December 14, 2012

TOPICS COVERED THIS WEEK

FEDERAL ISSUES

CFPB Proposes Trial Consumer Disclosure Program. On December 13, as part of its Project Catalyst, the CFPB proposed a new policy that will allow financial institutions to conduct trial consumer disclosure programs. Participating firms would receive time-limited exemptions from federal disclosure laws in exchange for sharing with the CFPB the results of their trial disclosures. According to the proposed policy, firms seeking to participate in the program would need to submit to the CFPB information about the proposed disclosure program, including (i) the type of disclosure and laws to be waived in connection with the program, (ii) the proposed changes, expected improvements from the changes, and metrics for evaluating the improvements, (iii) the duration of the test and the size, location, and nature of the consumer population involved in the test, and (iv) the names and planned roles of any third-party vendors. In considering proposed trial disclosures, the CFPB would evaluate, among other factors, (i) how effectively and efficiently the proposed trial will test for potential improvements to consumer understanding about the costs, benefits, and risks of products and services, (ii) how the proposed trial will help develop more cost-effective disclosure rules or policies, (iii) the extent to which the program is designed to mitigate any risk to consumers, (iv) the extent to which the program may help the CFPB develop rules or policies to correct or mitigate market failure, and (v) the strength of the company's compliance management system relative to the size, nature, and complexity of the company's consumer business. The proposal is subject to a 60-day notice and comment period, which begins once the proposal is published in the Federal Register.

CFPB Publishes White Paper on Largest Consumer Reporting Agencies. On December 13, the CFPB issued a white paper on its review of 2011 data to determine how the three largest consumer reporting agencies (CRAs) manage consumer data and complaints. According to the CFPB press release, its review of the data revealed that more than half of the trade lines (the accounts in a consumer's name reported by creditors) in the CRAs databases are supplied by the credit card industry, with 40 percent related to bank cards, such as general credit cards, and 18 percent from retail credit cards. Only seven percent comes from mortgage lenders or servicers, and only four percent comes from auto lenders. The CFPB also reported that (i) almost 40 percent of disputes have to do with collections, and debt in collection is five times more likely to be disputed than mortgage information, (ii) fewer than one in five people obtain copies of their credit report each year, (iii) most information contained in credit reports comes from a few large companies, and (iv) most complaints are forwarded to the furnishers that provided the original information, while the CRAs resolve an average of 15 percent of consumer disputed items internally. The report adds that certain documentation provided by consumers to support their cases may not be getting passed on to the data furnishers for them to properly investigate and report back to the CRA, but the report does not offer any policy prescriptions.

CFPB Provides Additional Details about Certain Information-Sharing Activities. On December 11, the CFPB announced plans to share consumer complaint data with state regulatory agencies. The CFPB explained that it is providing "real-time access" to its database of consumer complaints in a manner that will protect any personally-identifiable information. Further, the CFPB plans in the future to accept such information from state agencies, and to make data available to other federal agencies, state attorneys general, local agencies, congressional offices, and other governmental organizations like the California mortgage settlement monitor and the national mortgage settlement monitor. This announcement follows a December 6, 2012 Statement of Intent issued by the CFPB in which it describes how it is coordinating broader information-sharing efforts with state banking and financial services regulators, including with regard to enforcement matters.

U.S. Law Enforcement Authorities and Regulators Resolve Significant Money Laundering and Sanctions Investigations. On December 11, a major international bank holding company announced agreements with U.S. law enforcement authorities and federal bank regulators to end investigations into alleged inadequate compliance with anti-money laundering and sanctions laws by the holding company and its U.S. subsidiaries (collectively the banks). Under these agreements, the banks will make payments totaling $1.92 billion, will continue to cooperate fully with regulatory and law enforcement authorities, and will take further action to strengthen compliance policies and procedures. As part of the resolution, the banks entered into a deferred prosecution agreement (DPA) with the DOJ pursuant to which the banks will forfeit $1.256 billion, $375 million of which satisfies a settlement with the Office of Foreign Assets Control (OFAC). The four-count criminal information filed in conjunction with the DPA charges that the banks violated the Bank Secrecy Act by failing to maintain an effective anti-money laundering program and to conduct appropriate due diligence on its foreign correspondent account holders. The DOJ also alleged that the banks violated the International Emergency Economic Powers Act and the Trading with the Enemy Act by illegally conducting transactions on behalf of customers in certain countries that were subject to sanctions enforced by OFAC. The banks agreed to pay a single $500 million civil penalty to satisfy separate assessments by the OCC and FinCEN related to the same alleged conduct, as well as a $165 million penalty to the Federal Reserve Board. The banks already have undertaken numerous voluntary remedial actions, including to (i) substantially increase AML compliance spending and staffing, (ii) revamp their Know Your Customer program, (iii) exit 109 correspondent relationships for risk reasons, and (iv) claw back bonuses for a number of senior officers. The banks also have undertaken a comprehensive overhaul of their structure, controls, and procedures, including to (i) simplify the control structure, (ii) create new compliance positions and elevate their roles, (iii) adopt a set of guidelines limiting business in those countries that pose a high financial crime risk, and (iv) implement a single global standard shaped by the highest or most effective anti-money laundering standards available in any location where the banks operates. Pursuant to the DPA, an independent monitor will evaluate the banks' continued implementation of these and other enhanced compliance measures.

