

November 9, 2012

TOPICS COVERED THIS WEEK (CLICK TO VIEW)[FEDERAL ISSUES](#)[STATE ISSUES](#)[COURTS](#)[FIRM NEWS](#)[FIRM PUBLICATIONS](#)[MORTGAGES](#)[BANKING](#)[CONSUMER FINANCE](#)[CREDIT CARDS](#)[E-COMMERCE](#)[PRIVACY/DATA SECURITY](#)**[FEDERAL ISSUES](#)**

Banking Regulators Provide Guidance on Basel III Implementation Timeline, Congress Offers Additional Responses to Basel III Proposals. On November 9, the Federal Reserve Board, the OCC, and the FDIC [announced](#) that proposed rules to implement the Basel III regulatory capital accords will not take effect on January 1, 2013. The agencies cite the large volume of comments received in response to the proposed rules as the reason for the delay. Recently, members of three states' congressional delegations joined others in submitting letters to the federal banking regulators in response to the proposed Basel III regulations. The letters all raise concerns about the potential disproportionate impact of the proposed rules on smaller, community and regional institutions, and challenge the attempt by regulators to apply international accords to all U.S. institutions regardless of size. Members of the Texas delegation [focused](#) on provisions that would require all unrealized gains and losses on available-for-sale securities to flow through to common Tier-1 equity, which the lawmakers believe will require community banks to divert capital resources from customer services and bank growth. Indiana Members [added concerns](#) about the effect of proposed excessive risk weighting and restrictions on dividends and discretionary bonuses, while Members from South Carolina [echoed](#) general concerns about the impact of the proposals on community banks. These legislators join other federal and state policymakers who have [submitted similar comments](#) in recent weeks. Scrutiny of the proposals will continue next week with a Senate Banking Committee [hearing planned](#) for November 14, 2012 to review the pending rules with representatives from the Federal Reserve Board, the OCC, and the FDIC.

NCUA Releases New National Supervision Policy Manual. On November 2, the NCUA [released](#) a public version of its new [National Supervision Policy Manual](#), which describes the agency's internal operations and procedures for supervisory staff. Certain sensitive portions of the Manual

remain confidential. The release completes a two-year process to create uniform national procedures for NCUA's supervisory staff that are expected to improve examination consistency.

FTC and States Target "Cardholder Services" Robocalls. On November 1, the FTC [announced](#) that courts have granted temporary restraining orders in five cases in which the FTC alleged that the defendants placed automated calls to consumers to make allegedly deceptive "no-risk" offers to substantially reduce the consumers' credit card interest rates in exchange for an upfront fee. The telemarketers claimed to be calling from the consumers' credit card company, or otherwise used the generic "Cardholder Services" title to suggest a relationship with a bank or credit card company, the FTC says. Each complaint alleges that the defendants violated the FTC Act by misrepresenting that consumers who buy their services will have their credit card interest rates reduced substantially and will save thousands of dollars as a result. Four of the five complaints also charge that the defendants violated the FTC Act by making other misrepresentations, such as promises of faster debt payoff. The FTC also charges that the defendants violated the Telemarketing Sales Rule (TSR) by misrepresenting their services, calling numbers on the Do Not Call Registry, making illegal robocalls, and collecting up-front fees. The FTC coordinated with multiple state entities, including the attorneys general of Arizona and Arkansas and the Florida Department of Agriculture and Consumer Services, each of which took separate actions against other companies for similar alleged activities.

House Members Release Data Brokers' Responses to Congressional Inquiry. On November 8, a bipartisan group of lawmakers [released](#) the responses of nine firms the lawmakers [targeted in July 2012](#) as "major data brokerage companies" and from which the members sought information about how each firm collects, uses, and protects consumer data. Representative Markey (D-MA) who is leading the inquiry of these firms characterized the responses as incomplete, particularly with regard to how the firms analyze personal information to categorize and rate consumers. Last month, Senator Rockefeller (D-WV) [initiated](#) a similar review of data broker practices.

