Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

September 14, 2012

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

FHFA, Fannie Mae, and Freddie Mac Implement New Representation and Warranty Framework. On September 11, the FHFA announced that Fannie Mae and Freddie Mac (the GSEs) are implementing a new representation and warranty framework for all conventional loans sold or delivered to the GSEs on or after January 1, 2013. As detailed in subsequent announcements from the GSEs, including Fannie Mae Selling Guide Announcement SEL-2012-08, Fannie Mae Lender Letter LL-2012-05, Freddie Mac Bulletin 2012-18, and a Freddie Mac Industry Letter, the new framework is designed to improve the GSE loan review process and to clarify lenders' repurchase exposure. With regard to loan review, under the new framework, (i) GSE reviews will generally be conducted between 30 and 120 days after loan purchase, (ii) the GSEs will have consistent timelines for submission of loan file review requests, (iii) loan file evaluation will be more comprehensive and will leverage data from tools currently used by the GSEs, and (iv) the repurchase request appeals process will be made more transparent. For lenders, the new framework will provide relief from certain repurchase obligations for loans that meet specific payment requirements, including for loans with 36 consecutive months of timely payments and HARP loans with a twelve-month acceptable payment history. Lenders will receive additional detailed information about exclusions from this new representation and warranty relief.

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REO properties in the pilot program through which the FHFA is selling foreclosed properties to be transitioned into rental housing.

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Kimberly Hebb from the OCC offered some considerations for institutions seeking to comply with SCRA. She explained that the SCRA compliance process need not stand alone. For example, with regard to the law's rate reduction requirements, compliance steps could be incorporated into existing processes for error resolution. Ms. Hebb also stressed documentation and record keeping, pointing out that while the law does not include a specific record retention requirement, examiners will want to see the full scope of compliance processes documented for use in determining compliance.

FinCEN Launches New Data Portal for Law Enforcement Authorities. On September 10, FinCEN announced that its new search application providing access to data collected and maintained by FinCEN is now available for use by authorized users from other state and federal law enforcement and regulatory authorities. FinCEN has completed a series of meetings with other law enforcement officials to introduce them to FinCEN Query, a tool that will allow those authorities to access and analyze eleven years of data collected by FinCEN through its enforcement of the Bank Secrecy Act. The new tool replaces the existing database with updated technology to provide more complex search and analysis capabilities.

House Members Introduce Mobile Device Privacy Legislation. On September 12, Representatives Edward Markey (D-MA) and Diana DeGette (D-CO) unveiled new legislation to establish consumer privacy protections with regard to mobile applications. The Mobile Device Privacy Act(H.R. 6377) would direct the FTC to promulgate regulations that require upfront disclosure of (i) the existence of any monitoring software on a device, (ii) the types of information that could be collected, (iii) the identity of those with access to the collected information, and (iv) the expected use of the information. Prior consumer consent to the collection of information and procedures for enabling consenting device owners to stop such collection would also be required. In addition, the bill would mandate information security practices in connection with information collected from mobile device users, and establish an enforcement regime involving both the FTC and the FCC, as well as state attorneys general and private suits.

CFPB Announces Advisory Board Members. On September 12, the CFPB announced the members of three new advisory panels: (i) the Consumer Advisory Board, (ii) the Community Bank Advisory Council, and (iii) the Credit Union Advisory Council. The Consumer Advisory Board is comprised of twenty-five experts from outside of government. Pursuant to the Dodd-Frank Act, it is required to meet at least twice each year and to provide the CFPB with advice "in the exercise of its functions under the Federal consumer financial laws" and "information on emerging practices in the consumer financial products or services industry, including regional trends." The first Consumer Advisory Board meetings will be held on September 27 and 28, 2012. The community bank and credit union councils will advise the CFPB with regard to the impact of its regulations on their respective groups. Additional information about these and other CFPB advisory boards and councils is available on the CFPB's website.

