

February 24, 2012

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InfoBytes Blog

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Federal Issues

CFPB Turns Attention to Bank Overdraft Practices. On February 22, the CFPB launched an inquiry into overdraft practices with a coordinated release of information. The official announcement came during a [CFPB Roundtable discussion](#) at Hunter College in New York City. At that event, [CFPB Director Richard Cordray drew similarities](#) between overdraft practices and payday lending, which was the subject of [a prior CFPB field event](#). Mr. Cordray expressed his "concern[]" that overdraft practices employed by some banks unnecessarily increase consumer costs by making it difficult to anticipate and avoid fees." He also identified some practices the CFPB views as problematic, including those related to (i) ordering of transactions, (ii) missing or confusing information, and (iii) misleading marketing. To address those and other practices, the CFPB [issued a request for information](#) from consumers, third party processors, and financial institutions, regarding overdraft programs and their costs, benefits and risks to consumers. The CFPB also released and is seeking comment on a [prototype "penalty fee box"](#) that would appear on checking account statements to

highlight overdraft activity and fees. Finally, the CFPB is collecting data from several large banks to inform a study of the effects of prior federal regulations and guidance regarding overdraft fees. While conducting these initiatives, Director Cordray promised to employ the CFPB's supervisory and enforcement authorities to take action against financial institutions engaged in deceptive marketing related to overdrafts.

CFPB Convenes Small Business Mortgage Panel and Updates Mortgage Disclosure

Prototypes. On February 21, [the CFPB announced](#) the formation of a small business panel to provide feedback on the Bureau's mortgage disclosure form initiatives, as required under the Small Business Regulatory Enforcement Fairness Act. That law requires that federal agencies gather small business input to help the agencies fulfill the related legal requirement that regulations avoid significant economic impact on a substantial number of small firms. The panel will provide feedback on small business compliance burdens related to the CFPB's proposed mortgage disclosures and related proposed regulations. The CFPB's announcement included the release of several documents that will be shared with the panel, including a [detailed overview of the mortgage disclosure proposals](#) under consideration, a [fact sheet summarizing the review process](#), and an [outline of questions](#) the panel will address. In a [related blog post](#), the CFPB also sought public comment on the proposals to be considered by the small business panel. The formation of the panel follows the CFPB's [recent release](#) of another round of prototype integrated mortgage disclosures. After [several rounds of previous testing](#), the CFPB provides in this most recent release a prototype [loan estimate](#) and [settlement disclosure](#). At this stage, the CFPB no longer is offering multiple versions to compare, but is still testing the prototypes in person while seeking broader public feedback online. The CFPB promises that this is the last round of testing before it turns to crafting a proposed rule.

FTC Seeks Public Input Regarding Motor Vehicle Financing. On February 21, the [FTC issued a reminder](#) that public comments may be submitted through April 1, 2012 as part of the FTC's ongoing project to gather information on consumer experiences in the sale, financing, and leasing of motor vehicles at dealerships. The FTC [held multiple events](#) on the topic last year. A [recent FTC report](#) identified automobile finance as an area of focus in 2012.

White House Privacy Report Pushes for New Laws and Industry Self-Regulation. On February 23, the White House [released a report](#) on consumer privacy, setting out a Consumer Privacy Bill of Rights. The proposed Bill of Rights consists of seven broad principles, including individual control, security, and transparency of data use. [The report asks](#) Congress to codify the recommendations as a statute enforceable by the Federal Trade Commission, and identifies FTC enforcement as critical to ensuring privacy protections. Pending or absent congressional action, the report promises that the Administration will work with the private sector to adopt new protections on voluntary basis. The Administration will hold stakeholder forums to develop legally enforceable codes of conduct. Finally, the report addresses the need for international interoperability and coordination of enforcement.

NIST Publishes Recommendations for Establishing Governance Structure for Implementation of National Trusted Identities Strategy. On February 7, the National Institute of Standards and Technology (NIST) [published a report](#) with recommendations for developing a governance system to implement the [National Strategy for Trusted Identities in Cyberspace \(NSTIC\)](#). The NSTIC directs the

federal government to work with private sector stakeholders to establish and maintain an identity ecosystem for internet transactions aimed at promoting trust, privacy and security. The report summarizes comments received in response to a [June 2011 Notice of Inquiry \(NOI\)](#) that sought public input regarding the establishment and structure of a private sector-led steering group to implement the NSTIC. Based on those comments, stakeholder workshops, and best practices from similar governance efforts, the report presents recommendations in four areas: (i) steering group initiation, (ii) steering group structure, (iii) stakeholder representation, and (iv) international coordination. The report also includes a recommended charter to establish the steering group and notes that, subject to public comment and finalization of the approach outlined in the report, NIST intends to initiate a competitive grant program to fund a secretariat responsible for convening the initial steering group.

