Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

August 3, 2012

TOPICS - COVERED THIS WEEK (CLICK TO VIEW)

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OCC and Federal Reserve Board Extend Independent Foreclosure Review Program Deadline. On August 2, the Federal Reserve Board and the OCC announced that the deadline for borrowers to seek review of their mortgage foreclosures under the Independent Foreclosure Review program has been extended to December 31, 2012. Under the program, an eligible borrower can have his or her foreclosure reviewed by independent consultants to determine whether the borrower was financially injured due to errors, misrepresentations, or other deficiencies in the foreclosure process. An injured borrower may be eligible for compensation or other remedies. The program originally was scheduled to close April 30, 2012, but has been extended numerous times over the past year.

CFPB Publishes Semiannual Report. On July 30, the CFPB published its second semiannual report to Congress. The report, which is mandated by the Dodd-Frank Act, provides an update of CFPB activities from January 1, 2012 through June 30, 2012. Included in the report is an overview of the CFPB's complaint handling process and updated summary information about complaints received to date. The CFPB also states that it is currently conducting investigations spanning the "full breadth of the Bureau's enforcement jurisdiction" while attempting to focus on violations that cause the most harm to consumers. As in the first report, this report identifies consumer "shopping challenges", highlights planned regulatory activities for the remainder of 2012, and compiles citations to testimony and speeches delivered, and reports prepared or expected to be prepared over the coming months.

FTC Submits Staff Comments on CFPB's Proposed Prepaid Card Regulation. On July 30, the FTC released staff comments submitted in response to the CFPB's Advance Notice of Proposed Rulemaking regarding the regulation of prepaid cards. The CFPB issued the Notice in May, noting its intention to extend Regulation E to cover general purpose reloadable gift cards and seeking comment, data, and information about such cards. In response, the FTC staff comments review the current regulation of payment cards, and identify for the CFPB's consideration several consumer protection issues that may arise with regard to prepaid cards, including (i) liability limits, (ii) disclosure and fees expiration dates, (iii) error resolution procedures, (iv) authorization standards for recurrent payments, and (v) consumer access to account information.

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Federal Reserve Board Finalizes Rule Allowing Debit Fraud-Prevention Adjustments. On July 27, the Federal Reserve Board issued a final rule that amends Regulation II. The rule allows a debit issuer that is subject to the interchange fee standards to charge-in addition to interchange fees-a fraud-prevention fee to defray costs associated with implementing policies and procedures that reduce fraudulent electronic debit transactions. The fee cannot exceed one cent per transaction, unchanged from the Federal Reserve's interim final rule on this issue. The final rule details fraud-prevention program requirements that an issuer must meet in order to charge the fee. An issuer charging such a fee must annually review and update its fraud-prevention program and notify its payment card networks that it complies with the rule's fraud prevention standards. The rule takes effect October 1, 2012.

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HUD Delays Changes to Title Approval at Conveyance. On July 31, HUD issued Mortgagee Letter 2012-14, which delays until November 1, 2012 implementation of recent changes to title approval at conveyance. The changes, originally set to take effect August 1, 2012, were issued in June as Mortgagee Letter 2012-11. Pursuant to that letter, mortgagees must pay in full prior to conveyance all taxes, homeowners' association fees, and water, sewer or other assessments. The

initial letter also detailed related documentation and certification requirements and outlined FHA's rights to reconvey a property under certain circumstances.

FTC Considers Additional Revisions to Children's Online Privacy Protection Rule. On August 1, the FTC announced that it is seeking public comment on additional proposed changes to the Children's Online Privacy Protection Rule (COPPA Rule). In September 2011, the FTC sought comments on certain proposed changes to its COPPA Rule. In response to the hundreds of comments received, as well as subsequent efforts to enforce the rule, the FTC now is proposing to modify certain definitions to enhance protections related to the online collection, use, or disclosure of children's personal information. The revised definitions include: (i) "operator", (ii) "website or online service directed to children", and (iii) "personal information." For example, with regard to "personal information", the definition would be altered to include a persistent identifier where it can be used to recognize a user over time or across different websites. The FTC is accepting comments on the proposal through September 10, 2012.