HUD and Banking Regulators Offer Borrower and Institution Relief Following Hurricane Sandy. Recently, HUD has made a series of announcements regarding housing relief for individuals displaced by Hurricane Sandy. For example, on October 30 HUD [granted](#) a 90-day moratorium on foreclosures and forbearance on foreclosures of FHA-insured mortgages. Similar announcements have followed for victims in [New York](#), [Connecticut](#), and [Rhode Island](#). Also on October 30, the Federal Reserve Board, the OCC, and the FDIC issued a [statement](#) on supervisory practices impacted by the hurricane. For example, the regulators stated that "prudent efforts to adjust or alter terms on existing loans in affected areas should not be subject to examiner criticism."

Fannie Mae, Freddie Mac Announce Additional Storm Relief Measures. On November 9, [Fannie Mae](#) and [Freddie Mac](#) announced that effective immediately servicers can suspend for 90 days evictions and foreclosures involving borrowers affected by Hurricane Sandy in order to assess the borrowers' situations. In addition, next week Fannie Mae and Freddie Mac will issue guidance to servicers to expand the options they can offer to homeowners impacted by the hurricane. Under the new Fannie Mae guidance, servicers will be authorized to (i) extend forbearance for up to 12 months, where appropriate, (ii) provide loan modifications, once the homeowner is able to resume monthly mortgage payments, (iii) waive any late payment charges, (iv) suspend credit reporting for any homeowner for whom relief is granted, and (v) delay the initiation of any foreclosure action to determine the condition of the property and the borrower's employment and income status. Freddie Mac's policy changes will authorize servicers to (i) automatically suspend for 90 days evictions and foreclosure sales for borrowers with homes secured by Freddie Mac owned-or guaranteed mortgages and located in eligible disaster areas, (ii) verbally grant 90-day forbearances to all borrowers in eligible disaster areas, including borrowers with mortgages modified under HAMP or who are currently in a HAMP or Standard Modification Trial Period Plan, and (iii) expedite the

distribution of insurance proceeds on storm damage claims. Additionally, Freddie Mac will maintain pricing that was in place at the time of the storm for mortgages that are secured by homes in eligible disaster areas and delivered through Freddie Mac's bulk guarantor channel.

HUD Again Delays Changes to Title Approval at Conveyance. On October 31, HUD issued [Mortgagee Letter 2012-21](#), which delays until January 1, 2013, implementation of changes to title approval at conveyance. The changes, originally set to take effect August 1, 2012, were issued in June 2012 as [Mortgagee Letter 2012-11](#). Under the original 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.

OCC Designates Two Senior National Bank Examiners. On November 5, the OCC [designated](#) William D. Haas and Scott J. Wilson as Senior National Bank Examiners, the highest honor for national bank examiners. Mr. Haas joined the OCC in 1984 and currently serves as the Deputy Comptroller for Midsize Bank Supervision. Mr. Wilson joined the OCC in 1985 and is currently the Examiner-in-Charge of one of the nation's largest financial institutions.

STATE ISSUES

State Banks and Servicers Provide Post-Hurricane Mortgage Relief in New York. On November 7, New York Governor Andrew Cuomo [announced](#) that several major state-chartered banks and mortgage servicers are offering a range of relief for borrowers impacted by Hurricane Sandy. While the particular relief may vary by institution and borrower circumstances, the following types of relief generally are being offered: (i) 90-day postponement of foreclosures and evictions, (ii) 90-day waiver of late fees on mortgage payments, including online payments, (iii) 90-day or more forbearance on mortgage payments where the borrower has been impacted by the storm and is seeking relief, (iv) waiver of interest where a refinancing transaction has been closed, but not funded, (v) late payment relief for borrowers in a trial modification, and (vi) suspension of notification to credit bureaus if borrowers make late payments. Additionally, a state order prohibiting the termination, cancellation, or non-renewal of homeowners' insurance policies for 30 days started October 26, which means servicers cannot force place insurance on any homeowner who had insurance in effect as of that date.

Pennsylvania Enacts Package of Bills to Modernize Banking Law. On October 24, Pennsylvania enacted three bills that together make numerous substantive and technical changes to upgrade and modernize the state's banking code, all of which take effect December 23, 2012. [HB 2368](#) updates commercial, mortgage, and consumer lending provisions of the code by, among other things, removing conflicting and outdated lending provisions, and reflecting current lending interest rates and fees. This bill also (i) adds provisions required by the Dodd-Frank Act with regard to lending limits that require state financial regulators to consider credit exposure to derivative transactions, (ii) increases penalties for unlawful lending and trust activities to a felony and a \$10,000 to \$500,000 fine, and (iii) removes the current two-person cap on the number of individuals who can be beneficiaries of deposit accounts. [HB 2369](#) provides for greater public disclosure and enforcement by the Department of Banking, and clarifies the Department's examination authority over bank subsidiaries. It also allows the Department to assess civil money penalties against individuals and institutions for conduct that causes the institution to suffer substantial financial loss, is willful, flagrant or evidences bad faith, involves an insider who benefits in a substantial way, or does not comply with previous supervisory actions involving violations. The bill allows the Department to publicly disclose enforcement actions against depository institutions and their employees, and expands the Department's authority to remove officers and employees from bank