In a separate matter, on December 10, Manhattan District Attorney Cyrus R. Vance, Jr. and the DOJ announced the resolution of a joint investigation into a British bank's alleged movement of more than $200 million through the U.S. financial system primarily on behalf of Iranian and Sudanese clients by removing information that would have revealed the payments as originating with a sanctioned country or entity, and thereby avoiding OFAC scrutiny. To resolve the matter, the bank was required to pay $227 million in penalties and forfeiture, and to enter into a DPA and corresponding Statement of Facts. Through the DPA, the bank admitted that it violated New York State law by falsifying the records of New York financial institutions and by submitting false statements to its state and federal regulators about its business conduct, and agreed to certain enhanced compliance practices and procedures. The payment also satisfies a settlement with OFAC over the same practices, while the Federal Reserve Board required an additional $100 million penalty to resolve its parallel investigation. The settlement follows an earlier settlement between this British bank and the New York Superintendent of Financial Services regarding the same alleged conduct.

Congress Acts on Several Banking Bills, Two Set for President's Signature. On December 11, the U.S. Senate passed by voice vote two bills impacting bank supervision and compliance. The first, H.R.4014, amends the Federal Deposit Insurance Act to protect information submitted to the CFPB as part of its supervisory process. The bill provides CFPB-supervised institutions the same non-waiver of privilege protections already afforded to information submitted by supervised entities to federal, state, and foreign banking regulators. For more information about these issues, please see our recent Special Alert. The second bill, H.R. 4367, amends the Electronic Fund Transfer Act to remove the requirement that ATMs have an attached placard disclosing fees. The amended law will require only that fees be disclosed on the ATM screen. Both bills previously were passed by the U.S. House of Representatives and now go to the President. On December 12, the House passed H.R. 5817, which would exempt from Gramm-Leach-Bliley Act (GLBA) annual privacy policy notice requirements any financial institution that (i) provides nonpublic personal information only in accordance with specified requirements, (ii) does not share information with affiliates under Section 603(d)(2)(A) of FCRA, and (iii) has not changed its policies and practices with regard to disclosing nonpublic personal information from those included in its most recent disclosure. The bill also would remove all GLBA disclosure requirements for any institution that is licensed by a state and is either subject, or becomes subject in the future, to existing state regulation of consumer confidentiality that prohibits disclosure of nonpublic personal information without knowing and express consent of the consumer. The bill now proceeds to the Senate. A fourth bill, S. 3637, which would extend the Transaction Account Guarantee program for two additional years, was blocked in the Senate on December 13, 2012. The program, which was established by the Dodd-Frank Act to provide unlimited deposit insurance for noninterest-bearing transaction accounts, will expire at the end of 2012 if legislators do not take further action to extend the program.

FTC Report Urges Mobile Application Developers to Improve Disclosures, Announces Multiple COPPA Investigations. On December 10, the FTC issued a staff report on the privacy disclosures and practices of mobile applications offered for children in certain online application stores. The report provides the results of an FTC survey of the disclosures and links on the promotion page in the application store, on the application developer's website, and within the application, for hundreds of applications for children. According to the report, most mobile applications failed to give parents any information needed to determine what data is being collected from their children, how it is being shared, and with whom it is being shared. Further, the FTC states that many applications shared certain information with third parties without disclosing that fact to parents, and a number of applications contained interactive features - such as advertising, the ability to make in-application purchases, and links to social media - without disclosing these features to parents prior to download. The report also states that the FTC staff is launching multiple nonpublic investigations of certain entities that may have violated the Children's Online Privacy Protection Act (COPPA) or engaged in unfair or deceptive trade practices in violation of the FTC Act, and the FTC "strongly urges" the mobile application industry to develop and implement best practices to protect privacy, including those recommended in an FTC privacy report issued earlier this year. In a related development, on December 11, the Center for Digital

Democracy filed a complaint with the FTC seeking an investigation of one firm for allegedly offering and operating a mobile application in violation of COPPA.

Fannie Mae and Freddie Mac Announce Next Phase of ULDD. On December 13, Fannie Mae and Freddie Mac published the Phase 2 Specification for the Uniform Loan Delivery Dataset (ULDD), the common set of data elements required by Fannie Mae and Freddie Mac for single-family loan deliveries as part of the Uniform Mortgage Data Program, an initiative announced in May 2010 to improve appraisal quality and other loan information. The Phase 2 ULDD specification contains a total of 19 joint data points, of which 15 of which were optional for both Fannie Mae and Freddie Mac as part of the Phase 1 ULDD specification, one data point that was conditionally required for Freddie Mac and optional for Fannie Mae, and three new data points. Lenders must begin collecting the Phase 2 data points for all loans with application received dates on or after March 1, 2014, for loans delivered on or after August 25, 2014.