NCUA Seeks Role in Declaring State Credit Unions "Troubled." On July 31, the NCUA proposed a rule that would give it a role in determining whether a state-chartered credit union is in "troubled condition." Under current law, only a state supervisory authority is permitted to declare a federally insured, state-chartered credit union to be in troubled condition. The NCUA believes that the change would help protect the National Credit Union Share Insurance Fund by leveraging the federal regulator's resources to increase the likelihood that problems at covered credit unions are identified. The NCUA is accepting comments on the proposal through October 1, 2012.

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STATE ISSUES

Massachusetts Set to Enact Foreclosure Reform Measure. On July 26, the Massachusetts state legislature passed a bill, H 4323, that establishes new pre-foreclosure requirements that will make it harder to foreclose in that state. Under the bill, prior to initiating a foreclosure sale, a creditor must make specified good faith efforts to avoid foreclosure, including assessing potential mortgage modification options. The bill sets up a pre-foreclosure process by which a creditor must notify a borrower of his or her right to a loan modification assessment. In addition, the bill (i) prohibits publication of a foreclosure notice if the creditor knows or should know that the mortgagee is neither the note holder or the note holder's authorized agent, (ii) requires that assignments be recorded in the registry of deeds and that each assignment of a mortgage be referenced in any notice of foreclosure for a given property, and (iii) establishes a task force to study foreclosure mediation programs. Governor Deval Patrick is expected to sign the bill, the majority of which would take effect November 1, 2012.

Arizona Attorney General Settles Action Against Internet Payday Loan Lead Generator. On July 30, Arizona Attorney General Tom Horne announced an agreement with an Internet lead generator that requires the firm to halt operations through which it solicited information on behalf of

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Tenth Circuit Overturns Heightened Pleading Standard for TILA Rescission Cases. On July 30, the U.S. Court of Appeals for the Tenth Circuit overturned a district court ruling that would have required borrowers seeking rescission under TILA to state their ability to repay in the initial complaint. *Sanders v. Mountain Am. Fed. Credit Union*, No. 11-4008, 2012 WL 3064741 (10th Cir. Jul. 30, 2012). The borrowers timely sued to compel rescission of their mortgage loan, claiming that the lender failed to provide disclosures required under TILA. The district court held that the borrowers were not entitled to rescission because they failed to plead their ability to repay. On appeal the court held that, while TILA recognizes that a court may entertain a creditor's petition for an order equitably modifying the rescission procedure, in this case the district court impermissibly altered that procedure and created a pleading standard that would require all borrowers seeking TILA rescission to plead their ability to repay. The court reasoned that such a standard would add a condition not supported by TILA or Regulation Z, and that categorical relief is outside of the district court's equitable powers. However, the court maintained that a district court still may use its equitable powers to protect a creditor's interest during the rescission process. The appellate court also reversed the district court's dismissal of the borrowers' ECOA claim related to a separate refinance transaction because the district court made factual assumptions about the refinance process in violation of its obligation to draw all reasonable inferences in favor of the plaintiff borrowers. While the TILA and ECOA claims were remanded for further proceedings, the court upheld the district court's dismissal of the borrowers' claims that the lender also violated FCRA when it reported false information to consumer reporting agencies, holding that FCRA does not provide a private right of action against the furnisher of credit information.