management and boards whenever such individuals violate any law or Department order. HB 2369 also requires any state or local government agency that proposes civil enforcement of a law or ordinance against a bank to consult with and receive approval from the Department prior to enforcement. [HB 2370](#) repeals certain sections of the state's general usury law that duplicate TILA's variable rate mortgage loan disclosures. It also adds savings banks to the list of institutions subject to maximum interest rate provisions and clarifies that the maximum rate is the rate authorized by federal or state law.

District of Columbia Enacts Emergency Bill to Enhance Foreclosure Protections. On October 26, the District of Columbia enacted, on an emergency basis, [Bill 914](#), which extends to borrowers that receive a defective notice of default on a residential mortgage the same protections that apply with regard to a defective notice of intention to foreclose. The bill also (i) provides that a foreclosure sale is void if a lender files a notice of intention to foreclose without a mediation certificate, (ii) revises the definition of residential mortgage, and (iii) creates a Foreclosure Mediation Fund to collect the proceeds from the mediation program and the national servicing settlement completed earlier this year. Those proceeds can be used for specified purposes, including financial fraud and consumer protection enforcement and certain borrower outreach and assistance. The bill was made retroactively effective to September 13, 2012, and expires on January 24, 2013.

COURTS

FTC Loses Motion in Unfair Billing Case Against Online Payday Loan Referral Service. On November 7, the U.S. District Court for the Middle District of Florida [held](#) that numerous factual issues prevented the court from granting summary judgment on the FTC's claims that an online payday loan referral business engaged in unfair and deceptive billing practices and failed to provide adequate disclosures. *FTC v. Direct Benefits Group, LLC*, No 11-1186, 2012 WL 5430989 (M.D. Fla. Nov. 7, 2012). The FTC [alleges](#) that the defendants violated the FTC Act by obtaining consumers' bank account information through payday loan referral websites and debiting their accounts without their consent. The FTC also alleges that the defendants failed to adequately disclose that, in addition to using consumers' financial information for a payday loan application, they would use it to charge them for enrollments in unrelated programs and services. Although it acknowledged that the FTC had presented substantial evidence regarding consumer complaints about the defendants' activities, the court held that because the defendants maintain that no consumer could be enrolled in the programs without at least clicking an "okay" button on the defendants' websites, the FTC was not entitled to summary judgment. A bench trial is scheduled for November 27, 2012, during which the parties will present additional evidence and arguments regarding the content and operation of the websites and whether consumers could enroll in the referral programs without taking affirmative steps to do so.

Bank Argues Government's False Claims Act Case Violates National Servicing Settlement. On November 1, one of the five banks that entered into a comprehensive mortgage servicing settlement earlier this year with the federal government and 49 state attorneys general [invoked](#) that agreement in defense of claims recently filed against it by the federal government. Motion of Defendant Wells Fargo Bank, N.A. to Enforce Consent Judgment, *United States v. Bank of America Corp.*, No. 1:12-cv-00361 (D.D.C. Nov. 1, 2012). Wells Fargo's motion responds to a [complaint filed in the Southern District of New York](#) in which the DOJ and HUD allege that the bank falsely certified loans under the FHA's Direct Endorsement Lender Program in violation of the False Claims Act (FCA) and the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). In response, the bank has asked [the court overseeing the national servicer settlement](#) to enforce the [Consent Judgment](#) the bank entered, which the bank notes includes a comprehensive release for certain liability with respect to its alleged FHA mortgage lending conduct. The bank argues that the release specifically releases liability arising under the FCA and FIRREA for its alleged FHA-

certification conduct. The bank seeks declaratory relief with respect to its rights under the servicing settlement, as well as an order enjoining the federal government from pursuing its case in New York. Wells Fargo's motion indicates that the government plans to oppose the motion.

