InfoBytes

December 2, 2011

Topics In This Issue

Federal Issues

CFPB Seeks Input on Streamlining Regulations. On November 29, the Consumer Financial Protection Bureau (CFPB) issued a notice seeking public input on CFPB's efforts to prioritize revisions to the consumer financial services-related regulations for which it is now responsible. Pursuant to the Dodd-Frank Act, the authority of seven federal agencies to promulgate regulations under fourteen consumer financial laws was transferred and consolidated within the CFPB, which was tasked with reducing outdated, unnecessary, and unduly burdensome regulations. Although the CFPB noted that its near-term focus will be to implement the various mortgage-related rules required by the Dodd-Frank Act to be in place by January 2013, this notice begins the regulatory streamlining process by soliciting information to help the bureau identify the highest streamlining priorities. Specifically, the CFPB poses a number of questions to obtain comments regarding: (i) planning for the reviews of inherited regulations; (ii) specific opportunities for streamlining; and (iii) practical measures to ensure compliance and facilitate innovation. The bureau will consider five factors in setting priorities: (i) the potential benefits and costs of a regulatory change for consumers and regulated institutions; (ii) the likelihood that the benefits are achievable while remaining consistent with the underlying statute; (iii) the speed with which the benefits would be realized; (iv) the governmental and private resources required to achieve the benefits; and (v) the state of the evidence with which to judge these factors. With regard to the fifth criterion, the CFPB will be assessing and weighing the reliability of evidence provided for a given change, and it will favor quantitative data where feasible.

The CFPB also notes that it soon will begin republishing the inherited consumer financial regulations as regulations of the CFPB. In republishing inherited regulations, the CFPB intends only to make conforming and technical changes to the regulations. Initial comments are due in ninety days from the date of publication in the Federal Register, with an additional thirty days to respond to submitted comments. Click here for a copy of the notice.

CFPB Issues Interim Report and Policy Statement on Credit Card Complaints, Mortgage Complaints Next. On November 30, the CFPB issued an interim report that summarizes findings related to collection of roughly 5,000 consumer credit card complaints received by the CFPB between July and October 2011. This represents the first report on the centralized complaint system the CFPB put in place to monitor consumer financial products and services. Under the process, the CFPB takes formal complaints from consumers and forwards the complaints to the issuers for review and response. The CFPB performs additional review and investigation where the issuer fails to respond or where the response is disputed by the consumer. According to the CFPB, the complaints evidenced: (i) "customer confusion", which reveals "a mismatch between consumer expectations and the way the product functions;" (ii) a significant amount of third-party fraud, which assisted in identifying recurring scams; and (iii) a "large volume" of conflicting factual accounts, many of which were resolved by the issuers. Concurrent with the report, the CFPB issued a proposed policy statement outlining its plans for sharing credit card complaint data through a public database. Confidential personal information will be excluded, but the database would include at least the following fields: (i) type of complaint/subject area; (ii) name of the card issuer; (iii) consumer's zip code; (iv) complaint date; and (v) whether and how the issuer responded. Users will be able to search and filter, enabling aggregation of data by each field; all data will be available for download. While the database will be updated regularly by the CFPB, issuers will have thirty days to respond to a complaint before that complaint information is added to the database. The CFPB is accepting comments on the proposed policy through January 30, 2012. Finally, the CFPB also announced that it expects to begin accepting complaints regarding home mortgages on or about December 1, 2011, and will be prepared to handle complaints for all consumer financial products by the end of 2012. Click here for a copy of the CFPB press release with links to the report and proposed policy statement.

OCC Issues Proposed Rule to Replace Credit Rating References with Alternative Creditworthiness Standards. On November 29, the Office of Comptroller of Currency (OCC) issued a proposed rule to implement Section 939A of the Dodd-Frank Act, which required the replacement of the use of credit ratings with alternative standards of creditworthiness. This proposal identifies regulations applicable to investment securities, securities offerings, and foreign bank capital equivalency deposits, and does not pertain to regulations that establish regulatory capital requirements. The proposal would require national banks to assess whether a security issuer has an "adequate capacity to meet financial commitments under the security for the projected life of the asset or exposure," a standard which may be met if the risk of default by the issuer is low and timely repayment of principal and interest is expected. For federal savings associations, the definition of "investment grade" would cross-reference the requirement established by the Federal Deposit Insurance Corporation (FDIC), which is currently under review by the FDIC and will be replaced after July 21, 2012.

