Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

August 31, 2012

## TOPICS - COVERED THIS WEEK (CLICK TO VIEW)



## FEDERAL ISSUES

**FHFA Increases Mortgage Guarantee Fees.** On August 31, the FHFA announced that Fannie Mae and Freddie Mac will attempt to bring more private capital into the secondary mortgage market by increasing guarantee fees (g-fees) on single-family mortgages by an average of ten basis points. The increases will be effective on December 1, 2012 for loans exchanged for mortgage-backed securities, and on November 1, 2012 for loans sold for cash. The increases are designed to decrease the difference between g-fees charged to large volume lenders and those charged to small volume lenders, and to reduce cross-subsidies between higher-risk and lower-risk mortgages. With the announcement the FHFA released a report on guarantee fees charged in 2010 and 2011. The FHFA also stated that it soon will seek public comment on a proposal to develop risk-based pricing at the state level.

**SEC Releases Dodd-Frank Financial Literacy Study.** On August 30, the SEC published a study of financial literacy. The Dodd-Frank Act required the SEC to examine (i) existing financial literacy among retail investors, (ii) methods to improve disclosures, (iii) information needed to make informed investment decisions, (iv) disclosure improvements related to expenses and conflicts of interest, (v) existing efforts to educate investors, and (vi) options for increasing investor financial literacy. The report's findings reveal that currently investors lack knowledge of elementary financial concepts. The SEC staff reports that investors (i) prefer to receive disclosures before making a decision on whether to engage a financial intermediary, (ii) consider information about fees, conflicts of interest, and investment strategy essential, (iii) have mixed preferences on method of delivery for disclosures, but generally prefer that they be written in clear and concise language presented in summary and detailed form. The study concludes that transparency about conflicts of interest may be improved through the use of specific examples, among other things.

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that they had implemented more than half of all of the standards.

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**FTC Extends Comment Period for Children's Privacy Rule.** On August 27, the FTC extended through September 24, 2012 the time period for comments on proposed changes to the Children's Online Privacy Protection Rule. The comment period originally was due to close on September 10, 2012.

**State Regulators Urge Passage of CFPB Privilege Legislation.** On August 23, the American Association of Residential Mortgage Regulators, the Conference of State Bank Supervisors, and other state financial regulators sent a letter to Representatives Jim Renacci (R-OH) and Ed Perlmutter (D-CO) in support of H.R. 6125. The recently introduced legislation seeks to amend the Federal Deposit Insurance Act to ensure that information submitted by banks and nonbanks to the CFPB is treated as privileged and confidential information. The state regulators argue that the bill will allow state and federal regulators to share information to facilitate better collaboration and will support use of the Nationwide Mortgage Licensing System and Registry. The letter adds that other federal legislation to address the confidentiality of information submitted to the CFPB does not go far enough to support federal-state coordination.

**White House Requires Agencies to Implement Electronic Recordkeeping.** On August 24, the Office of Management and Budget and the Archivist of the United States issued a directive that requires all executive offices and federal agencies to eliminate paper and implement electronic recordkeeping for all records, regardless of security classification. The directive, which was required by a November 2011 Presidential Memorandum that outlined an effort to reform federal records management policies and practices, seeks to improve agencies' compliance with federal records management statutes and regulations. The directive states that by the end of 2013, each agency must develop a plan to achieve electronic management of all permanent electronic records by the end of 2019. By the end of 2016, all agencies must manage email records in an electronic system that supports records management and litigation requirements. The National Archives and Records Administration will revise transfer guidance for permanent electronic records, issue new email management guidance, and support research in applied technologies to facilitate electronic records management. The Archivist will facilitate the initiative by leading a group of federal entities and private sector leaders in information technology, legal counsel, and records management to solve electronic records management challenges.