Federal District Court Dismisses Borrowers' Subprime Lending RICO Claims. On October 30, the U.S. District Court of the Northern District of California [dismissed](#), without prejudice, claims brought by two borrowers alleging that their mortgage lender engaged in fraudulent loan practices which violated RICO. The court held that the claims were time-barred and that the complaint failed to allege facts about predicate acts and a pattern of activity necessary to sustain a civil RICO claim. *Cabrera v. Countrywide Fin.*, No. 11-4869, 2012 WL 5372116 (N.D. Cal. Oct. 30, 2012). The court rejected the borrowers' arguments that (i) the statute of limitations began to run not from the date they entered into their adjustable rate mortgage, but from the date the rate adjusted, and (ii) equitable tolling should apply because the borrowers' could not have discovered their adjusted rate absent a forensic loan audit they obtained years into the contract. With regard to equitable tolling, the court held that the plain terms of the mortgage provide information about the rate at issue, which could have been uncovered by "a reasonably diligent investigation of the loan documents." The court similarly dismissed the borrowers' claims that the lender discriminated against minority borrowers in violation of the ECOA, as time-barred. It also held that the borrowers, who are Hispanic, failed to state a claim under ECOA in that, although they offered statistical evidence that Hispanics were given less favorable loans than white borrowers with the same risk characteristics, they failed to allege that they themselves qualified for better loans. The borrowers' claim of unfair business practices under the state's unfair competition law survived. The court held that the borrowers pled facts sufficient to support their claim that the lender's effort to initiate a foreclosure while a loan modification was pending violated public policy reflected in the California Homeowner Bill of Rights, even though the specific provision of that statute that prohibits such practices was not codified until after the foreclosure occurred.

Lender Wins Dismissal of Force-Placed Insurance Class Action. On October 30, the U.S. District Court for the Northern District of California [dismissed](#) a putative class action alleging that the lender breached certain mortgage contracts and violated state and federal law through its policy and practices requiring borrowers to maintain flood insurance sufficient to cover the replacement value of their homes. *McKenzie v. Wells Fargo Home Mortg., Inc.*, No. 11-4965, 2012 WL 5372120 (N.D. Cal. Oct. 30, 2012). The borrowers claim that the FHA requirement that flood insurance must cover the remaining balance of the mortgage served as a cap on the flood insurance amounts the lender could require. Declining to follow the reasoning of the court in [Kolbe v. BAC Home Loans Servicing, LP](#), No. 11-2030, 2012 WL 4240298 (1st Cir. Sep. 21, 2012), the *McKenzie* court held that because the deeds of trust authorized the lender to set the required level of insurance and the FHA requirement is a statutory floor, the lender did not breach the mortgage contracts by requiring coverage above the outstanding principal loan balance. Therefore, the court dismissed those claims with prejudice. For the same reasons, the court dismissed with prejudice the borrowers' claims that letters sent to the borrowers notifying them of insufficient coverage altered the terms of their loans and required the lender to make additional disclosures under TILA. The court dismissed, with one opportunity to amend, claims that the lender breached the contract by force-placing insurance through an affiliate that charged excessive amounts allegedly in exchange for kickbacks.

FIRM NEWS

Complimentary Webinar - The Evolution of False Claims Act and FIRREA Enforcement
[BuckleySandler LLP](#) will host a webinar on Friday, November 16, 2012, from 1:00 - 2:15 PM ET, focused on the Government's most recent financial fraud enforcement actions, an overview of recent False Claims Act (FCA) cases and the Government's increasing use of the Financial

Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), and what this means for financial institutions that do business with the Government, Government-Sponsored Enterprises (GSEs), and other recipients of federal funds.

BuckleySandler attorneys [Andrew Sandler](#), [Andrew Schilling](#), [Matthew Previn](#), and [Michelle Rogers](#) will cover:

- A summary of recent enforcement actions by the DOJ, including the U.S. Attorney's Office for the Southern District of New York's (SDNY) use and expansion of FCA and FIRREA.
- Understanding what the SDNY's most recent lawsuits mean for the industry.
- Challenges facing financial services companies who do business with the Government and the GSEs.
- Predictions about where the Government may go from here.