Simultaneously, the OCC issued proposed guidance to outline measures institutions should put in place to demonstrate due diligence in examining the "adequate capacity" of an issuer. Specific factors will depend on the type of security, and firms will need to adjust the depth of due diligence to match the credit quality of the security, its complexity, and the size of the investment. Comments on the proposed rule and on the proposed guidance on the due diligence requirements are due by December 29. Click here for a copy of the proposed rule. Click here for a copy of the proposed guidance.

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FRB Appoints New Banking Supervision and Regulation Director. On November 30, the Federal Reserve Board (FRB) announced that Michael S. Gibson will serve as the director of the Division of Banking Supervision and Regulation, effective January 1, 2012. Mr. Gibson previously served as deputy director in the Division of Research and Risk Management and replaces Patrick Parkinson. Click here for a copy of the FRB announcement.

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SEC Chairman Seeks Authority for Higher Penalties. On November 28, U.S. Securities and Exchange Commission (SEC) Chairman Mary Shapiro sent a letter to Senators Jack Reed and Mike Crapo requesting additional statutory authority to obtain higher civil monetary penalties. Current law limits penalties in administrative proceedings to a maximum of $150,000 per violation for individuals, and $725,000 per violation for firms. In federal civil actions, penalties alternatively can be calculated using the same "per violation" method, or by matching the penalty to the "gross amount of pecuniary gain" to the defendant. The SEC seeks three specific statutory changes, including: (i) increasing the maximum "per violation" penalty to $1 million for individuals and $10 million for entities; (ii) altering the "pecuniary gain" method to allow penalties up to three times the pecuniary gain to the defendant; and (iii) creating a new calculation method setting a maximum penalty based on the amount of investor losses. The new method would be available in both administrative proceedings and civil actions. The letter further outlines additional statutory language specifically to address penalties for recidivists. Click here for a copy of the letter.

NCUA Finalizes Remittance Transfers Rule. On November 30, the National Credit Union Administration (NCUA) published a final rule to add remittance transfers, as newly defined by the Dodd-Frank Act, as a permissible form of money transfer instrument that federal credit unions may offer. Federal credit unions previously were permitted to offer negotiable checks, money orders, and other similar money transfer instruments. This final rule is unchanged from an interim final rule published by NCUA on July 27, 2011 implementing the changes required by Dodd-Frank. Click here for a copy of the final rule.

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State Issues

Pennsylvania State Court Announces Residential Mortgage Foreclosure Diversion Program. Recently, the Pennsylvania Court of Common Pleas for Schuylkill County issued Administrative Order 2011.3, which establishes a mandatory diversion program for all residential mortgage foreclosure actions. Under the new program, residential mortgage foreclosure actions are automatically stayed for ninety days from the date of service so that the parties can undertake informal dispute resolution. The borrower must attend an intake meeting with a housing counselor, who then meets with party seeking foreclosure to negotiate a resolution of the borrower's default. Unresolved actions are referred to a mandatory Court Supervised Conciliation Conference. Following the Conciliation Conference, the court may: (i) order that the stay be lifted so that the foreclosure action can proceed; (ii) order a continuation of the stay to allow for further negotiations or implementation of an agreement; or (iii) take any other action that it deems appropriate. The diversion program goes into effect on December 19. Click here for a copy of the court's administrative order.

