreclose constitutes an unfair and deceptive practice under Florida law that may be investigated by the Attorney General. In April 2011, the Fourth District ruled that the Attorney General's office did not have authority to subpoena records from one of the law firms under investigation. Because the Attorney General cannot appeal that decision to the Florida Supreme Court, it sought certification of the issue as one of great public importance. (See *InfoBytes*, January 6, 2012). With that request now denied, the Attorney General must reassess its pending investigations of law firms alleged to have engaged in foreclosure misconduct. Click here for a copy of the Attorney General's press release.

Banking

NCUA Proposes Rule Regarding Loan Workouts and Nonaccrual Policies. On February 1, the National Credit Union Administration (NCUA) published a proposed rule related to the management of loan workouts and nonaccrual policies for loans. The rule as proposed would, for all federally insured credit unions, (i) establish standards for the management of loan workout arrangements and require written workout policies, (ii) revise requirements for reporting troubled debt (TDR) restructured loans, including the calculation and reporting of TDR loan delinquency based on restructured contract terms, (iii) prohibit accruing interest on loans at least ninety days past due (with some exceptions), and (iv) maintain member business workout loans in nonaccrual status until the credit union receives six consecutive payments under the modified loan terms. The NCUA is accepting comments on the proposed rule through March 2, 2012.

Click here for a copy of the proposed rule.

NCUA Issues List of Regulations Subject to Regulatory Review. On January 30, the NCUA issued a list of regulations to be reviewed in 2012. The NCUA reviews one third of its rules every year to ensure that the regulations are "clearly articulated and easily understood" and that substantive concerns are considered as well. This year, in the spirit of Executive Order 13579 regarding agency regulatory review, the NCUA is seeking comments to help it modify, streamline, expand, or repeal rules that are not required by statute and would not jeopardize safety and soundness. Rules under review this year include, for example, those covering (i) corporate credit unions, (ii) unfair or deceptive acts or practices, (iii) Truth in Savings, (iv) investment and deposit activities, and (v) bank conversions and mergers. The NCUA is accepting comments on the listed regulations through August

3, 2012. Click here for a copy of the NCUA press release with link to the list of regulations under review.

Consumer Finance

CFPB Releases First Semi-Annual Report, Director Testifies Before Senate Banking Committee. On January 31, the Consumer Financial Protection Bureau (CFPB) released its first semi-annual report to Congress and CFPB Director Richard Cordray appeared before the Senate Banking Committee. The report reviews the CFPB's structure and purpose, and provides a general overview of the CFPB's activities to date. The report also identifies consumer "shopping challenges" by product category (*i.e.*, challenges that consumers face when shopping for mortgages, credit cards, and student loans), and identifies the CFPB's planned activities for the next six months.

Issues raised during the Senate hearing included: (i) prepaid card regulation, (ii) the definition of "abusive" as it is used in the Dodd-Frank Act, (iii) the "ability to pay" rule required by Dodd-Frank, and (iv) treatment of privileged information during the examination process. First, the Director acknowledged the importance of innovation in the card market, but also noted that regulation of credit and debit cards likely have pushed the market towards prepaid cards. He noted legislation sponsored by Senator Menendez to regulate the prepaid card market, and said the Bureau would welcome legislation addressing prepaid card issues. Second, consistent with his statements to the House Financial Services Committee (see

InfoBytes, January 27, 2012), the Director reported that a rulemaking to further define the term "abusive" is not currently on the CFPB's agenda. Third, Director Cordray did not provide insight into the CFPB's view of the "ability to repay" rule, noting that at this time the Bureau has not prepared a draft rule. Finally, Director Cordray indicated support for a legislative fix to protect legal privileges applicable to documents and information that could be requested by the CFPB during the course of its examinations. Click here for the Senate Banking Committee hearing information, including written testimony; click here for a copy of the CFPB report.