Fannie Mae Updates Maximum Allowable Attorney Fees, Provides Standard Short Sale FAQs. On December 13, Fannie Mae issued Servicing Guide Announcement SVC-2012-26 to update the maximum allowable foreclosure attorney fees for mortgage loans, participation pool mortgage loans, and MBS mortgage loans serviced under the special servicing option secured by properties located in Idaho, Montana, New Hampshire, Puerto Rico, U.S. Virgin Islands, and Wyoming. All listed fee revisions are effective as of January 1, 2013. Concurrently, Fannie Mae issued Frequently Asked Questions regarding its standard short sale and deed-in-lieu of foreclosure requirements, which were announced last month in SVC-2012-19.

FDIC Finalizes Online Regulatory Calendar for Community Banks. On December 10, the FDIC issued Financial Institution Letter FIL-51-2012 to launch the final version of an online calendar to help community banks monitor changes in federal banking rules. The final calendar incorporates comments received from industry stakeholders and provides information regarding (i) notices of proposed, interim, and final rulemakings, (ii) supervisory guidance to financial institutions issued by the FDIC and FFIEC, (iii) joint issuances with other regulators who are not part of the FFIEC, (iv) select items from other regulators relevant to the FDIC's supervisory examination programs, and (v) outreach and educational events.

OCC Renews Mutual Savings Associations Advisory Committee. On December 12, the OCC announced that it renewed the charter for the Mutual Savings Associations Advisory Committee (MSAAC). The MSAAC originally was chartered by the Office of Thrift Supervision, and responsibility for the MSAAC transferred to the OCC under the Dodd-Frank Act, along with all of the OTS' responsibilities for supervising federal savings associations. The MSAAC will generally meet two to three times per year to discuss issues of importance to mutual savings associations and provide advice and recommendations to OCC. It is comprised of officers and directors of a variety of mutual savings institutions. The committee's first meeting is planned for January 16, 2013, in Washington, D.C.

FHFA Deputy Director Announces Retirement. On December 12, the FHFA announced the retirement of Deputy Director of the Division of Federal Home Loan Bank Regulation Stephen Cross, effective March 2013. Mr. Cross has served in that position since the agency was created in 2008, and also served as the Chief Operating Officer for a period of time.

SEC Announces Chief of Staff Departure. On December 12, the SEC announced that Chief of Staff Didem Nisanci will leave the agency on December 14, 2012. Ms. Nisanci was a senior advisor to outgoing Chairman Mary Schapiro since March of 2009 and also served as an SEC deputy to the Financial Services Oversight Council.

STATE ISSUES

CSBS Joins with Federal Authorities to Combat Corporate Account Takeover. On December 7, the Conference of State Bank Supervisors announced a joint effort with the U.S. Secret Service (Secret Service) and the Financial Services-Information Sharing and Analysis Center (FS-ISAC) to assist financial institutions in adopting best practices to reduce the risks of corporate account takeover, a form of identity theft where cyber criminals gain control of a business' bank account by stealing credentials and then initiate fraudulent wire and ACH transactions. The recommended practices were developed by a task force formed by the Texas Banking Commissioner and the Secret Service. Using in part the contributions from leading data security and audit firms that serve the community banking industry, the practices expand upon the "Protect, Detect, and Respond" framework developed by the Secret Service, the FBI, the Internet Crime Complaint Center, and FS-ISAC.

New Jersey Creates Summary Foreclosure Process for Vacant and Abandoned Properties. On December 3, New Jersey Governor Chris Christie signed SB 2156, which authorizes lenders to bring summary actions to foreclose mortgages on vacant and abandoned residential properties, and grants state courts the authority to enter a final residential mortgage foreclosure judgment if it finds, by clear and convincing evidence, that the residential property is "vacant and abandoned." Vacant and abandoned means: (i) the property is not occupied by a mortgagor or by a tenant who entered into a lease agreement before the mortgagee served notice of intention to commence foreclosure, and (ii) there exist at least two of 15 enumerated conditions that indicate vacancy and abandonment. If the court makes a finding in the foreclosure judgment that the property is vacant and abandoned, the sheriff will be required to sell the property within 60 days of the sheriff's receipt of any writ of execution issued by the court. The law took effect immediately, but does not become operative until April 1, 2013.

COURTS

Fourth Circuit Suggests Borrower Must Plead Tender in TILA Rescission Case. On December 10, the U.S. Court of Appeals for the Fourth Circuit affirmed in an unpublished per curiam opinion the dismissal of a TILA rescission claim because of the borrower's failure to allege tender of the net loan proceeds. *Miranda v. Wells Fargo Bank, N.A.*, No. 12-1054, 2012 WL 6098229 (4th Cir. December 10, 2012). BuckleySandler filed an amicus brief on behalf of three industry trade groups in *Miranda*. Although unpublished, the decision marks the first time that the Fourth Circuit has suggested that tender must be plead in a complaint seeking TILA-based rescission. In addition, the decision conflicts with a recent decision from the Tenth Circuit holding that borrowers need not plead ability to tender the loan proceeds. *See, Sanders v. Mountain Am. Fed. Credit Union*, 689 F.3d 1138, 1144-45 (10th Cir. 2012).