Courts

Massachusetts AG Sues Servicers Over Foreclosure and Servicing Practices. On December 1, Massachusetts Attorney General Martha Coakley filed suit in Suffolk County Superior Court against five banks and Mortgage Electronic Registration Systems, Inc. (MERS) alleging unfair and deceptive trade practices relating to the defendants' mortgage loan servicing and foreclosure activities. Specifically, the complaint alleges that the defendants engaged in unfair and deceptive practices in violation of the Massachusetts Consumer Protection Act by (i) foreclosing on mortgages without being the actual holder of the mortgage; (ii) failing to identify the present holder of the mortgage in the notice of sale; (iii) falsely representing themselves as the holder of the mortgage; (iv) conducting deceptive loan modification and servicing practices through, among other things, misrepresenting the terms and conditions of modification programs and the status of modifications and foreclosure proceedings to borrowers; and (v) failing to register the assignment of mortgages. The complaint provides certain "illustrative examples" of those alleged practices, including those involving so-called "robo-signing", to demonstrate that the servicers "repeatedly failed to strictly adhere to [state] statutory requirements in conducting foreclosures." With respect to the assignment of mortgages, the complaint alleges that by utilizing MERS for the assignment of mortgages, the banks failed to comply with the Massachusetts registration statute, which requires all instruments associated with a mortgage to be registered. The complaint further alleges that this both concealed the true holder of the debt and avoided millions of dollars in filing fees. Finally, the complaint seeks to void as unlawful any foreclosure initiated or advanced by the defendants when it was not a current holder of the mortgage, or where the defendant falsely identified itself as the present holder of the mortgage in notices sent to the mortgagor. Massachusetts is seeking certain injunctive relief, as well as a $5,000 civil penalty per violation of the Consumer Protection Act. Click here for a copy of the complaint, as well as additional information about the filing.

New York Federal Court Rejects SEC's Proposed MBS Consent Judgment with Bank. On November 28, the U.S. District Court for the Southern District of New York rejected a proposed Consent Judgment between the U.S. Securities and Exchange Commission (SEC) and a bank defendant in a securities fraud suit because the court held that it lacked sufficient information to determine whether the judgment was in the public interest where the defendant did not admit or deny any of the underlying allegations. *U.S. Securities and Exchange Commission v. Citigroup Global Markets Inc.*, 11 Civ. 7387, 2011 WL 5903733 (S.D.N.Y. Nov. 28, 2011). The SEC's suit alleges numerous violations of the Securities Act where the bank had purportedly created a fund to dump mortgage-backed securities on investors after realizing that the market for these securities was weakening. According to the SEC's complaint, the bank informed investors that the fund's assets were selected by an independent investment advisor, but were in reality selected by the defendant to rid itself of negatively projected assets. The SEC and the defendant subsequently reached a Consent Agreement in which, among other provisions, the defendant would have to pay a $95 million penalty and disgorge $190 million in profits and interest. In keeping with the SEC Consent Judgment convention, the defendant did not admit or deny any of the allegations as part of the agreement. The court determined that, contrary to the parties' arguments, the appropriate standard for review of whether it could enforce the Consent Judgment was whether the agreement was: (i) fair; (ii) reasonable; (iii) adequate; and (iv) in the public interest. Because the parties agreed to settle without the defendant having to admit or deny any of the underlying factual allegations, the court held it was not provided with evidence sufficient to determine whether the agreement satisfied those standards. The court placed significant value on the public interest, noting that the settlement would deprive the public "of ever knowing the truth in a matter of obvious public importance." Thus the court could not use its injunctive powers to enforce the agreement. Please click here for a copy of the decision.

New York Appeals Court Holds State Appraisal Laws Not Preempted. On November 22, the New York Court of Appeals ruled in *Cuomo v. First American Corporation*, No. 184, 2011 WL 5838482 (N.Y. Nov. 22, 2011) to affirm two lower court rulings and allow the state attorney general to pursue state law claims against an appraiser. The court held that New York state laws regulating appraisal practices are not preempted by federal laws, including the Home Owner's Loan Act (HOLA) and the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). In its complaint, the state alleges that a title company illegally inflated appraisal reports for a lender with which it did a substantial volume of business, in violation of the state's Executive Law and Consumer Protection Act, as well as state common law. Arguing alternatively that federal law occupied the entire field of real estate appraisals, or that New York's regulations obstructed the lenders ability to finance real estate transactions, the appraiser moved to dismiss and lost. On appeal to the Appellate Division, the appraiser abandoned the second theory regarding conflict, but the lower court decision holding no preemption still was affirmed. The Court of Appeals agreed, holding that "FIRREA governs the regulation of appraisal management companies and explicitly envisioned a cooperative effort between federal and state authorities." Moreover, the court found "no basis to conclude that HOLA itself or federal regulations promulgated under HOLA preempt" state common or statutory law claims. Those regulations do not explicitly list appraisal laws as a type of preempted state law, and to the contrary provide that state laws that only incidentally affect lending operations of federal savings associations are not preempted. According to the court, authority to pursue the appraisal company under state law would, at most, incidentally affect the institutions lending operations. One judge dissented from the majority opinion and argued that federal guidance on preemption creates conflicts in that some mortgage-related state laws are preempted, *e.g.* those regarding mortgage processing, under HOLA. Please click here to review a copy of the decision.