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Majority of NCUA MBS Claims Survive Motion to Dismiss. On July 25, the U.S. District Court for the District of Kansas denied a motion to dismiss that sought to dispose of allegations that the defendant financial institutions misled investors in connection with the sale of certain mortgage-backed securities (MBS). *Nat. Credit Union Admin. Bd. v. RBS Secs., Inc.*, No. 11-2340, 2012 WL 3028803 (D. Kan. Jul. 25, 2012). The NCUA brought the suit against several MBS-issuers on behalf of a failed credit union for which it had been appointed conservator, arguing that the MBS issuers' documents used in offering the MBS contained material misstatements and omissions that led to substantial losses to the investor credit union and the NCUA Stabilization Fund. The facts and arguments are similar to those NCUA has presented in several cases around the country in an effort to recover MBS-related losses for failed institutions. Here, the MBS issuers argued that the NCUA complaint exceeded the statute of limitations, having been filed more than three years from the issuance of the securities. The issuers maintained that the failed institution should have been able to identify the issues within the statutory limit. The court disagreed and held that the federal extender statute applied, allowing NCUA to bring the case beyond the three year limit. Because the government could not have known the details of the offerings until after it became conservator, and given that ambiguous statutes of limitations should be construed in favor of the government, the court determined the NCUA claims were timely. The court also held that the NCUA presented evidence sufficient to maintain a plausible claim of misrepresentation, except with regard to certain credit enhancement language that the NCUA charged was untrue and material.

Michigan Appellate Court Affirms Validity of Electronic Signature Under UETA. Recently, the Michigan Court of Appeals affirmed summary judgment in favor of a defendant insurance company seeking to dispose of a challenge to an electronic signature executed by a policyholder. *Zulkiewski v. Am. Gen. Life Ins. Co.*, No. 299025, 2012 WL 2126068 (Mich. Ct. App. Jun. 12, 2012). In this case, shortly before a life insurance policy holder died, the beneficiary information on his policy was changed through the insurance company's online account management service. The former beneficiaries challenged the new beneficiary designation, arguing that although the Uniform Electronic Transactions Act (UETA) permits an electronic signature, to validate the authenticity of such a signature the insurance company must prove the efficacy of its security procedures. On appeal, the court held that the trial court did not err when it relied on evidence provided by the insurance company showing the extent of the personal information required to change the beneficiary, combined with an affidavit that the new beneficiary did not change the beneficiary designation. The court further explained that the appellants misread the relevant portions of the UETA when they argued that the lower court improperly accepted the insurance company's assertions that its security procedures were "adequate to prevent deception by an imposter." The court explained that the insurance company need not prove the efficacy of its online security procedures to authenticate a customer's signature since under the UETA doing so is merely one method by which to show attribution.

FIRM NEWS

Jeffrey Naimon and Howard Eisenhardt were Course Instructors for the Mortgage Bankers Association's Anti-Money Laundering (AML) and Suspicious Activity Report (SAR) Training for Nonbank Residential Mortgage Lenders and Originators (RMLOs) on August 2, 2012. Mr. Naimon and Mr. Eisenhardt discussed (i) money laundering and how it works, AML and SAR reporting requirements, and the role of AML programs and SARs in fighting mortgage fraud and preventing losses; (ii) the AML program structure; (iii) what triggers a SAR filing; (iv) red flags for mortgage professionals to be aware of; (v) timing and confidentiality requirements of SARs; and (vi) the risks and penalties for violating Bank Secrecy Act/AML requirements. Training is required under the new FinCEN regulation of all employees of RMLOs. The Training was recorded and available for future viewing on the Mortgage Bankers Association website.

Jeffrey Naimon moderated and Michael Williams presented on a panel discussion of the CFPB's amicus effort on a Truth in Lending rescission issue at the American Bar Association Business Law Section Annual Meeting on August 3, 2012.

Jonathan Cannon will speak at the Lenders One Summer Conference in Chicago on August 7, 2012. Mr. Cannon's topics include: (i) What to Expect When the CFPB Comes Calling: The CFPB's Enforcement and Examination Agenda, (ii) RESPA and TILA Update: The New GFE and HUD-1 Disclosures, and (iii) Compliance with the New Suspicious Activity Report Requirements.

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 regulation, and regulation in the pipeline, for both those on the origination side of the business, as well as mortgage servicing.