FTC and DOJ Obtain Settlement of Claims Against Debt Buyer. On January 30, the FTC and the DOJ announced that a Michigan-based debt buyer had agreed to pay a $2.5 million civil penalty to settle allegations of misconduct in connection with the company's debt collection activities. The FTC alleged that the debt buyer violated the FTC Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act by, among other things, (i) misrepresenting without substantiation that consumers owed a debt, (ii) failing to disclose that certain time-barred debt did not have to be repaid, (iii) knowingly providing false information to credit reporting agencies, and (iv) failing to investigate disputes raised by credit reporting agencies. In addition to paying the civil penalty, the company must address the failures and misconduct alleged by the FTC. For example, it must inform consumers when a debt is too old to be legally enforceable. Further, the company is prohibited from engaging in certain conduct, such as placing debt on consumer credit reports without notifying the consumer. Concurrent with the announcement, the FTC released a publication to help consumers understand their rights with regard to time-barred debt. Click here for a copy of the FTC press release with a link to the publication; click here for the DOJ press release.

Litigation

Two Federal Appeals Courts Address Enforceability of Arbitration Agreements. This week, the U.S. Courts of Appeals for the Second and Eleventh Circuits issued rulings regarding the enforceability of arbitration clauses in customer agreements. On January 31, the Eleventh Circuit, on remand from the U.S. Supreme Court, reversed its earlier unpublished decision that affirmed a district court ruling allowing a consumer class action to proceed against a bank because the class action waiver in the arbitration agreement at issue was substantively unconscionable. The underlying case involves allegations that the bank improperly ordered customer transactions in order to maximize overdraft fees. The bank sought to enforce the arbitration clause in its customer agreement. Given the U.S. Supreme Court's holding in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which held that the Federal Arbitration Act establishes a broad policy requiring arbitration of such disputes, and preempts state law that may allow class actions despite customer arbitration agreements, the Eleventh Circuit vacated its earlier decision and remanded the case to the district court for further proceedings and reconsideration of the bank's original motion to compel arbitration.

On February 1, the Second Circuit decided not to enforce an arbitration agreement, notwithstanding the Supreme Court's decision in *Concepcion*. In this case, merchants sued a credit card provider arguing that the card provider's interchange fee system violated federal antitrust laws. The card company moved to compel arbitration and enforce a class action waiver provision in the merchant agreement. The Second Circuit vacated a district court decision to enforce the arbitration agreement. That decision in turn was vacated by the Supreme Court and remanded. The Second Circuit, though, did not find that *Concepcion* altered its original analysis, and the Second Circuit again held that the class action waiver agreement was unenforceable in this case because the practical effect would be to preclude the merchants' ability to pursue statutory rights, an issue not addressed by *Concepcion*. Consistent with prior Supreme Court case law untouched by *Concepcion*, the merchants proved as a matter of law that the costs of individual arbitration with the lender would be so costly as to deprive them of statutory protections granted by the antitrust laws.

Click here for a copy of the Eleventh Circuit decision; click here for the Second Circuit decision.

E-Commerce

New Jersey Updates Title Recordation Laws. On January 17, New Jersey enacted a 2010-2011 session bill, A2565, to modernize the state's title recordation laws to permit the use of electronic documents and to reorganize and streamline the state's recordation requirements. Given that the federal E-sign Act and the New Jersey Uniform Electronic Transactions Act both authorize the acceptance of electronic alternatives to paper documents and encourage the development of systems that accept electronic documents, the bill updates state law to, for example, (i) broaden the definition of "document" and "recorded" to allow for electronic recordation; (ii) delete statutory references to separate sets of books or separate databases for different kinds of documents; (iii) remove requirements for marginal notation of documents; and (iv) require development of standard formats for electronic documents.

Click here for a copy of A2565.