California Federal Court Holds National Bank Act Preempts State Law Claims Asserting National Bank Mislead Consumers by Failing to Make Material Disclosures. Recently, a California federal court held that the National Bank Act (NBA) preempts state laws purporting to require disclosure requirements on the bank's deposit-related activities. *Robinson v. Bank of America, N.A.*, Case No. CV 11-03939-GHK JEM, 2011 WL 5870541 (C.D. Cal. Nov. 11, 2011). In this case, the plaintiff was charged a fee for using a cash-access account, which can be avoided by going to a branch office to withdraw funds. The plaintiff alleged that the failure to disclose the ability to avoid the fee violated, among other things, California's Consumer Legal Remedies Act (CLRA) and unfair competition law (UCL). The defendant argued that the NBA preempts any claims alleging to regulate disclosures on deposit accounts, and the court agreed. The court also rejected the plaintiff's argument that state laws that require all businesses generally (as opposed to banks in particular) to refrain from misrepresentations and from fraudulent, unfair, or illegal behavior are not specific disclosure requirements preempted by the NBA. In support of its holding, the court cited the standard articulated by the U.S. Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996) that a state may only regulate the activities of a national bank where doing so does not prevent or significantly interfere with the exercise by the national bank of its powers. As such, the court granted the motion for judgment on pleadings, and dismissed the case. Click here for a copy of the report and recommendation granting the motion for judgment on the pleadings; click here for the order accepting the same.

California Court of Appeal Dismisses Claim under California's UCL because the Federal TISA Provides no Cause of Action. On November 21, a California appellate court held that because Congress repealed the section of the Federal Truth in Savings Act (TISA) granting a private right of action, a technical violation of TISA could not serve as the predicate violation for a claim under California's unfair competition law (UCL). *Rose v. Bank of America*, No. B230859, 2011 WL 5831324 (Cal. Ct. App. Nov. 21, 2011). The plaintiffs alleged, on behalf of a putative class, that Bank of America violated TISA by failing to notify them in a clear, conspicuous, and detailed way of fee increases on their accounts, and that such violations were unlawful and unfair under the UCL. Bank of America successfully demurred, arguing that the prohibition on a private cause of action to enforce TISA in 2001 forbid UCL claims based on the federal statute. The court sustained the bank's demurrer, holding that, because "Congress has clearly rejected a private right to enforce TISA," plaintiffs could not allege violations thereof were "unlawful" as required to sustain a claim under the UCL. The court found that although the UCL provides "broad" coverage and "borrows violations from other laws, making them independently actionable as unfair competitive practices," it cannot be extended to laws where the legislature specifically prohibits private enforcement. As such, Congress' specific repeal of the private right of action provision reflected its intent to prohibit private enforcement of TISA violations. Click here for a copy of the decision.

SEC, U.S. Attorney and FBI Charge 13 in Alleged Securities Scheme. On December 1, the U.S. Securities and Exchange Commission (SEC), the U.S. Attorney's office for the District of Massachusetts, and the Federal Bureau of Investigation (FBI) announced the filing of criminal charges against thirteen individuals alleged to have engaged in secret kickbacks related to the sale of certain securities in micro-cap stock markets. Under the alleged scheme, those charged provided kickbacks through sham consulting agreements with an investment fund representative. The kickbacks were offered in exchange for the fund investing in certain companies identified by the defendants. Click here for the SEC press release announcing these charges, as well as links to related civil complaints filed.