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."

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.

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

Benjamin Saul, Bradley Marcus, and Sasha Leonhardt recently published "The Paper Chase: Effects of FDIC Document Retention Policies on D&O Suits," in Consumer Lending Litigation News.

Thomas Sporkin, Robyn Quattrone, and Kendra Kinnaird authored "Minimizing Missteps When Interfacing with SEC Staff", which was published in Law360 on July 6, 2012.

Jonice Gray Tucker and Kendra Kinnaird published in the July 2012 issue of Mortgage Banking "Will Vendors Create New Liability for Servicers?".

Thomas Sporkin authored "Seven Steps Companies Can Take to Incentivize Internal Reporting of FCPA Violations" for the July 2012 issue of The FCPA Report.

Andrew Sandler, Jeffrey Naimon, and Kirk Jensen on July 13, 2012 prepared for the American Bankers Association a white paper entitled "Disparate Impact Under FHA and ECOA: A Theory Without a Statutory Basis."

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

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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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.

In addition, please feel free to email our attorneys. A list of attorneys can be found at: http://www.buckleysandler.com/professionals/professionals.

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SECURITIES

Majority of NCUA MBS Claims Survive Motion to Dismiss. On July 25, the U.S. District Court for the District of Kansas denied a motion to dismiss that sought to dispose of allegations that the defendant financial institutions misled investors in connection with the sale of certain mortgage-backed securities (MBS). *Nat. Credit Union Admin. Bd. v. RBS Secs., Inc.*, No. 11-2340, 2012 WL 3028803 (D. Kan. Jul. 25, 2012). The NCUA brought the suit against several MBS-issuers on behalf of a failed credit union for which it had been appointed conservator, arguing that the MBS issuers' documents used in offering the MBS contained material misstatements and omissions that led to substantial losses to the investor credit union and the NCUA Stabilization Fund. The facts and arguments are similar to those NCUA has presented in several cases around the country in an effort to recover MBS-related losses for failed institutions. Here, the MBS issuers argued that the NCUA complaint exceeded the statute of limitations, having been filed more than three years from the issuance of the securities. The issuers maintained that the failed institution should have been able to identify the issues within the statutory limit. The court disagreed and held that the federal extender statute applied, allowing NCUA to bring the case beyond the three year limit. Because the government could not have known the details of the offerings until after it became conservator, and given that ambiguous statutes of limitations should be construed in favor of the government, the court determined the NCUA claims were timely. The court also held that the NCUA presented evidence sufficient to maintain a plausible claim of misrepresentation, except with regard to certain credit enhancement language that the NCUA charged was untrue and material.

E-COMMERCE

FTC Submits Staff Comments on CFPB's Proposed Prepaid Card Regulation. On July 30, the FTC released staff comments submitted in response to the CFPB's Advance Notice of Proposed Rulemaking regarding the regulation of prepaid cards. The CFPB issued the Notice in May, noting its intention to extend Regulation E to cover general purpose reloadable gift cards and seeking comment, data, and information about such cards. In response, the FTC staff comments review the current regulation of payment cards, and identify for the CFPB's consideration several consumer protection issues that may arise with regard to prepaid cards, including (i) liability limits, (ii) disclosure and fees expiration dates, (iii) error resolution procedures, (iv) authorization standards for

recurrent payments, and (v) consumer access to account information.

Federal Reserve Board Finalizes Rule Allowing Debit Fraud-Prevention Adjustments. On July 27, the Federal Reserve Board issued a final rule that amends Regulation II. The rule allows a debit issuer that is subject to the interchange fee standards to charge-in addition to interchange fees-a fraud-prevention fee to defray costs associated with implementing policies and procedures that reduce fraudulent electronic debit transactions. The fee cannot exceed one cent per transaction, unchanged from the Federal Reserve's interim final rule on this issue. The final rule details fraud-prevention program requirements that an issuer must meet in order to charge the fee. An issuer charging such a fee must annually review and update its fraud-prevention program and notify its payment card networks that it complies with the rule's fraud prevention standards. The rule takes effect October 1, 2012.