## STATE ISSUES

**California Enacts Blight Bill As Part of Homeowner Bill of Rights, Broadens Servicemember Protections.** On August 27, California enacted Assembly Bill 2314, another bill included as part of the state's proposed Homeowner Bill of Rights. The bill extends indefinitely portions of existing state law that (i) require property owners maintain vacant property obtained in foreclosure, (ii) authorize local enforcement of vacant property maintenance requirements, and (iii) provide for notice and processes to correct or contests violations. The extended provisions were due to sunset on January 1, 2013. The bill also provides a sixty day period for purchasers of foreclosed properties to remedy any violations of state housing law or building codes. Current law only requires a thirty day period for all properties in violation. Finally, the bill requires that an entity that releases a lien on a property subject to corrective action for maintenance violations must provide notice to the enforcement agency within thirty days of releasing the lien. These changes take effect on January 1, 2013. Also on August 27, California enacted Assembly Bill 2475, which extends from three to nine months the period following military service within which it is unlawful to sell, foreclose upon, or seize a servicemember's mortgaged property. These changes also take effect on January 1, 2013.

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## COURTS

**Second Circuit Applies "Least Sophisticated Consumer" Test In Student Loan Debt Collection Case.** On August 30, the U.S. Court of Appeals for the Second Circuit held that a debt collector's representation to a debtor that her student loans were "ineligible" for bankruptcy discharge is a "false, misleading, or deceptive" debt collection practice in violation of the FDCPA. *Easterling v. Collecto, Inc.*, No. 11-3209, 2012 WL 3734389 (2nd Cir. Aug. 30, 2012). The debt collector sent a collection letter to the debtor with a notice that the account was ineligible for bankruptcy discharge. The debtor sued the collector on her own behalf and on behalf of nearly 200 borrowers who also received such notices. The district court granted summary judgment in favor of the debt collector, concluding that because the debtor had previously filed for bankruptcy without seeking to discharge her student loan debt, and because student loan debt is presumptively non-dischargeable, her debt was, in fact, not eligible to be discharged. The appeals court disagreed and held that the district court erred in focusing on the borrower's circumstances instead of applying the "least sophisticated consumer" standard. In applying that standard on appeal, the court reasoned that while the bar for bankruptcy discharge is high, it is not impossible and the "least sophisticated consumer" might not seek the advice of counsel for pursuing discharge through bankruptcy after receiving the debt collector's inaccurate notice. The court held that the debt collector's notice did violate the FDCPA and reversed and remanded the case for further proceedings.

**Privacy Challenge to Bank's Overseas Call Centers Dismissed.** On August 28, the U.S. District Court for the District of Columbia dismissed a putative class action that claimed that a bank's use of overseas call centers subjects private financial records to U.S. government review in violation of the Right to Financial Privacy Act (RFPA). The RFPA generally prohibits financial institutions from providing customer information to a government authority. *Stein v. Bank of Am. Corp.*, No. 11-1400, 2012 WL 3671009 (D.D.C. Aug. 28, 2012). The bank customer plaintiffs claim that because foreign states and foreign nationals are not subject to U.S. privacy laws, including the RFPA, the bank's transmission of account and other customer data to an overseas call center risks making that data available for potential review by federal national security authorities. The bank moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. The court granted the bank's motion, finding that the plaintiffs failed to allege a cognizable injury sufficient to establish standing. The court held that the bank customers do not allege that the bank actually provided any records to a government entity and therefore, the customers do not adequately plead "a concrete and particularized injury, free of conjecture or speculation."

**Eighth Circuit Finds No Merit in Borrowers' "Show-Me-The-Note" Case.** On August 27, the U.S. Court of Appeals for the Eight Circuit upheld a district court's dismissal of a suit by borrowers challenging the validity of a foreclosure completed by their mortgage servicer. *Butler v. Bank of Am., N.A.*, No 11-2653, 2012 WL 3641469 (8th Cir. Aug. 27, 2012). On appeal, the borrowers argued that their putative class action suit should be reinstated because the district court mistakenly characterized their claims as a single "show-me-the-note" claim, rather than as a quiet title action.