SEC Initiates Enforcement Actions Against Multiple Hedge Fund Managers. On December 1, the U.S. Securities and Exchange Commission (SEC) filed enforcement actions against multiple hedge fund managers accused of, among other things: (i) fraudulently valuating of portfolio holdings; (ii) misusing hedge fund assets; (iii) misrepresenting performance, liquidity, and other critical fund attributes. Additional details regarding the allegations, as well as links to the complaints, are available at http://www.sec.gov/news/press/2011/2011-252.htm.

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

BuckleySandler LLP is honored to have five partners named in Washingtonian magazine's 2011 "Best Lawyers" list. **Andrew L. Sandler**, **Jeremiah S. Buckley**, **Benjamin B. Klubes** and **Joseph M. Kolar** were named as "Stars of the Bar" in the area of Banking and Financial Services and partner **David S. Krakoff** was named as a "Star of the Bar" in the area of White Collar Defense. Sandler, the firm's Chairman and Executive Partner, was also recognized as one of DC's 30 "Superstar" lawyers. The Washingtonian's "Best Lawyers," which is available in the December 2011 issue, highlights "the very best in legal talent" within the Washington, DC area. Sandler was recognized for the leading role he has played in helping financial services companies navigate complex litigation and government investigations and for his work for company boards facing regulatory examinations and enforcement actions by federal bank regulatory and enforcement agencies. Sandler, Buckley, Klubes and Kolar were highlighted as "elite financial services lawyers" who help their clients "defend their practices and understand new regulations." Krakoff, co-head of the firm's White Collar practice, was recognized as a "preeminent white-collar defender" and as one of Washington's best legal minds in the area of white-collar defense.

Donna Wilson will be speaking in the Strafford Privacy Data Breach Class Action Webinar on Wednesday, December 7, from 1:00 to 2:30 PM EST/10:00 to 11:30 AM PST. Ms. Wilson's session is entitled: "Class Actions on Data Breach and Privacy on the Rise; Litigating Class Claims, Alleging and Challenging Damages, and Evaluating Insurance."

David Baris, **Sam Buffone**, and **Donna Wilson** will be hosting and presenting in an AABD complimentary webinar entitled "Legal Actions by the FDIC to Recover Losses of Failed Banks: The Potential Liability of Officers and Directors" on December 7, from 3:00 to 4:30 PM EST/12:00 to 1:30 PM PST. Joining Mr. Baris, Mr. Buffone, and Ms. Wilson will be Richard Osterman, head of the FDIC's Professional Liability Program.

Jeff Naimon, **Jonice Gray Tucker**, and **Lori Sommerfield** will be hosting and presenting in a complimentary webinar entitled "The CFPB in Focus: Where Are We Now and What Lies Ahead?" on December 8, 2011 from 2:00 to 3:15 PM. The webinar will review the current status of CFPB and its progress to date and offer a projection of what lies ahead. To register, please visit https://www1.gotomeeting.com/register/335580144.

Jeff Naimon and **Jonice Gray Tucker** will be speaking on an American Bankers Association Telephone Briefing entitled "Mortgage Servicing: Development and Impact." The Panel will be moderated by the ABA's Rod Alba. The briefing will be on Wednesday, December 14, 2011 from 2:00 to 4:00 p.m. Eastern time. The briefing will discuss servicing guidance from the Consumer Financial Protection Bureau's (CFPB) new examination manual and the Office of the Comptroller of the Currency's OCC-2011-29 Guidance to Banks Regarding Foreclosure Practices. Click here to register.

Jonice Gray Tucker will be speaking in an ALI-ABA phone seminar, titled "CFPB: Redefining the Consumer Credit Market by Defining 'Abusive' Standards," on December 21, 2011. The seminar will discuss the the CFPB's structure, powers, and enforcement priorities; key initiatives; the new Supervisory Manual; anticipated collaboration with other government regulators; and the Bureau's interim rules. For more information on this seminar, visit: www.ali-aba.org/TSTK01

Donna Wilson will be participating as a panelist at the Round Table on 2011-2012 Legal Developments and Trends for the Retail and Fashion Industries on January 19, 2012 in New York, New York.

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 program on worldwide anti-corruption laws in Palm Springs in February 2012.

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."

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."