SEC Names New Deputy Director of Compliance Inspection and Examinations. On September 12, the SEC announced Andrew J. Bowden as the new Deputy Director of the Office of Compliance Inspections and Examinations (OCIE). Mr. Bowden has been with the SEC since November 2011 as the National Associate Director for OCIE's Investment Adviser/Investment Company Examination Program. Prior to joining the SEC, Mr. Bowden was a lawyer in private practice. He replaces Norm Champ who became the Director of the Division of Investment Management in July.

STATE ISSUES

California Amends Mortgage Licensing Statute. On September 7, California enacted Assembly Bill 2666, which updates and clarifies portions of the state's Residential Mortgage Lending Act and Finance Lenders Law to parallel federal implementation of the SAFE Act. The bill requires licensing of individuals who engage in the business of a mortgage loan originator, and sets forth exemptions

for employees of nonprofit organizations and government employees. The bill also clarifies requirements for subsidiaries of depository institutions owned and controlled by federally regulated depository institutions, and addresses the validity of certain NMLS records.

Oregon Updates Check Cashing Regulations, Adopts Rules Allowing Bank Interest Rate Swaps. Recently, the Oregon Department of Consumer and Business Services published final rules to update certain rules applicable to check cashing businesses. The adopted regulations simplify reporting requirements and reduce the data that licensees must include in annual reports. In the same publication, the Department adopted temporary rules granting Oregon commercial banks authority to engage in interest rate swap transactions as intermediary with and on behalf of the bank's customers, provided the bank receives prior written approval from the Director of the Department of Consumer and Business Services and other specified conditions are satisfied .

Montana Adopts Mortgage Servicer Regulations. On September 6, the Montana Department of Administration published final rules governing mortgage servicers. In 2011, Montana enacted House Bill 90, which made numerous revisions to the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act concerning the licensing and regulation of mortgage servicers. The bill also updated licensing and other requirements for brokers, lenders and originators. The new regulations implement these amendments, addressing mortgage servicer (i) quarterly reporting requirements, (ii) record keeping requirements and electronic record keeping rules, (iii) renewal application deadlines, and (iv) escrow fund requirements. The final rules also amend existing regulatory definitions and other provisions impacting all mortgage licensees. The adopted regulations largely track the proposed versions, with the exception of changes made in response to comments or to address technical issues.

COURTS

Second Circuit Holds Email Notice of Arbitration Agreement Insufficient. On September 7, the U.S. Court of Appeals for the Second Circuit held that three plaintiff consumers were not bound to arbitrate certain claims related to their purchase of a discount club membership because email notice of the arbitration clause was insufficient. *Schnabel v. Trilegiant Corp.*, No. 11-1311 WL 3871366 (2nd Cir. Sep. 7, 2012). On appeal of the district court's denial of its motion to compel arbitration, the membership club marketer argued that it provided the plaintiffs with notice of an arbitration provision (i) through a hyperlink appearing on the page the plaintiffs would have seen before enrolling in a service offered by the defendants and (ii) through an email sent to the plaintiffs after their enrollment. The Second Circuit disagreed and affirmed the district court's decision. According to the court, the email notice containing the arbitration clause "was both temporally and spatially decoupled from the plaintiffs' enrollment in and use of [the membership]; the term was delivered after initial enrollment and . . . members such as the plaintiffs would not be forced to confront the terms while enrolling in or using the service or maintaining their memberships." As such, "the email did not provide sufficient notice to the plaintiffs of the arbitration provision, and the plaintiffs therefore could not have assented to it solely as a result of their failure to cancel their enrollment in the defendants' service." The court did not provide a substantive ruling on notice via a hyperlink, holding instead that the defendants forfeited their argument by failing to raise it in the district court.