After a close review of the allegations and causes of action, the court found no merit in this "borderline frivolous lawsuit" and upheld the dismissal. The court characterized the borrowers' claims that the foreclosure was invalid because the servicer held the mortgage but not the note as a "flawed theory" unsupported by Minnesota law. Under Minnesota law and previous application of that law by the Eighth Circuit and Minnesota Supreme Court, the court held that the servicer has an undeniable right to initiate foreclosure as the legal holder of title.

**Missouri District Court Holds State Funds Transfer Act Preempts Certain Customer Indemnity Agreements.** On August 20, the U.S. District Court for the Western District of Missouri dismissed a bank's counterclaims that its customer's agreement to indemnify the bank for any losses, costs, or expenses covers the customer's losses from an allegedly fraudulent transfer of funds. *Choice Escrow & Title, LLC v. BancorpSouth Bank*, No. 10-03531, slip op. (W.D.Mo. Aug. 20, 2012). The customer sued the bank claiming that a $440,000 wire transfer from its account through the bank's internet wire transfer system was fraudulently initiated by a third-party. The bank filed four counterclaims for the same amount based on indemnity agreements signed by the customer. The customer moved to dismiss the counterclaims, arguing that the state Funds Transfer Act, part of the Uniform Commercial Code, displaces the counterclaims. Describing its decision as a "very close call," the court held that the Funds Transfer Act preempts the types of indemnity agreements relied upon by the bank in its counterclaims and dismissed those claims. The court reasoned that while the Funds Transfer Act generally was not intended to preempt or displace all causes of action between a bank and its customers, the Act does provide that common law causes of action based on allegedly fraudulent transfers are preempted where the common law claims would create rights, duties, or liabilities inconsistent with the Act or where the circumstances giving rise to the claims are specifically covered by the Act. The court held the indemnity agreements could require the customer to pay back to the bank the very losses the bank might owe if the customer proves a fraudulent transfer, a result that is inconsistent with the Act.

## FIRM NEWS

Benjamin Saul,Valerie Hletko, and Amanda Raines will present a podcast sponsored by LexisNexis on September 5, 2012 at 2:00 p.m. This podcast will relate to fair lending risk assessments, with a focus on considerations for conducting these risk assessments on non-mortgage lines of business.

Andrew Sandler will speak at the National Mortgage News 2nd Annual Mortgage Regulatory Forum taking place September 13-14, 2012, in Arlington, VA. The Mortgage Regulatory Forum is created to provide the most up-to-date information on newly implemented regulations, and regulations in the pipeline, for those on the origination side of the business, as well as mortgage servicing.

Melissa Klimkiewicz and Jon Langlois will speak on a live teleconference sponsored by the National Business Institute on October 4, 2012. The presentation is titled "HAMP, HARP, HAFA and FHA Update: Evolving Program Requirements and Expectations." To register call (800) 931-3140 or visit the website, www.nbi-sems.com.

James Parkinson will speak at the ABA's International White Collar Crime Conference in London on October 8, 2012. Mr. Parkinson's panel is entitled "What Every General Counsel Needs to Know Regarding Compliance and Internal Investigations."

Jonice Gray Tucker, Valerie Hletko, and Amanda Raines will present a webinar sponsored by the California Mortgage Bankers Association on October 9, 2012. Their remarks will focus on fair lending enforcement trends and related risk assessments.

John Stoner will speak on a panel addressing "The Uniform Commercial Code and the Mortgage Crisis" at the State Bar of California Annual Meeting on October 12, 2012. Mr. Stoner recently was appointed to the Commercial Transactions Committee of the State Bar of California.

Thomas Sporkin will speak at the Securities Enforcement Forum 2012 on October 18, 2012, in Washington, DC. The Securities Enforcement Forum 2012 brings together securities enforcement and white-collar attorneys, current and former senior SEC and DOJ officials, in-house counsel and compliance executives, and other top professionals in the field.