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.

Mortgages

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The CFPB also notes that it soon will begin republishing the inherited consumer financial regulations as regulations of the CFPB. In republishing inherited regulations, the CFPB intends only to make conforming and technical changes to the regulations. Initial comments are due in ninety days from the date of publication in the Federal Register, with an additional thirty days to respond to submitted comments. Click here for a copy of the notice.

Securities

SEC Chairman Seeks Authority for Higher Penalties. On November 28, U.S. Securities and Exchange Commission (SEC) Chairman Mary Shapiro sent a letter to Senators Jack Reed and Mike Crapo requesting additional statutory authority to obtain higher civil monetary penalties. Current law limits penalties in administrative proceedings to a maximum of $150,000 per violation for individuals, and $725,000 per violation for firms. In federal civil actions, penalties alternatively can be calculated using the same "per violation" method, or by matching the penalty to the "gross amount of pecuniary gain" to the defendant. The SEC seeks three specific statutory changes, including: (i) increasing the maximum "per violation" penalty to $1 million for individuals and $10 million for entities; (ii) altering the "pecuniary gain" method to allow penalties up to three times the pecuniary gain to the defendant; and (iii) creating a new calculation method setting a maximum penalty based on the amount of investor losses. The new method would be available in both administrative proceedings and civil actions. The letter further outlines additional statutory language specifically to address penalties for recidivists. Click here for a copy of the letter.

Litigation

Massachusetts AG Sues Servicers Over Foreclosure and Servicing Practices. On December 1, Massachusetts Attorney General Martha Coakley filed suit in Suffolk County Superior Court against five banks and Mortgage Electronic Registration Systems, Inc. (MERS) alleging unfair and deceptive trade practices relating to the defendants' mortgage loan servicing and foreclosure activities.

Specifically, the complaint alleges that the defendants engaged in unfair and deceptive practices in violation of the Massachusetts Consumer Protection Act by (i) foreclosing on mortgages without being the actual holder of the mortgage; (ii) failing to identify the present holder of the mortgage in the notice of sale; (iii) falsely representing themselves as the holder of the mortgage; (iv) conducting deceptive loan modification and servicing practices through, among other things, misrepresenting the terms and conditions of modification programs and the status of modifications and foreclosure proceedings to borrowers; and (v) failing to register the assignment of mortgages. The complaint provides certain "illustrative examples" of those alleged practices, including those involving so-called "robo-signing", to demonstrate that the servicers "repeatedly failed to strictly adhere to [state] statutory requirements in conducting foreclosures." With respect to the assignment of mortgages, the complaint alleges that by utilizing MERS for the assignment of mortgages, the banks failed to comply with the Massachusetts registration statute, which requires all instruments associated with a mortgage to be registered. The complaint further alleges that this both concealed the true holder of the debt and avoided millions of dollars in filing fees. Finally, the complaint seeks to void as unlawful any foreclosure initiated or advanced by the defendants when it was not a current holder of the mortgage, or where the defendant falsely identified itself as the present holder of the mortgage in notices sent to the mortgagor. Massachusetts is seeking certain injunctive relief, as well as a $5,000 civil penalty per violation of the Consumer Protection Act. Click here for a copy of the complaint, as well as additional information about the filing.

New York Federal Court Rejects SEC's Proposed MBS Consent Judgment with Bank. On November 28, the U.S. District Court for the Southern District of New York rejected a proposed Consent Judgment between the U.S. Securities and Exchange Commission (SEC) and a bank defendant in a securities fraud suit because the court held that it lacked sufficient information to determine whether the judgment was in the public interest where the defendant did not admit or deny any of the underlying allegations. *U.S. Securities and Exchange Commission v. Citigroup Global Markets Inc.*, 11 Civ. 7387, 2011 WL 5903733 (S.D.N.Y. Nov. 28, 2011). The SEC's suit alleges numerous violations of the Securities Act where the bank had purportedly created a fund to dump mortgage-backed securities on investors after realizing that the market for these securities was weakening. According to the SEC's complaint, the bank informed investors that the fund's assets were selected by an independent investment advisor, but were in reality selected by the defendant to rid itself of negatively projected assets. The SEC and the defendant subsequently reached a Consent Agreement in which, among other provisions, the defendant would have to pay a $95 million penalty and disgorge $190 million in profits and interest. In keeping with the SEC Consent Judgment convention, the defendant did not admit or deny any of the allegations as part of the agreement. The court determined that, contrary to the parties' arguments, the appropriate standard for review of whether it could enforce the Consent Judgment was whether the agreement was: (i) fair; (ii) reasonable; (iii) adequate; and (iv) in the public interest. Because the parties agreed to settle without the defendant having to admit or deny any of the underlying factual allegations, the court held it was not provided with evidence sufficient to determine whether the agreement satisfied those standards. The court placed significant value on the public interest, noting that the settlement would deprive the public "of ever knowing the truth in a matter of obvious public importance." Thus the court could not use its injunctive powers to enforce the agreement. Please click here for a copy of the decision.