Ohio Supreme Court Holds Website Notice of Sheriff's Sale Does Not Satisfy Due Process. On September 6, the Supreme Court of Ohio held that notice of a sheriff's sale via the sheriff's website was insufficient to satisfy due process and reversed an appellate court decision that denied a foreclosing lender's motion to set aside the sheriff's sale. *PHH Mortg. Corp. v. Prater,* No. CA2010-12-095, WL 3848454 (Ohio Sept. 6, 2012). The lender obtained a motion for default judgment and permission to foreclose on a borrower. The sheriff's office tried multiple times to

schedule a sale and each time withdrew the sale at the lender's request. The sheriff's office informed the lender in a letter that the sheriff's office no longer would send notices of scheduled sales via letter, and that the lender would need to check the sheriff's website for future notices. Notice subsequently was posted on the website and the property was sold. Both the trial court and intermediate appellate court denied the lender's request to set aside the sale. The lender argued that the sale was invalid because it had not received written notice. In a unanimous decision, the Ohio Supreme Court held that the notice directing the lender to check the sheriff's website was notice of a change in procedure and did not constitute actual notice of the sale. While the court acknowledged that Internet publication may conserve resources, it held that such notice is akin to newspaper notice and is insufficient to satisfy due process. The court agreed with a dissenting appellate court judge who identified e-mail notice as a closer substitute for mail notice, and explained that, in any event, such a change in notice requirements would have to be effectuated through a change to state or local law. The court reversed the appellate court's decision and set aside the sheriff's sale.

Federal District Court Holds TILA Supports Vicarious Liability for Creditors. On August 30, The U.S. District Court for the Southern District of Florida held that a creditor may be vicariously liable for certain Truth in Lending Act (TILA) violations committed by its servicer. *Kissinger v. Wells Fargo Bank, N.A.* No. 12-60878, 2012 WL 3759034 (S.D. Fla. Aug. 30, 2012). In this case, a creditor sought to dismiss two borrowers' complaint alleging that the creditor was liable for its servicer's failure to provide information the borrowers requested about the owner of the promissory note. In response to the borrowers' request, the servicer had provided the name of the owner of the note, along with the servicer's address and telephone number. The borrowers claimed that the servicer's failure to provide the owner's address and telephone number constituted a violation of TILA. The creditor argued the case should be dismissed because TILA does not support vicarious liability, and in any event, the servicer was acting as a master servicer and was allowed under TILA to provide its own contact information. The court rejected the latter argument as one not suited to a decision on the law at this stage, ruling that the creditor must reserve the argument as a defense to be raised later. With regard to vicarious liability, the court relied in part on *Davis v. Greenpoint Mortg. Funding, Inc.*, No 09-2719, 2011 WL 7070221 (N.D. Ga. Mar. 1, 2011), which held that a finding of no vicarious liability for creditors would render TILA's private right of action clause superfluous. The court thus held that TILA allows the application of agency principles so that creditors can be held liable for the actions of their servicers. Declining to follow another Florida case, *Holcomb v. Fed. Home Loan Mortg. Corp.*, No 10-81186, 2011 WL 5080324 (S.D. Fla. Oct. 26, 2011) --which held Congress did not intend to apply agency principles to TILA -- the court denied the creditor's motion to dismiss.

Federal District Court Declines to Enforce Browsewrap Arbitration Agreement. On August 28, the U.S. District Court for the Central District of California held that a retailer's so-called browsewrap agreement failed to provide the consumer with constructive notice of an agreement to arbitrate disputes and declined to enforce arbitration. *Nguyen v. Barnes & Noble, Inc.*, No 12-0812, WL3711081 (C.D. Cal. Aug. 28, 2012). The consumer filed suit under New York's and California's unfair competition and false advertising laws and other state statutes, alleging that the retailer canceled his online purchase of two sale items, causing him to have to later purchase substitute products at more expense. The retailer responded that by making the purchase through the company's website, the consumer accepted the website's Terms of Use, which contained an agreement to arbitrate any claims arising out of the use of that website. On the retailer's motion to compel arbitration, the court explained that the website's browsewrap agreement stated that any user of the site is deemed to have accepted its terms by, among other things, making a purchase. The court held that the retailer cannot show that the consumer had constructive notice of the Terms of Use because the site did not require that the consumer affirmatively assent to the terms. The

court denied the retailer's motion to compel arbitration and allowed the litigation to proceed.