Ninth Circuit Holds Mortgage Servicers Have No RESPA Duty To Respond to Request for Loan Terms. On December 11, the U.S. Court of Appeals for the Ninth Circuit held that letters sent by two borrowers challenging the monthly payment due on their mortgage loan were not "qualified written requests" and therefore did not trigger the servicer's duty under RESPA to respond. *Medrano v. Flagstar Bank, FSB*, No. 11-55412, 2012 WL 6183549 (9th Cir. Dec. 11, 2012). The borrowers alleged that their mortgage servicer failed to respond adequately to three letters in which the borrowers challenged the monthly payment due on their loan. RESPA grants borrowers a private right of action against servicers who fail to respond to a "qualified written request." Following the Seventh Circuit's decision in *Catalan v. GMAC Mortgage Corp.*, 629 F.3d 676 (7th Cir. 2011), the court held that RESPA provides that such requests must (i) reasonably identify the borrower's name and account, (ii) either state the borrower's reasons for the belief that the account is in error or provide sufficient detail to the servicer regarding other information sought, and (iii) seek information relating to the servicing of the loan. The court held that because the letters did not seek information relating to the servicing of the loan, but rather challenged the loan's terms, the letters were not qualified written requests and the servicer had no duty to respond. The court affirmed the district court's dismissal of the borrowers' RESPA claims and remand of the borrowers' remaining state law claims.

Tenth Circuit Enforces Electronic Agreement Entered Into on an Installation Technician's Laptop. On December 11, the U.S. Court of Appeals for the Tenth Circuit affirmed dismissal of plaintiffs' claims concerning AT&T's U-Verse services, based on forum selection and arbitration clauses in the agreements between the parties. *Hancock v. Am. Tel. & Tel. Co., Inc.*, 11-6233, 2012 WL 6132070 (10th Cir. Dec. 11, 2012). In support of the motion to dismiss, AT&T offered declarations from its employees concerning its standard practices for entering into agreements with customers obtaining U-Verse services. Under those practices, customers purchasing U-Verse TV and Voice services agreed to terms of service (TV Terms) that included a forum selection clause. The TV Terms were provided to customers in writing by the installation technician at the time the services were installed. The customers agreed to the TV Terms by clicking on an acknowledgement and acceptance box on the technician's laptop after being given the printed terms - the acknowledgement and acceptance stated that the customer had received and reviewed the TV Terms. Details of each acceptance were captured and stored on AT&T's servers at the time of acceptance. Also under AT&T's standard practices, customers purchasing U-Verse Internet Services agreed to separate terms of service (Internet Terms) during the online registration process - to complete registration, customers had to click on an "I Agree" button underneath the Internet Terms. For two of the plaintiffs, the Internet Terms included a mandatory arbitration clause at the time of registration. For another plaintiff, the mandatory arbitration clause was added after a notice of amendment, describing the new arbitration clause, was provided to the plaintiff via email. On appeal, the court held that the declarations concerning AT&T's standard practices were admissible in evidence, and since they were not contradicted by the plaintiffs' affidavits, the district court did not abuse its discretion by accepting the declarations as true. The court went on to hold that under AT&T's standard practices both the TV Terms and the Internet Terms were clearly presented, and that enforceable contracts were formed between the plaintiffs and AT&T. The court also concluded that the e-mail notification process used to add the arbitration clause to the Internet Terms was sufficient to make the amendment effective.

Third Circuit Shields Property Reporting Firm from FCRA Liability. On December 6, the U.S. Court of Appeals for the Third Circuit held that a property reporting firm cannot be held liable for a willful violation of FCRA because the firm's interpretation that it was not a consumer reporting agency subject to FCRA requirements was not unreasonable. *Fuges v. Southwest Fin. Servs., Ltd.*, No 11-4504, 2012 WL 6051966 (3rd Cir. Dec. 6, 2012). The borrower filed a putative class action against a property reporting firm, alleging that the firm failed to comply with FCRA when it prepared a report requested by a bank in connection with the borrower's credit application. On the reporting firm's motion for summary judgment, the district court explained that the property report contained information about deeds, mortgages, parcel number and taxes, and lien information that more closely relate to a particular parcel of property than to a particular consumer, and that the report did not contain a social security number, payment history, previous addresses, or other information typically included in consumer credit reports. It held that no jury could find that the firm acted willfully because the firm's reading of FCRA as not being applicable to property-reporting activities was not unreasonable, and granted summary judgment in favor of the firm. The appellate court agreed, holding that (i) the statute's terms are ambiguous, (ii) the firm's reading of the those terms has some foundation in the statutory text, and was therefore not objectively unreasonable, and (iii) there is no judicial or agency guidance that would suggest that the firm's reading is contrary to the intended meaning of the provisions in question, and therefore the firm did not run a substantial risk in adopting its interpretation. Further, the court rejected the borrower's argument that the reporting firm should lose the potential protection of the "reasonable interpretation" defense because it never actually interpreted FCRA prior to the commencement of the suit. The court affirmed summary judgment in favor of the reporting firm.