New York Appeals Court Holds State Appraisal Laws Not Preempted. On November 22, the New York Court of Appeals ruled in *Cuomo v. First American Corporation*, No. 184, 2011 WL 5838482 (N.Y. Nov. 22, 2011) to affirm two lower court rulings and allow the state attorney general to pursue state law claims against an appraiser. The court held that New York state laws regulating appraisal practices are not preempted by federal laws, including the Home Owner's Loan Act (HOLA) and the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). In its complaint, the state alleges that a title company illegally inflated appraisal reports for a lender with which it did a substantial volume of business, in violation of the state's Executive Law and Consumer Protection Act, as well as state common law. Arguing alternatively that federal law occupied the entire field of real estate appraisals, or that New York's regulations obstructed the lenders ability to finance real estate transactions, the appraiser moved to dismiss and lost. On appeal to the Appellate Division, the appraiser abandoned the second theory regarding conflict, but the lower court decision holding no preemption still was affirmed. The Court of Appeals agreed, holding that "FIRREA governs the regulation of appraisal management companies and explicitly envisioned a cooperative effort between federal and state authorities." Moreover, the court found "no basis to conclude that HOLA itself or federal regulations promulgated under HOLA preempt" state common or statutory law claims. Those regulations do not explicitly list appraisal laws as a type of preempted state law, and to the contrary provide that state laws that only incidentally affect lending operations of federal savings associations are not preempted. According to the court, authority to pursue the appraisal company under state law would, at most, incidentally affect the institutions lending operations. One judge dissented from the majority opinion and argued that federal guidance on preemption creates conflicts in that some mortgage-related state laws are preempted, *e.g.* those regarding mortgage processing, under HOLA. Please click here to review a copy of the decision.

California Federal Court Holds National Bank Act Preempts State Law Claims Asserting National Bank Mislead Consumers by Failing to Make Material Disclosures. Recently, a California federal court held that the National Bank Act (NBA) preempts state laws purporting to require disclosure requirements on the bank's deposit-related activities. *Robinson v. Bank of America, N.A.*, Case No. CV 11-03939-GHK JEM, 2011 WL 5870541 (C.D. Cal. Nov. 11, 2011). In this case, the plaintiff was charged a fee for using a cash-access account, which can be avoided by going to a branch office to withdraw funds. The plaintiff alleged that the failure to disclose the ability to avoid the fee violated, among other things, California's Consumer Legal Remedies Act (CLRA) and unfair competition law (UCL). The defendant argued that the NBA preempts any claims alleging to regulate disclosures on deposit accounts, and the court agreed. The court also rejected the plaintiff's argument that state laws that require all businesses generally (as opposed to banks in particular) to refrain from misrepresentations and from fraudulent, unfair, or illegal behavior are not specific disclosure requirements preempted by the NBA. In support of its holding, the court cited the standard articulated by the U.S. Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996) that a state may only regulate the activities of a national bank where doing so does not prevent or significantly interfere with the exercise by the national bank of its powers. As such, the court granted the motion for judgment on pleadings, and dismissed the case. Click here for a copy of the report and recommendation granting the motion for judgment on the pleadings; click here for the order accepting the same.