MISCELLANY

UK's FSA Publishes Consultation Paper on Regulatory Reform Implementation. On September 12, in advance of expected legislation that will restructure the United Kingdom's financial services regulatory framework, the Financial Services Authority (FSA) published the first in a series of Consultation Papers meant to support implementation of the reforms. The Parliament is expected to finalize later this year the Financial Services Bill that will abolish the FSA, create the Financial Conduct Authority (FCA) to regulate financial service provider conduct in retail and wholesale markets, and shift safety and soundness regulation to the new Prudential Regulation Authority (PRA), among other changes. The first Consultation Paper outlines changes to split the existing FSA handbook into new rulebooks for the FCA and PRA. All regulated firms are encouraged to review the Consultation Paper, and the FSA has asked for comments to be submitted by December 12, 2012.

FIRM NEWS

Margo Tank, Jim Shreve, and Ryan Pollard will present a Practicing Law Institute webinar titled "Mobile Payments Compliance: Unique Disclosure, Advertising, and Money Transmission Issues" on September 19, 2012.
Andrew Sandler will speak at the Public Policy Conference on Using Disparate Impact Analysis to Establish Discrimination in Lending, to be held at The National Press Club on Thursday, September 20, 2012. The conference is presented by the Law & Economics Center at George Mason University School of Law.
Jeff Naimon will speak on a panel at the Mortgage Bankers Association's Regulatory Compliance Conference on October 2, 2012. The panel is entitled "Government Program and Secondary Market Changes and Challenges."
Melissa Klimkiewiczand Jon Langloiswill 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 American Bar Association'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.
Jeff Naimon will be an instructor at the American Bar Association Consumer Financial Services Committee's Third Annual National Institute on Consumer Financial Services Basics on October 9, 2012. He will be co-presenting "Fair Lending" with Patrice Ficklin of the CFPB.
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 will participate on a panel at The American Bar Association's Fifth Annual National Institute on the Foreign Corrupt Practices Act, being held October 17 - 19, 2012 at The Westin Georgetown. Mr. Krakoff's session on October 18, 2012 is titled "The Trial of an FCPA Case: Pitfalls and Pratfalls."
Thomas Sporkin will speak at the Securities Enforcement Forum 2012on 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.
Margo Tank will speak at the ACORD Implementation Forum in Ft. Lauderdale, FL on October 24, 2012. Ms. Tank's panel is titled "Guidelines for e-Signatures and e-Delivery in the Insurance - Cutting through the Legalese."
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.
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.
David Krakoff will speak at ACI's Inaugural Summit on White Collar Litigation being held January 23-24, 2013, in New York, NY. Mr. Krakoff will participate in the session entitled "FCPA Case Review: A Hands-On Look at the Year in the FCPA and What Litigators Need to Take Away."

FIRM PUBLICATIONS

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."
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.
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.
David Krakoff and Lauren Randell authored "FCPA: Were the Sting Trials Doomed from the Start?" for the September 1, 2012 Law Journal Newsletters - Business Crimes Bulletin.

About BuckleySandler LLP (www.buckleysandler.com)

With over 150 lawyers in Washington, Los Angeles, New York, and Orange County, BuckleySandler provides best-in-class legal counsel to meet the challenges of its financial services industry and other corproate 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 institution. "The best at what they do in the country." (Chambers USA).

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New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400
Orange County: 3121 Michelson Drive, Suite 210, Irvine, CA 92612,(949)398-1360
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.

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depository institutions, and addresses the validity of certain NMLS records.