FIRM NEWS

Jonathan Cannon will speak at the Young Lawyers "Beer and Basics Program" at the American Bar Association's, Consumer Financial Services Committee Winter Meeting on January 5, 2013 in Naples, FL. Mr. Cannon will discuss the CFPB's proposed mortgage servicing rules.

Jonice Gray Tucker will speak at the American Bar Association's Consumer Financial Services Committee Winter Meeting on January 6, 2013 in Naples, FL. The panel on which she is participating will address CFPB examinations and enforcement actions.

Joseph Reilly will speak at the American Bar Association's Consumer Financial Services Committee Winter Meeting on January 8, 2013 in Naples, FL. Mr. Reilly will participate on a panel entitled "The Ability-to-Repay / Qualified Mortgage Rule: The Saga Continues."

David Krakoff will be an instructor for the Second Annual NACDL White Collar Criminal Defense College at Stetson. He will participate in a panel presentation entitled "Overview of Handling a White Collar Case" on January 10, 2013.

David Krakoff will speak at ACI's Inaugural Summit on White Collar Litigation being held January 22-23, 2013, in New York, NY. Mr. Krakoff will participate in the January 22 session entitled "The FCPA Year In Review: Assessing the Biggest Cases of the Year and What Litigators Need to Take Away to Best Protect Their Clients."

Donna Wilson will participate in a Strafford CLE entitled "Privacy Class Actions: Latest Developments in Intentional Privacy and Negligent Data Breach Litigation" on January 24, 2013. Panelists will discuss theories of liability in privacy litigation, related questions of statutory damages, defenses for defendants, lessons from recent data breach settlements, and potential insurance coverage to minimize litigation and liability costs.

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

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

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

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

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

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

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

FIRM PUBLICATIONS

Elizabeth McGinn and Kristopher Knabe wrote "Ethical Issues in the Digital Age: Navigating E-Discovery Challenges" on November 1, 2012 for the American Bar Association.

Benjamin Klubes, Matthew Previn, Michelle Rogers, and Ann Wiles published "How the DOJ is Adapting in the War on Financial Fraud" in the November 9, 2012 issue of Law360.

Clinton Rockwell and Daniel Ladd published "SAFE, or Out? Who's In, Who's Not under the SAFE Act" in the November 20, 2012 issue of Consumer Financial Services Law Report.

Thomas Sporkin published "Will Rakoff Opinion Impact Decision on Steven Cohen" in Law360 on December 5, 2012.

Jeremiah Buckley authored "How CFPB Can Turn Restrictive Mortgage Rule into a Win for All" for American Banker on December 10, 2012.

About BuckleySandler LLP (www.buckleysandler.com)

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

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Orange County: 3121 Michelson Drive, Suite 210, Irvine, CA 92612, (949)398-1360

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In addition, please feel free to email our attorneys. A list of attorneys can be found here.

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MORTGAGES

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Ninth Circuit Holds Mortgage Servicers Have No RESPA Duty To Respond to Request for Loan Terms. On December 11, the U.S. Court of Appeals for the Ninth Circuit held that letters sent by two borrowers challenging the monthly payment due on their mortgage loan were not "qualified written requests" and therefore did not trigger the servicer's duty under RESPA to respond. *Medrano v. Flagstar Bank, FSB*, No. 11-55412, 2012 WL 6183549 (9th Cir. Dec. 11, 2012). The borrowers alleged that their mortgage servicer failed to respond adequately to three letters in which the borrowers challenged the monthly payment due on their loan. RESPA grants borrowers a private right of action against servicers who fail to respond to a "qualified written request." Following the Seventh Circuit's decision in *Catalan v. GMAC Mortgage Corp.*, 629 F.3d 676 (7th Cir. 2011), the court held that RESPA provides that such requests must (i) reasonably identify the borrower's name and account, (ii) either state the borrower's reasons for the belief that the account is in error or provide sufficient detail to the servicer regarding other information sought, and (iii) seek information relating to the servicing of the loan. The court held that because the letters did not seek information relating to the servicing of the loan, but rather challenged the loan's terms, the letters were not qualified written requests and the servicer had no duty to respond. The court affirmed the district court's dismissal of the borrowers' RESPA claims and remand of the borrowers' remaining state law claims.