California Court of Appeal Dismisses Claim under California's UCL because the Federal TISA Provides no Cause of Action. On November 21, a California appellate court held that because Congress repealed the section of the Federal Truth in Savings Act (TISA) granting a private right of action, a technical violation of TISA could not serve as the predicate violation for a claim under California's unfair competition law (UCL). *Rose v. Bank of America*, No. B230859, 2011 WL 5831324 (Cal. Ct. App. Nov. 21, 2011). The plaintiffs alleged, on behalf of a putative class, that Bank of America violated TISA by failing to notify them in a clear, conspicuous, and detailed way of fee increases on their accounts, and that such violations were unlawful and unfair under the UCL. Bank of America successfully demurred, arguing that the prohibition on a private cause of action to enforce TISA in 2001 forbid UCL claims based on the federal statute. The court sustained the bank's demurrer, holding that, because "Congress has clearly rejected a private right to enforce TISA," plaintiffs could not allege violations thereof were "unlawful" as required to sustain a claim under the UCL. The court found that although the UCL provides "broad" coverage and "borrows violations from other laws, making them independently actionable as unfair competitive practices," it cannot be extended to laws where the legislature specifically prohibits private enforcement. As such, Congress' specific repeal of the private right of action provision reflected its intent to prohibit private enforcement of TISA violations. Click here for a copy of the decision.

SEC Initiates Enforcement Actions Against Multiple Hedge Fund Managers. On December 1, the U.S. Securities and Exchange Commission (SEC) filed enforcement actions against multiple hedge fund managers accused of, among other things: (i) fraudulently valuating of portfolio holdings; (ii) misusing hedge fund assets; (iii) misrepresenting performance, liquidity, and other critical fund attributes. Additional details regarding the allegations, as well as links to the complaints, are available at http://www.sec.gov/news/press/2011/2011-252.htm.

e-Financial Services

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.

Credit Cards

CFPB Issues Interim Report and Policy Statement on Credit Card Complaints, Mortgage Complaints Next. On November 30, the CFPB issued an interim report that summarizes findings related to collection of roughly 5,000 consumer credit card complaints received by the CFPB between

July and October 2011. This represents the first report on the centralized complaint system the CFPB put in place to monitor consumer financial products and services. Under the process, the CFPB takes formal complaints from consumers and forwards the complaints to the issuers for review and response. The CFPB performs additional review and investigation where the issuer fails to respond or where the response is disputed by the consumer. According to the CFPB, the complaints evidenced: (i) "customer confusion", which reveals "a mismatch between consumer expectations and the way the product functions;" (ii) a significant amount of third-party fraud, which assisted in identifying recurring scams; and (iii) a "large volume" of conflicting factual accounts, many of which were resolved by the issuers. Concurrent with the report, the CFPB issued a proposed policy statement outlining its plans for sharing credit card complaint data through a public database. Confidential personal information will be excluded, but the database would include at least the following fields: (i) type of complaint/subject area; (ii) name of the card issuer; (iii) consumer's zip code; (iv) complaint date; and (v) whether and how the issuer responded. Users will be able to search and filter, enabling aggregation of data by each field; all data will be available for download. While the database will be updated regularly by the CFPB, issuers will have thirty days to respond to a complaint before that complaint information is added to the database. The CFPB is accepting comments on the proposed policy through January 30, 2012. Finally, the CFPB also announced that it expects to begin accepting complaints regarding home mortgages on or about December 1, 2011, and will be prepared to handle complaints for all consumer financial products by the end of 2012. Click here for a copy of the CFPB press release with links to the report and proposed policy statement.

Criminal Enforcement Action

SEC, U.S. Attorney and FBI Charge 13 in Alleged Securities Scheme. On December 1, the U.S. Securities and Exchange Commission (SEC), the U.S. Attorney's office for the District of Massachusetts, and the Federal Bureau of Investigation (FBI) announced the filing of criminal charges against thirteen individuals alleged to have engaged in secret kickbacks related to the sale of certain securities in micro-cap stock markets. Under the alleged scheme, those charged provided kickbacks through sham consulting agreements with an investment fund representative. The kickbacks were offered in exchange for the fund investing in certain companies identified by the defendants. Click here for the SEC press release announcing these charges, as well as links to related civil complaints filed.