David Krakoff, James Parkinson, Andrew Schilling, and Thomas Sporkin will speak at the Commerce and Industry Group's seminar, "Anti-Bribery: The Changing Anti-Corruption Environment in Key Jurisdictions" on October 24, 2012, in London. The panel will examine recent developments in anti-corruption enforcement in the UK, US, and Continental Europe; it will also consider best practices to identify and mitigate exposure to corruption risk.

**FIRM PUBLICATIONS**

Andrew Schilling published "Understanding FIRREA's Reach: When Does Fraud 'Affect' a Financial Institution?" in the July, 24, 2012 BNA Banking Report.

Bradley Marcus and Nakiya Whitaker authored for the August 2012 issue of Mortgage Banking Magazine an article titled "The Risk of Vicarious Liability for Broker Misconduct."

Andrew Schilling published "Whistle-blower Bounties May Encourage Residential Mortgage-Backed Securities Fraud Reporting" on August 29, 2012 in the Westlaw Journal Bank & Lender Liability.

Thomas Sporkin, Robyn Quattrone, and Stephen LeBlanc authored "Crowdfunding Offers Attractive Financing Alternative, But SEC Must Give More Clarity", which was published by Accelus on August 21, 2012.

## About BuckleySandler LLP (www.BuckleySandler.com)

***With over 150 lawyers in Washington, DC, Los Angeles, and New York, 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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- **Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (424) 203-1000**
- **New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400**

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

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***InfoBytes is not intended as legal advice to any person or firm. It is provided as a client service and information contained herein is drawn from various public sources, including***

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**Second Circuit Applies "Least Sophisticated Consumer" Test In Student Loan Debt Collection Case.** On August 30, the U.S. Court of Appeals for the Second Circuit held that a debt collector's representation to a debtor that her student loans were "ineligible" for bankruptcy discharge is a "false, misleading, or deceptive" debt collection practice in violation of the FDCPA. *Easterling v. Collecto, Inc.*, No. 11-3209, 2012 WL 3734389 (2nd Cir. Aug. 30, 2012). The debt collector sent a collection letter to the debtor with a notice that the account was ineligible for bankruptcy discharge. The debtor sued the collector on her own behalf and on behalf of nearly 200 borrowers who also received such notices. The district court granted summary judgment in favor of the debt collector, concluding that because the debtor had previously filed for bankruptcy without seeking to discharge her student loan debt, and because student loan debt is presumptively non-dischargeable, her debt was, in fact, not eligible to be discharged. The appeals court disagreed and held that the district court erred in focusing on the borrower's circumstances instead of applying the "least sophisticated consumer" standard. In applying that standard on appeal, the court reasoned that while the bar for bankruptcy discharge is high, it is not impossible and the "least sophisticated consumer" might not seek the advice of counsel for pursuing discharge through bankruptcy after receiving the debt collector's inaccurate notice. The court held that the debt collector's notice did violate the FDCPA and reversed and remanded the case for further proceedings.

## SECURITIES

**SEC Releases Dodd-Frank Financial Literacy Study.** On August 30, the SEC published a study of financial literacy. The Dodd-Frank Act required the SEC to examine (i) existing financial literacy among retail investors, (ii) methods to improve disclosures, (iii) information needed to make informed investment decisions, (iv) disclosure improvements related to expenses and conflicts of interest, (v) existing efforts to educate investors, and (vi) options for increasing investor financial literacy. The report's findings reveal that currently investors lack knowledge of elementary financial concepts. The SEC staff reports that investors (i) prefer to receive disclosures before making a decision on whether to engage a financial intermediary, (ii) consider information about fees, conflicts

of interest, and investment strategy essential, (iii) have mixed preferences on method of delivery for disclosures, but generally prefer that they be written in clear and concise language presented in summary and detailed form. The study concludes that transparency about conflicts of interest may be improved through the use of specific examples, among other things.