Third Circuit Upholds District Court's Order Enjoining Full Enforcement of New Jersey Gift Card Escheat Law. Recently, the U.S. Court of Appeals for the Third Circuit affirmed the district court's decision to enjoin New Jersey from fully applying and enforcing its gift card escheat law. *N.J. Retail Merchs. Assoc. v. Sidamon-Eristoff*, No. 10-4551 2012 WL 19385 (3d Cir. Jan. 5, 2012). Retailers challenged the constitutionality of a 2010 amendment to New Jersey's unclaimed property statute that provided for the custodial escheat of store valued cards (SVCs or gift cards). Under New Jersey's Chapter 25, SVCs are presumed to be abandoned after two years of inactivity and issuers are required to transfer to the state the remaining value on the SVCs at the end of the two-year abandonment period. In addition, issuers are required to obtain the name and address of the purchaser or owner of each SVC issued or sold and, at a minimum, maintain a record of the zip code of the owner or purchaser, and there is a presumption that the address of the owner or purchaser is the same as the address of the place where the SVC was purchased or issued. This latter provision has the effect of causing unused funds to escheat to New Jersey, rather than to the state where the card issuer is domiciled, when the last known address of the purchaser is unknown. In response to challenges under the Supremacy Clause, the Due Process Clause, the Commerce Clause, the Contract Clause, and the Takings Clause of the U.S. Constitution, the Third Circuit upheld the district court's preliminary injunction enjoining the retroactive application of Chapter 25 to SVCs redeemable for merchandise or services that were issued before Chapter 25's enactment. It also upheld the district court's preliminary injunction enjoining the prospective enforcement of the place-of-purchase presumption. The court, however, declined to prospectively enjoin the data collection provision or the two-year abandonment provision, finding that SVC issuers failed to show a reasonable likelihood of success on the merits of these claims and that the data collection provision is severable from the place-of-purchase provision. Click here for a copy of the court's opinion.

FTC Settles Claims Against Negative-Option Sales Operators. On February 1, the Federal Trade Commission (FTC) announced a settlement with two individuals alleged to have operated businesses that improperly collected consumer information and then used that data to enroll consumers in negative-option programs that promised to match consumers with payday lenders. The FTC claimed the operators enrolled consumers in the payday lender matching program without consumer consent and refused to provide promised refunds. Under the settlement agreement, the individuals must pay nearly $10 million and will be prohibited from marketing secured loan products. The agreement also bars the individuals from making certain misrepresentations and prohibits the conduct at issue. Click here for a copy of the FTC announcement of this settlement.

SPeRS Announces Release of Updated E-Commerce Compliance Guidelines. Recently, the Standards and Procedures for Electronic Records and Signatures version 2.0 (SPeRS 2.0) was released. This new version of SPeRS reflects current e-commerce business practices and updates applicable electronic record and signature case law and federal regulatory developments since SPeRS was originally published in 2003. The update also examines nationwide developments in the evolving area of electronic notarization laws. SPeRS is a technology-neutral set of guidelines and strategies for industry use in designing and implementing systems for electronic transactions under the federal Electronic Signatures in Global and National Commerce Act (ESIGN) and state adoptions

of the Uniform Electronic Transactions Act (UETA). SPeRS 2.0 updates the groundbreaking guidance contained in SPeRS 1.0, developed by a broad cross-section of leading financial service companies and trade associations. More information about SPeRS is available at www.spers.org.

Criminal Enforcement Action

D.C. Federal Judge Declares Mistrial For Three Remaining Defendants In Second FCPA Sting Case Trial. On January 31, Judge Richard Leon of the U.S. District Court for the District of Columbia declared a mistrial after a federal jury failed to reach a unanimous verdict on foreign bribery charges against John Mushriqui, Jeana Mushriqui, and Marc Morales, in one of the highest profile Foreign Corrupt Practices Act (FCPA) cases ever brought by the DOJ. BuckleySandler represented John Mushriqui at the nearly four-month jury trial. One day prior to the court declaring a mistrial, the jury acquitted two other defendants of the same charges. At the end of 2011, following the close of the prosecution's evidence, Judge Leon acquitted all defendants of related conspiracy charges, sending one defendant home entirely, and acquitted the Mushriquis of two of the five substantive FCPA charges pending against them. The defendants were charged with paying bribes to a purported government official from the country of Gabon, in connection with contracts to supply Gabon with military and law enforcement products. The Federal Bureau of Investigation's sting operation resulted in the arrests of twenty-two individuals at an industry trade show in Las Vegas in 2010. The first trial of four other defendants also ended in a mistrial in July 2011. Between the two trials regarding the Gabon deal sting, three defendants have been acquitted and seven have proceeded to a hung jury.

Click here for a report regarding these recent case developments.