Montana Adopts Mortgage Servicer Regulations. On September 6, the Montana Department of Administration published final rules governing mortgage servicers. In 2011, Montana enacted House Bill 90, which made numerous revisions to the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act concerning the licensing and regulation of mortgage servicers. The bill also updated licensing and other requirements for brokers, lenders and originators. The new regulations implement these amendments, addressing mortgage servicer (i) quarterly reporting requirements, (ii) record keeping requirements and electronic record keeping rules, (iii) renewal application deadlines, and (iv) escrow fund requirements. The final rules also amend existing regulatory definitions and other provisions impacting all mortgage licensees. The adopted regulations largely track the proposed versions, with the exception of changes made in response to comments or to address technical issues.

Ohio Supreme Court Holds Website Notice of Sheriff's Sale Does Not Satisfy Due Process. On September 6, the Supreme Court of Ohio held that notice of a sheriff's sale via the sheriff's website was insufficient to satisfy due process and reversed an appellate court decision that denied a foreclosing lender's motion to set aside the sheriff's sale. *PHH Mortg. Corp. v. Prater,* No. CA2010-12-095, WL 3848454 (Ohio Sept. 6, 2012). The lender obtained a motion for default judgment and permission to foreclose on a borrower. The sheriff's office tried multiple times to schedule a sale and each time withdrew the sale at the lender's request. The sheriff's office informed the lender in a letter that the sheriff's office no longer would send notices of scheduled sales via letter, and that the lender would need to check the sheriff's website for future notices. Notice subsequently was posted on the website and the property was sold. Both the trial court and intermediate appellate court denied the lender's request to set aside the sale. The lender argued that the sale was invalid because it had not received written notice. In a unanimous decision, the Ohio Supreme Court held that the notice directing the lender to check the sheriff's website was notice of a change in procedure and did not constitute actual notice of the sale. While the court acknowledged that Internet publication may conserve resources, it held that such notice is akin to newspaper notice and is insufficient to satisfy due process. The court agreed with a dissenting appellate court judge who identified e-mail notice as a closer substitute for mail notice, and explained that, in any event, such a change in notice requirements would have to be effectuated through a change to state or local law. The court reversed the appellate court's decision and set aside the sheriff's sale.

Federal District Court Holds TILA Supports Vicarious Liability for Creditors. On August 30, The U.S. District Court for the Southern District of Florida held that a creditor may be vicariously liable for certain Truth in Lending Act (TILA) violations committed by its servicer. *Kissinger v. Wells Fargo Bank, N.A.* No. 12-60878, 2012 WL 3759034 (S.D. Fla. Aug. 30, 2012). In this case, a creditor sought to dismiss two borrowers' complaint alleging that the creditor was liable for its servicer's failure to provide information the borrowers requested about the owner of the promissory note. In response to the borrowers' request, the servicer had provided the name of the owner of the note, along with the servicer's address and telephone number. The borrowers claimed that the servicer's failure to provide the owner's address and telephone number constituted a violation of TILA. The creditor argued the case should be dismissed because TILA does not support vicarious liability, and in any event, the servicer was acting as a master servicer and was allowed under TILA to provide its own contact information. The court rejected the latter argument as one not suited to a decision on the law at this stage, ruling that the creditor must reserve the argument as a defense to be raised later. With regard to vicarious liability, the court relied in part on *Davis v. Greenpoint Mortg. Funding, Inc.*, No 09-2719, 2011 WL 7070221 (N.D. Ga. Mar. 1, 2011), which held that a finding of no vicarious liability for creditors would render TILA's private right of action clause superfluous. The court thus held that TILA allows the application of agency principles so that

creditors can be held liable for the actions of their servicers. Declining to follow another Florida case, *Holcomb v. Fed. Home Loan Mortg. Corp.*, No 10-81186, 2011 WL 5080324 (S.D. Fla. Oct. 26, 2011) --which held Congress did not intend to apply agency principles to TILA -- the court denied the creditor's motion to dismiss.