## E-COMMERCE

**White House Requires Agencies to Implement Electronic Recordkeeping.** On August 24, the Office of Management and Budget and the Archivist of the United States issued a directive that requires all executive offices and federal agencies to eliminate paper and implement electronic recordkeeping for all records, regardless of security classification. The directive, which was required by a November 2011 Presidential Memorandum that outlined an effort to reform federal records management policies and practices, seeks to improve agencies' compliance with federal records management statutes and regulations. The directive states that by the end of 2013, each agency must develop a plan to achieve electronic management of all permanent electronic records by the end of 2019. By the end of 2016, all agencies must manage email records in an electronic system that supports records management and litigation requirements. The National Archives and Records Administration will revise transfer guidance for permanent electronic records, issue new email management guidance, and support research in applied technologies to facilitate electronic records management. The Archivist will facilitate the initiative by leading a group of federal entities and private sector leaders in information technology, legal counsel, and records management to solve electronic records management challenges.

**Missouri District Court Holds State Funds Transfer Act Preempts Certain Customer Indemnity Agreements.** On August 20, the U.S. District Court for the Western District of Missouri dismissed a bank's counterclaims that its customer's agreement to indemnify the bank for any losses, costs, or expenses covers the customer's losses from an allegedly fraudulent transfer of funds. *Choice Escrow & Title, LLC v. BancorpSouth Bank*, No. 10-03531, slip op. (W.D.Mo. Aug. 20, 2012). The customer sued the bank claiming that a $440,000 wire transfer from its account through the bank's internet wire transfer system was fraudulently initiated by a third-party. The bank filed four counterclaims for the same amount based on indemnity agreements signed by the customer. The customer moved to dismiss the counterclaims, arguing that the state Funds Transfer Act, part of the Uniform Commercial Code, displaces the counterclaims. Describing its decision as a "very close call," the court held that the Funds Transfer Act preempts the types of indemnity agreements relied upon by the bank in its counterclaims and dismissed those claims. The court reasoned that while the Funds Transfer Act generally was not intended to preempt or displace all causes of action between a bank and its customers, the Act does provide that common law causes of action based on allegedly fraudulent transfers are preempted where the common law claims would create rights, duties, or liabilities inconsistent with the Act or where the circumstances giving rise to the claims are specifically covered by the Act. The court held the indemnity agreements could require the customer to pay back to the bank the very losses the bank might owe if the customer proves a fraudulent transfer, a result that is inconsistent with the Act.

## PRIVACY / DATA SECURITY

**FTC Extends Comment Period for Children's Privacy Rule.** On August 27, the FTC extended through September 24, 2012 the time period for comments on proposed changes to the Children's Online Privacy Protection Rule. The comment period originally was due to close on September 10, 2012.

**Privacy Challenge to Bank's Overseas Call Centers Dismissed.** On August 28, the U.S. District Court for the District of Columbia dismissed a putative class action that claimed that a bank's use of overseas call centers subjects private financial records to U.S. government review in violation of the Right to Financial Privacy Act (RFPA). The RFPA generally prohibits financial institutions from providing customer information to a government authority. *Stein v. Bank of Am. Corp.*, No. 11-1400, 2012 WL 3671009 (D.D.C. Aug. 28, 2012). The bank customer plaintiffs claim that because foreign states and foreign nationals are not subject to U.S. privacy laws, including the RFPA, the bank's transmission of account and other customer data to an overseas call center risks making that data available for potential review by federal national security authorities. The bank moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. The court granted the bank's motion, finding that the plaintiffs failed to allege a cognizable injury sufficient to establish standing. The court held that the bank customers do not allege that the bank actually provided any records to a government entity and therefore, the customers do not adequately plead "a concrete and particularized injury, free of conjecture or speculation."



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