This webinar will be of particular interest to in-house legal, compliance, and risk management personnel at banks and other financial services providers that do business with the Government, GSEs and other recipients of federal funds. Please no outside law firms, government agency personnel, consulting firms, or media. After registering and being approved, you will receive a confirmation email containing instructions for joining the webinar. **Click [here](#) to register.**

Complimentary Webinar - The CFPB: Investigations and Enforcement Actions in Focus

[BuckleySandler LLP](#) will host a webinar on Thursday, December 6, 2012 from 2:00-3:15 PM ET, to discuss the CFPB's rules governing investigations, enforcement actions, and adjudications. BuckleySandler attorneys [Jeff Naimon](#), [Jonice Gray Tucker](#), and [Lori Sommerfield](#), also will discuss themes prevalent in the first three public enforcement actions undertaken by the CFPB, all of which were predicated, in part, on allegations of unfair and deceptive practices.

This webinar will be of particular interest to in-house legal, compliance, and risk management personnel at banks and other financial services providers subject to CFPB oversight. Please no outside law firms, government agency personnel, consulting firms, or media. After registering and being approved, you will receive a confirmation email containing instructions for joining the webinar. **Click [here](#) to register.**

[Andrew Sandler](#) will speak on a panel at the [Seventh Annual Judicial Symposium on Civil Justice Issues](#), which will be held at The Mason Inn Conference Center and Hotel on the George Mason University Campus, Fairfax, Virginia, on November 12, 2012. Mr. Sandler's panel is entitled "Using Disparate Impact Analysis to Establish Discrimination in Lending."

[Jonathan Jerison](#) will present a webinar for [BankersWEB](#) on November 13, 2012 entitled "[Update on Managing HELOCs - Consumer Laws and Recent Litigation](#)." Mr. Jerison's presentation will help institutions understand how to navigate safely through the legal and regulatory maze of managing HELOCs.

[James Parkinson](#) will moderate a panel at the [ACI's 28th National Conference on Foreign Corrupt Practices Act](#) in Washington, D.C. Mr. Parkinson's panel, entitled "Data and Document Management Strategies for FCPA Investigations: Practical Tools for Effectively Accessing, Obtaining and Controlling Data and Documents during an FCPA Investigation," will be held November 14, 2012.

[Margo Tank](#) will speak at [The Electronic Signature and Records Association's Annual Conference](#), November 14-15, 2012, in Washington, DC. Ms. Tank's panel will discuss electronic signatures and mobile technology.

[Andrew Sandler](#) will participate in an American Bankers Association telephone briefing entitled "[Fair Lending and HMDA Update](#)" on November 28, 2012. The briefing, which also will feature representatives from the CFPB, the Federal Reserve Board, and the FDIC, will review the 2011 HMDA data, the CFPB's role in HMDA data collection, fair lending enforcement trends, and other fair lending topics.

[James Shreve](#) will speak at the American Conference Institute's [Advanced Forum on International & Cross-Border Payments](#) on November 28, 2012 in New York. The panel, "Managing Privacy and Data Security Risks on a Global Scale," will address US and international compliance issues relating to payment systems.

[Valerie Hletko](#) will participate in [PLI's Banking Law Institute 2012](#), on December 5, 2012, in New York, NY. Ms. Hletko's panel is entitled "Major Non-Consumer Litigation/Enforcement and Consumer Financial Protection Supervision and Enforcement." Panelists, including Kent Markus of the CFPB, will review topics ranging from mortgage servicing enforcement to anti-money laundering enforcement.

[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."

[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.

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

[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.

FIRM PUBLICATIONS

[Jonice Gray Tucker](#) and [Jeff Naimon](#) wrote "Liability for Servicers: Localities Jump in the Game," which appears in *Mortgage Servicing News*' October 2012 issue.

[Jonice Gray Tucker](#) and [Lori Sommerfield](#) authored "Consumer Complaint Management: Meeting Regulatory Expectations," which was published in the October 2012 edition of *The Review of Banking & Financial Services*.

[Andrea Mitchell](#) and [Lori Sommerfield](#) authored "'Red Flags' For Fair Lending Risk - How Banks Can Identify and Resolve Them" for the [American Association of Bank Directors](#).

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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Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (310) 424-3900

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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.

In addition, please feel free to email our attorneys. [A list of attorneys can be found here.](#)

For back issues of InfoBytes, please see: <http://www.buckleysandler.com/infobytes/infobytes>.