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Federal Court Ruling on Placement of ATM Fee Notice Favors Consumers. On July 25, the U.S. District Court for the District of Minnesota granted summary judgment to a consumer alleging that the placement of an ATM fee notice on the inside of a "hooded ATM" was not "prominent and conspicuous" as required under the Electronic Funds Transfer Act (EFTA). *Brown v. Wells Fargo & Co.*, No. 11-1362 2012 WL 3030294 (D. Minn. Jul. 25, 2012). The consumer, on behalf of a putative class, alleged that the ATM fee disclosure was placed on the inside of the hood protecting the screen, and not in a more conspicuous position. The consumer did not contest that the disclosure was provided electronically on the screen, as also required by the EFTA, and that he was aware before completing the transaction that he would be charged a fee. Because the EFTA does not define "prominent and conspicuous," the court looked to other consumer protection statutes to determine that the disclosure must be displayed such that a reasonable person ought to have noticed. In this case, the court held that a reasonable person would not conclude that the notice was prominent and conspicuous because (i) the disclaimer was not in capital letters, (ii) the type and background of the notice were in a coordinating, not contrasting color, (iii) the notice was placed inside the hood as opposed to on top of the machine, and (iv) the notice generally did not stand out relative to other information on or near the ATM. While the court granted the consumer's motion for summary judgment on the EFTA claims, the court disposed of his claim for unjust enrichment, and refused to certify the class, holding that the consumer failed to meet the requirements of either Rule 23(a) or (b). As we have reported in recent weeks, the U.S. Congress is considering legislation that would eliminate the physical fee disclosure requirement, and instead require that ATM operators only provide an on-screen notice.

Michigan Appellate Court Affirms Validity of Electronic Signature Under UETA. Recently, the Michigan Court of Appeals affirmed summary judgment in favor of a defendant insurance company seeking to dispose of a challenge to an electronic signature executed by a policyholder. *Zulkiewski v. Am. Gen. Life Ins. Co.*, No. 299025, 2012 WL 2126068 (Mich. Ct. App. Jun. 12, 2012). In this case, shortly before a life insurance policy holder died, the beneficiary information on his policy was changed through the insurance company's online account management service. The former

beneficiaries challenged the new beneficiary designation, arguing that although the Uniform Electronic Transactions Act (UETA) permits an electronic signature, to validate the authenticity of such a signature the insurance company must prove the efficacy of its security procedures. On appeal, the court held that the trial court did not err when it relied on evidence provided by the insurance company showing the extent of the personal information required to change the beneficiary, combined with an affidavit that the new beneficiary did not change the beneficiary designation. The court further explained that the appellants misread the relevant portions of the UETA when they argued that the lower court improperly accepted the insurance company's assertions that its security procedures were "adequate to prevent deception by an imposter." The court explained that the insurance company need not prove the efficacy of its online security procedures to authenticate a customer's signature since under the UETA doing so is merely one method by which to show attribution.

PRIVACY / DATA SECURITY

FTC Considers Additional Revisions to Children's Online Privacy Protection Rule. On August 1, the FTC announced that it is seeking public comment on additional proposed changes to the Children's Online Privacy Protection Rule (COPPA Rule). In September 2011, the FTC sought comments on certain proposed changes to its COPPA Rule. In response to the hundreds of comments received, as well as subsequent efforts to enforce the rule, the FTC now is proposing to modify certain definitions to enhance protections related to the online collection, use, or disclosure of children's personal information. The revised definitions include: (i) "operator", (ii) "website or online service directed to children", and (iii) "personal information." For example, with regard to "personal information", the definition would be altered to include a persistent identifier where it can be used to recognize a user over time or across different websites. The FTC is accepting comments on the proposal through September 10, 2012.