BANKING

CFPB Proposes Trial Consumer Disclosure Program. On December 13, as part of its Project Catalyst, the CFPB proposed a new policy that will allow financial institutions to conduct trial consumer disclosure programs. Participating firms would receive time-limited exemptions from federal disclosure laws in exchange for sharing with the CFPB the results of their trial disclosures. According to the proposed policy, firms seeking to participate in the program would need to submit to the CFPB information about the proposed disclosure program, including (i) the type of disclosure and laws to be waived in connection with the program, (ii) the proposed changes, expected improvements from the changes, and metrics for evaluating the improvements, (iii) the duration of the test and the size, location, and nature of the consumer population involved in the test, and (iv) the names and planned roles of any third-party vendors. In considering proposed trial disclosures, the CFPB would evaluate, among other factors, (i) how effectively and efficiently the proposed trial will test for potential improvements to consumer understanding about the costs, benefits, and risks of products and services, (ii) how the proposed trial will help develop more cost-effective disclosure rules or policies, (iii) the extent to which the program is designed to mitigate any risk to consumers, (iv) the extent to which the program may help the CFPB develop rules or policies to correct or mitigate market failure, and (v) the strength of the company's compliance management system relative to the size, nature, and complexity of the company's consumer business. The proposal is subject to a 60-day notice and comment period, which begins once the proposal is published in the Federal Register.

U.S. Law Enforcement Authorities and Regulators Resolve Significant Money Laundering and Sanctions Investigations. On December 11, a major international bank holding company announced agreements with U.S. law enforcement authorities and federal bank regulators to end investigations into alleged inadequate compliance with anti-money laundering and sanctions laws by the holding company and its U.S. subsidiaries (collectively the banks). Under these agreements, the banks will make payments totaling $1.92 billion, will continue to cooperate fully with regulatory and law enforcement authorities, and will take further action to strengthen compliance policies and procedures. As part of the resolution, the banks entered into a deferred prosecution agreement (DPA) with the DOJ pursuant to which the banks will forfeit $1.256 billion, $375 million of which satisfies a settlement with the Office of Foreign Assets Control (OFAC). The four-count criminal information filed in conjunction with the DPA charges that the banks violated the Bank Secrecy Act by failing to maintain an effective anti-money laundering program and to conduct appropriate due diligence on its foreign correspondent account holders. The DOJ also alleged that the banks violated the International Emergency Economic Powers Act and the Trading with the Enemy Act by illegally conducting transactions on behalf of customers in certain countries that were subject to sanctions enforced by OFAC. The banks agreed to pay a single $500 million civil penalty to satisfy separate assessments by the OCC and FinCEN related to the same alleged conduct, as well as a $165 million penalty to the Federal Reserve Board. The banks already have undertaken numerous voluntary remedial actions, including to (i) substantially increase AML compliance spending and staffing, (ii) revamp their Know Your Customer program, (iii) exit 109 correspondent relationships for risk reasons, and (iv) claw back bonuses for a number of senior officers. The banks also have undertaken a comprehensive overhaul of their structure, controls, and procedures, including to (i) simplify the control structure, (ii) create new compliance positions and elevate their roles, (iii) adopt a set of guidelines limiting business in those countries that pose a high financial crime risk, and (iv) implement a single global standard shaped by the highest or most effective anti-money laundering standards available in any location where the banks operates. Pursuant to the DPA, an independent monitor will evaluate the banks' continued implementation of these and other enhanced compliance measures.

In a separate matter, on December 10, Manhattan District Attorney Cyrus R. Vance, Jr. and the DOJ announced the resolution of a joint investigation into a British bank's alleged movement of more than $200 million through the U.S. financial system primarily on behalf of Iranian and Sudanese clients by removing information that would have revealed the payments as originating with a sanctioned country or entity, and thereby avoiding OFAC scrutiny. To resolve the matter, the bank was required to pay $227 million in penalties and forfeiture, and to enter into a DPA and corresponding Statement of Facts. Through the DPA, the bank admitted that it violated New York State law by falsifying the records of New York financial institutions and by submitting false statements to its state and federal regulators about its business conduct, and agreed to certain enhanced compliance practices and procedures. The payment also satisfies a settlement with OFAC over the same practices, while the Federal Reserve Board required an additional $100 million penalty to resolve its parallel investigation. The settlement follows an earlier settlement between this British bank and the New York Superintendent of Financial Services regarding the same alleged conduct.

Congress Acts on Several Banking Bills, Two Set for President's Signature. On December 11, the U.S. Senate passed by voice vote two bills impacting bank supervision and compliance. The first, H.R.4014, amends the Federal Deposit Insurance Act to protect information submitted to the CFPB as part of its supervisory process. The bill provides CFPB-supervised institutions the same non-waiver of privilege protections already afforded to information submitted by supervised entities to federal, state, and foreign banking regulators. For more information about these issues, please see our recent Special Alert. The second bill, H.R. 4367, amends the Electronic Fund Transfer Act to remove the requirement that ATMs have an attached placard disclosing fees. The amended law will require only that fees be disclosed on the ATM screen. Both bills previously were passed by the U.S. House of Representatives and now go to the President. On December 12, the House passed H.R. 5817, which would exempt from Gramm-Leach-Bliley Act (GLBA) annual privacy policy notice requirements any financial institution that (i) provides nonpublic personal information only in accordance with specified requirements, (ii) does not share information with affiliates under Section 603(d)(2)(A) of FCRA, and (iii) has not changed its policies and practices with regard to disclosing nonpublic personal information from those included in its most recent disclosure. The bill also would remove all GLBA disclosure requirements for any institution that is licensed by a state and is either subject, or becomes subject in the future, to existing state regulation of consumer confidentiality that prohibits disclosure of nonpublic personal information without knowing and express consent of the consumer. The bill now proceeds to the Senate. A fourth bill, S. 3637, which would extend the Transaction Account Guarantee program for two additional years, was blocked in the Senate on December 13, 2012. The program, which was established by the Dodd-Frank Act to provide unlimited deposit insurance for noninterest-bearing transaction accounts, will expire at the end of 2012 if legislators do not take further action to extend the program.