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MORTGAGES

Fannie Mae, Freddie Mac Announce Additional Storm Relief Measures. On November 9, [Fannie Mae](#) and [Freddie Mac](#) announced that effective immediately servicers can suspend for 90 days evictions and foreclosures involving borrowers affected by Hurricane Sandy in order to assess the borrowers' situations. In addition, next week Fannie Mae and Freddie Mac will issue guidance to servicers to expand the options they can offer to homeowners impacted by the hurricane. Under the new Fannie Mae guidance, servicers will be authorized to (i) extend forbearance for up to 12 months, where appropriate, (ii) provide loan modifications, once the homeowner is able to resume monthly mortgage payments, (iii) waive any late payment charges, (iv) suspend credit reporting for any homeowner for whom relief is granted, and (v) delay the initiation of any foreclosure action to determine the condition of the property and the borrower's employment and income status. Freddie Mac's policy changes will authorize servicers to (i) automatically suspend for 90-days evictions and foreclosure sales for borrowers with homes secured by Freddie Mac owned-or guaranteed mortgages and located in eligible disaster areas, (ii) verbally grant 90-day forbearances to all borrowers in eligible disaster areas, including borrowers with mortgages modified under HAMP or who are currently in a HAMP or Standard Modification Trial Period Plan, and (iii) expedite the distribution of insurance proceeds on storm damage claims. Additionally, Freddie Mac will maintain pricing that was in place at the time of the storm for mortgages that are secured by homes in eligible

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(FCA) and the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). In response, the bank has asked [the court overseeing the national servicer settlement](#) to enforce the [Consent Judgment](#) the bank entered, which the bank notes includes a comprehensive release for certain liability with respect to its alleged FHA mortgage lending conduct. The bank argues that the release specifically releases liability arising under the FCA and FIRREA for its alleged FHA-certification conduct. The bank seeks declaratory relief with respect to its rights under the servicing settlement, as well as an order enjoining the federal government from pursuing its case in New York. Wells Fargo's motion indicates that the government plans to oppose the motion.

Federal District Court Dismisses Borrowers' Subprime Lending RICO Claims. On October 30, the U.S. District Court of the Northern District of California [dismissed](#), without prejudice, claims brought by two borrowers alleging that their mortgage lender engaged in fraudulent loan practices which violated RICO. The court held that the claims were time-barred and that the complaint failed to allege facts about predicate acts and a pattern of activity necessary to sustain a civil RICO claim. *Cabrera v. Countrywide Fin.*, No. 11-4869, 2012 WL 5372116 (N.D. Cal. Oct. 30, 2012). The court rejected the borrowers' arguments that (i) the statute of limitations began to run not from the date they entered into their adjustable rate mortgage, but from the date the rate adjusted, and (ii) equitable tolling should apply because the borrowers' could not have discovered their adjusted rate absent a forensic loan audit they obtained years into the contract. With regard to equitable tolling, the court held that the plain terms of the mortgage provide information about the rate at issue, which could have been uncovered by "a reasonably diligent investigation of the loan documents." The court similarly dismissed the borrowers' claims that the lender discriminated against minority borrowers in violation of the ECOA, as time-barred. It also held that the borrowers, who are Hispanic, failed to state a claim under ECOA in that, although they offered statistical evidence that Hispanics were given less favorable loans than white borrowers with the same risk characteristics, they failed to allege that they themselves qualified for better loans. The borrowers' claim of unfair business practices under the state's unfair competition law survived. The court held that the borrowers pled facts sufficient to support their claim that the lender's effort to initiate a foreclosure while a loan modification was pending violated public policy reflected in the California Homeowner Bill of Rights, even though the specific provision of that statute that prohibits such practices was not codified until after the foreclosure occurred.