BANKING

FinCEN Launches New Data Portal for Law Enforcement Authorities. On September 10, FinCEN announced that its new search application providing access to data collected and maintained by FinCEN is now available for use by authorized users from other state and federal law enforcement and regulatory authorities. FinCEN has completed a series of meetings with other law enforcement officials to introduce them to FinCEN Query, a tool that will allow those authorities to access and analyze eleven years of data collected by FinCEN through its enforcement of the Bank Secrecy Act. The new tool replaces the existing database with updated technology to provide more complex search and analysis capabilities.

Oregon Updates Check Cashing Regulations, Adopts Rules Allowing Bank Interest Rate Swaps. Recently, the Oregon Department of Consumer and Business Services published final rules to update certain rules applicable to check cashing businesses. The adopted regulations simplify reporting requirements and reduce the data that licensees must include in annual reports. In the same publication, the Department adopted temporary rules granting Oregon commercial banks authority to engage in interest rate swap transactions as intermediary with and on behalf of the bank's customers, provided the bank receives prior written approval from the Director of the Department of Consumer and Business Services and other specified conditions are satisfied.

UK's FSA Publishes Consultation Paper on Regulatory Reform Implementation. On September 12, in advance of expected legislation that will restructure the United Kingdom's financial services regulatory framework, the Financial Services Authority (FSA) published the first in a series of Consultation Papers meant to support implementation of the reforms. The Parliament is expected to finalize later this year the Financial Services Bill that will abolish the FSA, create the Financial Conduct Authority (FCA) to regulate financial service provider conduct in retail and wholesale markets, and shift safety and soundness regulation to the new Prudential Regulation Authority (PRA), among other changes. The first Consultation Paper outlines changes to split the existing FSA handbook into new rulebooks for the FCA and PRA. All regulated firms are encouraged to review the Consultation Paper, and the FSA has asked for comments to be submitted by December 12, 2012.

CONSUMER FINANCE

Federal Regulators Host Webinar on SCRA Compliance. On September 10, federal banking regulators, the CFPB, and the FHFA conducted a webinar on federal servicemember financial protections, recent changes to the Servicemembers' Civil Relief Act (SCRA), and recent changes to Fannie Mae and Freddie Mac short sale procedures for servicemembers and loan modification options for servicemembers. The event featured compliance and enforcement updates from the CFPB, the DOJ, and the OCC. Ann Thompson from the CFPB Office of Nonbank Supervision described recent joint agency guidanceregarding servicemembers with Permanent Change of Station (PCS) Orders as an extension of the CFPB's mortgage servicing exam procedures. Ms. Thompson explained that the CFPB will look at bank and nonbank servicers' policies and procedures to determine their adequacy for handling servicemembers with PCS orders. If there are deficiencies, the CFPB may take supervisory or enforcement actions to support implementation of the guidance. Eric Halperin from the DOJ's fair lending unit provided an update on enforcement

activity and described a recent SCRA enforcement action against a national bank that covered all aspects of SCRA, not just foreclosure protections, as the model for the DOJ moving forward. Finally, Kimberly Hebb from the OCC offered some considerations for institutions seeking to comply with SCRA. She explained that the SCRA compliance process need not stand alone. For example, with regard to the law's rate reduction requirements, compliance steps could be incorporated into existing processes for error resolution. Ms. Hebb also stressed documentation and record keeping, pointing out that while the law does not include a specific record retention requirement, examiners will want to see the full scope of compliance processes documented for use in determining compliance.

CFPB Announces Advisory Board Members. On September 12, the CFPB announced the members of three new advisory panels: (i) the Consumer Advisory Board, (ii) the Community Bank Advisory Council, and (iii) the Credit Union Advisory Council. The Consumer Advisory Board is comprised of twenty-five experts from outside of government. Pursuant to the Dodd-Frank Act, it is required to meet at least twice each year and to provide the CFPB with advice "in the exercise of its functions under the Federal consumer financial laws" and "information on emerging practices in the consumer financial products or services industry, including regional trends." The first Consumer Advisory Board meetings will be held on September 27 and 28, 2012. The community bank and credit union councils will advise the CFPB with regard to the impact of its regulations on their respective groups. Additional information about these and other CFPB advisory boards and councils is available on the CFPB's website.