FDIC Finalizes Online Regulatory Calendar for Community Banks. On December 10, the FDIC issued Financial Institution Letter FIL-51-2012 to launch the final version of an online calendar to help community banks monitor changes in federal banking rules. The final calendar incorporates comments received from industry stakeholders and provides information regarding (i) notices of proposed, interim, and final rulemakings, (ii) supervisory guidance to financial institutions issued by the FDIC and FFIEC, (iii) joint issuances with other regulators who are not part of the FFIEC, (iv) select items from other regulators relevant to the FDIC's supervisory examination programs, and (v) outreach and educational events.

OCC Renews Mutual Savings Associations Advisory Committee. On December 12, the OCC announced that it renewed the charter for the Mutual Savings Associations Advisory Committee (MSAAC). The MSAAC originally was chartered by the Office of Thrift Supervision, and responsibility for the MSAAC transferred to the OCC under the Dodd-Frank Act, along with all of the OTS' responsibilities for supervising federal savings associations. The MSAAC will generally meet two to three times per year to discuss issues of importance to mutual savings associations and provide advice and recommendations to OCC. It is comprised of officers and directors of a variety of mutual savings institutions. The committee's first meeting is planned for January 16, 2013, in Washington, D.C.

CONSUMER FINANCE

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CFPB Publishes White Paper on Largest Consumer Reporting Agencies. On December 13, the CFPB issued a white paper on its review of 2011 data to determine how the three largest consumer reporting agencies (CRAs) manage consumer data and complaints. According to the CFPB press release, its review of the data revealed that more than half of the trade lines (the accounts in a consumer's name reported by creditors) in the CRAs databases are supplied by the credit card industry, with 40 percent related to bank cards, such as general credit cards, and 18 percent from retail credit cards. Only seven percent comes from mortgage lenders or servicers, and only four percent comes from auto lenders. The CFPB also reported that (i) almost 40 percent of disputes have to do with collections, and debt in collection is five times more likely to be disputed than mortgage information, (ii) fewer than one in five people obtain copies of their credit report each year, (iii) most information contained in credit reports comes from a few large companies, and (iv) most complaints are forwarded to the furnishers that provided the original information, while the CRAs resolve an average of 15 percent of consumer disputed items internally. The report adds that certain documentation provided by consumers to support their cases may not be getting passed on to the data furnishers for them to properly investigate and report back to the CRA, but the report does not offer any policy prescriptions.

CFPB Provides Additional Details about Certain Information-Sharing Activities. On December 11, the CFPB announced plans to share consumer complaint data with state regulatory agencies. The CFPB explained that it is providing "real-time access" to its database of consumer complaints in a manner that will protect any personally-identifiable information. Further, the CFPB plans in the future to accept such information from state agencies, and to make data available to other federal agencies, state attorneys general, local agencies, congressional offices, and other governmental organizations like the California mortgage settlement monitor and the national mortgage settlement monitor. This announcement follows a December 6, 2012 Statement of Intent issued by the CFPB in which it describes how it is coordinating broader information-sharing efforts with state banking and financial services regulators, including with regard to enforcement matters.

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Third Circuit Shields Property Reporting Firm from FCRA Liability. On December 6, the U.S. Court of Appeals for the Third Circuit held that a property reporting firm cannot be held liable for a willful violation of FCRA because the firm's interpretation that it was not a consumer reporting agency subject to FCRA requirements was not unreasonable. *Fuges v. Southwest Fin. Servs., Ltd.*, No 11-4504, 2012 WL 6051966 (3rd Cir. Dec. 6, 2012). The borrower filed a putative class action against a property reporting firm, alleging that the firm failed to comply with FCRA when it prepared a report requested by a bank in connection with the borrower's credit application. On the reporting firm's motion for summary judgment, the district court explained that the property report contained information about deeds, mortgages, parcel number and taxes, and lien information that more closely relate to a particular parcel of property than to a particular consumer, and that the report did not contain a social security number, payment history, previous addresses, or other information typically included in consumer credit reports. It held that no jury could find that the firm acted willfully because the firm's reading of FCRA as not being applicable to property-reporting activities was not unreasonable, and granted summary judgment in favor of the firm. The appellate court agreed, holding that (i) the statute's terms are ambiguous, (ii) the firm's reading of the those terms has some foundation in the statutory text, and was therefore not objectively unreasonable, and (iii) there is no judicial or agency guidance that would suggest that the firm's reading is contrary to the intended meaning of the provisions in question, and therefore the firm did not run a substantial risk in adopting its interpretation. Further, the court rejected the borrower's argument that the reporting firm should lose the potential protection of the "reasonable interpretation" defense because it never actually interpreted FCRA prior to the commencement of the suit. The court affirmed summary judgment in favor of the reporting firm.