Lender Wins Dismissal of Force-Placed Insurance Class Action. On October 30, the U.S. District Court for the Northern District of California [dismissed](#) a putative class action alleging that the lender breached certain mortgage contracts and violated state and federal law through its policy and practices requiring borrowers to maintain flood insurance sufficient to cover the replacement value of their homes. *McKenzie v. Wells Fargo Home Mortg., Inc.*, No. 11-4965, 2012 WL 5372120 (N.D. Cal. Oct. 30, 2012). The borrowers claim that the FHA requirement that flood insurance must cover the remaining balance of the mortgage served as a cap on the flood insurance amounts the lender could require. Declining to follow the reasoning of the court in [Kolbe v. BAC Home Loans Servicing, LP](#), No. 11-2030, 2012 WL 4240298 (1st Cir. Sep. 21, 2012), the *McKenzie* court held that because the deeds of trust authorized the lender to set the required level of insurance and the FHA requirement is a statutory floor, the lender did not breach the mortgage contracts by requiring coverage above the outstanding principal loan balance. Therefore, the court dismissed those claims with prejudice. For the same reasons, the court dismissed with prejudice the borrowers' claims that letters sent to the borrowers notifying them of insufficient coverage altered the terms of their loans and required the lender to make additional disclosures under TILA. The court dismissed, with one opportunity to amend, claims that the lender breached the contract by force-placing insurance through an affiliate that charged excessive amounts allegedly in exchange for kickbacks.

BANKING

Banking Regulators Provide Guidance on Basel III Implementation Timeline, Congress Offers Additional Responses to Basel III Proposals. On November 9, the Federal Reserve Board, the OCC, and the FDIC [announced](#) that proposed rules to implement the Basel III regulatory capital accords will not take effect on January 1, 2013. The agencies cite the large volume of comments received in response to the proposed rules as the reason for the delay. Recently, members of three states' congressional delegations joined others in submitting letters to the federal banking regulators in response to the proposed Basel III regulations. The letters all raise concerns about the potential disproportionate impact of the proposed rules on smaller, community and regional institutions, and challenge the attempt by regulators to apply international accords to all U.S. institutions regardless of size. Members of the Texas delegation [focused](#) on provisions that would require all unrealized gains and losses on available-for-sale securities to flow through to common Tier-1 equity, which the lawmakers believe will require community banks to divert capital resources from customer services and bank growth. Indiana Members [added concerns](#) about the effect of proposed excessive risk weighting and restrictions on dividends and discretionary bonuses, while Members from South Carolina [echoed](#) general concerns about the impact of the proposals on community banks. These legislators join other federal and state policymakers who have [submitted similar comments](#) in recent weeks. Scrutiny of the proposals will continue next week with a Senate Banking Committee [hearing planned](#) for November 14, 2012 to review the pending rules with representatives from the Federal Reserve Board, the OCC, and the FDIC.

NCUA Releases New National Supervision Policy Manual. On November 2, the NCUA [released](#) a public version of its new [National Supervision Policy Manual](#), which describes the agency's internal operations and procedures for supervisory staff. Certain sensitive portions of the Manual remain confidential. The release completes a two-year process to create uniform national procedures for NCUA's supervisory staff that are expected to improve examination consistency.

HUD and Banking Regulators Offer Borrower and Institution Relief Following Hurricane Sandy. Over the past week, HUD has made a series of announcements regarding housing relief for individuals displaced by Hurricane Sandy. For example, on October 30 HUD [granted](#) a 90-day moratorium on foreclosures and forbearance on foreclosures of FHA-insured mortgages. Similar announcements have followed for victims in [New York](#), [Connecticut](#), and [Rhode Island](#). Also on October 30, the Federal Reserve Board, the OCC, and the FDIC issued a [statement](#) on supervisory practices impacted by the hurricane. For example, the regulators stated that "prudent efforts to adjust or alter terms on existing loans in affected areas should not be subject to examiner criticism."

OCC Designates Two Senior National Bank Examiners. On November 5, the OCC [designated](#) William D. Haas and Scott J. Wilson as Senior National Bank Examiners, the highest honor for national bank examiners. Mr. Haas joined the OCC in 1984 and currently serves as the Deputy Comptroller for Midsize Bank Supervision. Mr. Wilson joined the OCC in 1985 and is currently the Examiner-in-Charge of one of the nation's largest financial institutions.