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SECURITIES

SEC Names New Deputy Director of Compliance Inspection and Examinations. On September 12, the SEC announced Andrew J. Bowden as the new Deputy Director of the Office of Compliance Inspections and Examinations (OCIE). Mr. Bowden has been with the SEC since November 2011 as the National Associate Director for OCIE's Investment Adviser/Investment Company Examination Program. Prior to joining the SEC, Mr. Bowden was a lawyer in private practice. He replaces Norm Champ who became the Director of the Division of Investment Management in July.

E-COMMERCE

House Members Introduce Mobile Device Privacy Legislation. On September 12, Representatives Edward Markey (D-MA) and Diana DeGette (D-CO) unveiled new legislation to establish consumer privacy protections with regard to mobile applications. The Mobile Device Privacy Act (H.R. 6377) would direct the FTC to promulgate regulations that require upfront disclosure of (i) the existence of any monitoring software on a device, (ii) the types of information that could be collected, (iii) the identity of those with access to the collected information, and (iv) the expected use of the information. Prior consumer consent to the collection of information and procedures for enabling consenting device owners to stop such collection would also be required. In addition, the bill would mandate information security practices in connection with information collected from mobile device users, and establish an enforcement regime involving both the FTC and the FCC, as well as state attorneys general and private suits.

Second Circuit Holds Email Notice of Arbitration Agreement Insufficient. On September 7, the U.S. Court of Appeals for the Second Circuit held that three plaintiff consumers were not bound to arbitrate certain claims related to their purchase of a discount club membership because email notice of the arbitration clause was insufficient. *Schnabel v. Trilegiant Corp.*, No. 11-1311 WL 3871366 (2nd Cir. Sep. 7, 2012). On appeal of the district court's denial of its motion to compel arbitration, the membership club marketer argued that it provided the plaintiffs with notice of an arbitration provision (i) through a hyperlink appearing on the page the plaintiffs would have seen before enrolling in a service offered by the defendants and (ii) through an email sent to the plaintiffs after their enrollment. The Second Circuit disagreed and affirmed the district court's decision. According to the court, the email notice containing the arbitration clause "was both temporally and spatially decoupled from the plaintiffs' enrollment in and use of [the membership]; the term was delivered after initial enrollment and . . . members such as the plaintiffs would not be forced to confront the terms while enrolling in or using the service or maintaining their memberships." As such, "the email did not provide sufficient notice to the plaintiffs of the arbitration provision, and the plaintiffs therefore could not have assented to it solely as a result of their failure to cancel their enrollment in the defendants' service." The court did not provide a substantive ruling on notice via a hyperlink, holding instead that the defendants forfeited their argument by failing to raise it in the district court.

Federal District Court Declines to Enforce Browsewrap Arbitration Agreement. On August 28, the U.S. District Court for the Central District of California held that a retailer's so-called browsewrap agreement failed to provide the consumer with constructive notice of an agreement to arbitrate disputes and declined to enforce arbitration. *Nguyen v. Barnes & Noble, Inc.*, No 12-0812, WL3711081 (C.D. Cal. Aug. 28, 2012). The consumer filed suit under New York's and California's unfair competition and false advertising laws and other state statutes, alleging that the retailer canceled his online purchase of two sale items, causing him to have to later purchase substitute products at more expense. The retailer responded that by making the purchase through the company's website, the consumer accepted the website's Terms of Use, which contained an agreement to arbitrate any claims arising out of the use of that website. On the retailer's motion to compel arbitration, the court explained that the website's browsewrap agreement stated that any user of the site is deemed to have accepted its terms by, among other things, making a purchase. The court held that the retailer cannot show that the consumer had constructive notice of the Terms of Use because the site did not require that the consumer affirmatively assent to the terms. The court denied the retailer's motion to compel arbitration and allowed thelitigation to proceed.

PRIVACY/DATA SECURITY

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