SECURITIES

SEC Announces Chief of Staff Departure. On December 12, the SEC announced that Chief of Staff Didem Nisanci will leave the agency on December 14, 2012. Ms. Nisanci was a senior advisor to outgoing Chairman Mary Schapiro since March of 2009 and also served as an SEC deputy to the Financial Services Oversight Council.

E-COMMERCE

FTC Report Urges Mobile Application Developers to Improve Disclosures, Announces Multiple COPPA Investigations. On December 10, the FTC issued a staff report on the privacy disclosures and practices of mobile applications offered for children in certain online application stores. The report provides the results of an FTC survey of the disclosures and links on the promotion page in the application store, on the application developer's website, and within the application, for hundreds of applications for children. According to the report, most mobile applications failed to give parents any information needed to determine what data is being collected from their children, how it is being shared, and with whom it is being shared. Further, the FTC states that many applications shared certain information with third parties without disclosing that fact to parents, and a number of applications contained interactive features - such as advertising, the ability to make in-application purchases, and links to social media - without disclosing these features to parents prior to download. The report also states that the FTC staff is launching multiple nonpublic investigations of certain entities that may have violated the Children's Online Privacy Protection Act (COPPA) or engaged in unfair or deceptive trade practices in violation of the FTC Act, and the FTC "strongly urges" the mobile application industry to develop and implement best practices to protect privacy, including those recommended in an FTC privacy report issued earlier this year. In a related development, on December 11, the Center for Digital Democracy filed a complaint with the FTC seeking an investigation of one firm for allegedly offering and operating a mobile application in violation of COPPA.

Tenth Circuit Enforces Electronic Agreement Entered Into on an Installation Technician's Laptop. On December 11, the U.S. Court of Appeals for the Tenth Circuit affirmed dismissal of plaintiffs' claims concerning AT&T's U-Verse services, based on forum selection and arbitration clauses in the agreements between the parties. *Hancock v. Am. Tel. & Tel. Co., Inc.*, 11-6233, 2012 WL 6132070 (10th Cir. Dec. 11, 2012). In support of the motion to dismiss, AT&T offered declarations from its employees concerning its standard practices for entering into agreements with customers obtaining U-Verse services. Under those practices, customers purchasing U-Verse TV and Voice services agreed to terms of service (TV Terms) that included a forum selection clause. The TV Terms were provided to customers in writing by the installation technician at the time the services were installed. The customers agreed to the TV Terms by clicking on an acknowledgement and acceptance box on the technician's laptop after being given the printed terms - the acknowledgement and acceptance stated that the customer had received and reviewed the TV Terms. Details of each acceptance were captured and stored on AT&T's servers at the time of acceptance. Also under AT&T's standard practices, customers purchasing U-Verse Internet Services agreed to separate terms of service (Internet Terms) during the online registration process - to complete registration, customers had to click on an "I Agree" button underneath the Internet Terms. For two of the plaintiffs, the Internet Terms included a mandatory arbitration clause at the time of registration. For another plaintiff, the mandatory arbitration clause was added after a notice of amendment, describing the new arbitration clause, was provided to the plaintiff via email. On appeal, the court held that the declarations concerning AT&T's standard practices were admissible in evidence, and since they were not contradicted by the plaintiffs' affidavits, the district court did not abuse its discretion by accepting the declarations as true. The court went on to hold that under AT&T's standard practices both the TV Terms and the Internet Terms were clearly presented, and that enforceable contracts were formed between the plaintiffs and AT&T. The court also concluded that the e-mail notification process used to add the arbitration clause to the Internet Terms was sufficient to make the amendment effective.

PRIVACY/DATA SECURITY

CSBS Joins with Federal Authorities to Combat Corporate Account Takeover. On December 7, the Conference of State Bank Supervisors announced a joint effort with the U.S. Secret Service (Secret Service) and the Financial Services-Information Sharing and Analysis Center (FS-ISAC) to assist financial institutions in adopting best practices to reduce the risks of corporate account takeover, a form of identity theft where cyber criminals gain control of a business' bank account by stealing credentials and then initiate fraudulent wire and ACH transactions. The recommended practices were developed by a task force formed by the Texas Banking Commissioner and the Secret Service. Using in part the contributions from leading data security and audit firms that serve the community banking industry, the practices expand upon the "Protect, Detect, and Respond" framework developed by the Secret Service, the FBI, the Internet Crime Complaint Center, and FS-ISAC.

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We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes.
Email: **infobytes@buckleysandler.com**

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