Pennsylvania Enacts Package of Bills to Modernize Banking Law. On October 24, Pennsylvania enacted three bills that together make numerous substantive and technical changes to upgrade and modernize the state's banking code, all of which take effect December 23, 2012. [HB 2368](#) updates commercial, mortgage, and consumer lending provisions of the code by, among other things, removing conflicting and outdated lending provisions, and reflecting current lending interest rates and fees. This bill also (i) adds provisions required by the Dodd-Frank Act with regard to lending limits that require state financial regulators to consider credit exposure to derivative transactions, (ii) increases penalties for unlawful lending and trust activities to a felony and a \$10,000 to \$500,000 fine, and (iii) removes the current two-person cap on the number of individuals

who can be beneficiaries of deposit accounts. [HB 2369](#) provides for greater public disclosure and enforcement by the Department of Banking, and clarifies the Department's examination authority over bank subsidiaries. It also allows the Department to assess civil money penalties against individuals and institutions for conduct that causes the institution to suffer substantial financial loss, is willful, flagrant or evidences bad faith, involves an insider who benefits in a substantial way, or does not comply with previous supervisory actions involving violations. The bill allows the Department to publicly disclose enforcement actions against depository institutions and their employees, and expands the Department's authority to remove officers and employees from bank management and boards whenever such individuals violate any law or Department order. HB 2369 also requires any state or local government agency that proposes civil enforcement of a law or ordinance against a bank to consult with and receive approval from the Department prior to enforcement. [HB 2370](#) repeals certain sections of the state's general usury law that duplicate TILA's variable rate mortgage loan disclosures. It also adds savings banks to the list of institutions subject to maximum interest rate provisions and clarifies that the maximum rate is the rate authorized by federal or state law.

CONSUMER FINANCE

FTC Loses Motion in Unfair Billing Case Against Online Payday Loan Referral Service. On November 7, the U.S. District Court for the Middle District of Florida [held](#) that numerous factual issues prevented the court from granting summary judgment on the FTC's claims that an online payday loan referral business engaged in unfair and deceptive billing practices and failed to provide adequate disclosures. *FTC v. Direct Benefits Group, LLC*, No 11-1186, 2012 WL 5430989 (M.D. Fla. Nov. 7, 2012). The FTC [alleges](#) that the defendants violated the FTC Act by obtaining consumers' bank account information through payday loan referral websites and debiting their accounts without their consent. The FTC also alleges that the defendants failed to adequately disclose that, in addition to using consumers' financial information for a payday loan application, they would use it to charge them for enrollments in unrelated programs and services. Although it acknowledged that the FTC had presented substantial evidence regarding consumer complaints about the defendants' activities, the court held that because the defendants maintain that no consumer could be enrolled in the programs without at least clicking an "okay" button on the defendants' websites, the FTC was not entitled to summary judgment. A bench trial is scheduled for November 27, 2012, during which the parties will present additional evidence and arguments regarding the content and operation of the websites and whether consumers could enroll in the referral programs without taking affirmative steps to do so.

CREDIT CARDS

FTC and States Target "Cardholder Services" Robocalls. On November 1, the FTC [announced](#) that courts have granted temporary restraining orders in five cases in which the FTC alleged that the defendants placed automated calls to consumers to make allegedly deceptive "no-risk" offers to substantially reduce the consumers' credit card interest rates in exchange for an upfront fee. The telemarketers claimed to be calling from the consumers' credit card company, or otherwise used the generic "Cardholder Services" title to suggest a relationship with a bank or credit card company, the FTC says. Each complaint alleges that the defendants violated the FTC Act by misrepresenting that consumers who buy their services will have their credit card interest rates reduced substantially and will save thousands of dollars as a result. Four of the five complaints also charge that the defendants violated the FTC Act by making other misrepresentations, such as promises of faster debt payoff. The FTC also charges that the defendants violated the Telemarketing Sales Rule (TSR) by misrepresenting their services, calling numbers on the Do Not Call Registry, making illegal

robocalls, and collecting up-front fees. The FTC coordinated with multiple state entities, including the attorneys general of Arizona and Arkansas and the Florida Department of Agriculture and Consumer Services, each of which took separate actions against other companies for similar alleged activities.

E-COMMERCE

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PRIVACY/DATA SECURITY

House Members Release Data Brokers' Responses to Congressional Inquiry. On November 8, a bipartisan group of lawmakers [released](#) the responses of nine firms the lawmakers [targeted in July 2012](#) as "major data brokerage companies" and from which the members sought information about how each firm collects, uses, and protects consumer data. Representative Markey (D-MA) who is leading the inquiry of these firms characterized the responses as incomplete, particularly with regard to how the firms analyze personal information to categorize and rate consumers. Last month, Senator Rockefeller (D-WV) [initiated](#) a similar review of data broker practices.

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