FHFA Takes Initiative on Idled Housing Finance Reform. On February 21, the Federal Housing Finance Agency (FHFA) [submitted a strategic plan](#) outlining the next phase of its conservatorship of Fannie Mae and Freddie Mac (the Enterprises). FHFA's plan is in part a response to requests from lawmakers, including requests made during a [December 2011 hearing](#). FHFA states that it will seek to build a new infrastructure for the secondary mortgage market, contract the Enterprises' current market dominance, and maintain the Enterprises' roles in foreclosure prevention activities and refinance initiatives. The FHFA paper notes that these strategic goals and plans are consistent with each of the housing finance reform options identified in a [February 2011 Obama administration report to Congress](#), as well as "leading legislative proposals." However, the paper also reminds legislators that fully addressing the Enterprises and the federal government's role in the secondary mortgage market will require congressional action, which should not be impaired by the FHFA's immediate pursuit of its strategic goals. For additional details on the strategic plan, please [click here](#).

Fannie Mae Advises Sellers Regarding SEC Disclosures. On February 21, Fannie Mae advised all sellers that on February 9, 2012 it had [filed its initial report](#) pursuant to a new SEC rule requiring public disclosure of information regarding asset-backed securities loan repurchase requests, including the identity of the originator. It will continue to disclose such information in quarterly reports to the SEC beginning in May 2012.

HUD Suspends Mortgage Insurance Program for Military Impacted Areas. On February 16, [HUD published a final rule](#) to suspend, effective March 19, 2012, the Federal Housing Administration's mortgage insurance program for military impacted areas. The program is being halted because it is underutilized and borrower needs can be served under comparable terms and conditions through HUD's primary single-family mortgage insurance program.

State Issues

California AG and Mobile Platforms Agree to Require Privacy Policies for Apps. On February 22, California Attorney General Kamala Harris

[announced an agreement](#) with six leading mobile platform companies to ensure that apps on those platforms have privacy policies. Privacy policies are already required under the [California Online](#)

[Privacy Protection Act](#), which governs commercial websites and online services that collect personal data from California residents. The new agreement also includes commitments from the six companies - Amazon, Apple, Google, Hewlett-Packard, Microsoft, and Research in Motion - to educate app developers about user privacy obligations.

Courts

U.S. Dismisses Charges in Major FCPA Sting Case. On February 21, U.S. federal prosecutors abandoned one of the highest profile Foreign Corrupt Practices Act cases ever brought by the DOJ. Judge Richard Leon of the U.S. District Court for the District of Columbia granted the

[government's motion to dismiss](#) foreign bribery charges against all remaining defendants facing charges from an FBI sting operation. The defendants were charged with paying bribes to a purported government official from the country of Gabon in connection with contracts to supply Gabon with military and law enforcement products. The government sting operation resulted in the [arrests of twenty-two individuals](#) at an industry trade show in Las Vegas in 2010. [BuckleySandler represented John Mushriqui in the case](#), and in January [successfully obtained a mistrial](#) for Mr. Mushriqui following a nearly four-month jury trial after a federal jury failed to reach a unanimous verdict for Mr. Mushriqui and two other defendants, including his sister Jeana Mushriqui.

U.S. Supreme Court Upholds Pre-Emptive Power of the Federal Arbitration Act. On February 21, the [U.S. Supreme Court upheld the Federal Arbitration Act's \(FAA\) pre-emptive power](#) over conflicting state laws and vacated a West Virginia Supreme Court of Appeals decision in which the West Virginia court found that arbitration clauses in nursing home contracts were unenforceable if adopted prior to an occurrence of negligence that resulted in personal injury or wrongful death. *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. ___ (2012) (per curiam). The three plaintiffs-family members of patients who had died in nursing homes-sued the homes in state court alleging negligence. The trial court dismissed two of the suits based on agreements to arbitrate that were found in the contracts. The Supreme Court of Appeals of West Virginia consolidated all three cases, and held that the arbitration clauses in the contracts were unenforceable "as a matter of public policy." The U.S. Supreme Court, citing [recent decisions in which the FAA pre-emptive power was reinforced](#), reversed the West Virginia court, stating, "[t]he West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court." The Court explained that whenever a state law prohibits outright the arbitration of a particular type of claim, the conflicting rule is displaced by the FAA. Because West Virginia's prohibition against predispute agreements to arbitrate negligence claims in nursing home suits was a categorical rule prohibiting arbitration, the rule was contrary to the terms and coverage of the FAA and could not be used to avoid arbitration.

FTC Takes Action Against Collectors of Alleged Phantom Payday Loan Debts. On February 21, [the FTC announced](#) that, at its request, a U.S. federal court stopped the operations of entities the FTC alleges collected over \$5 million of payday loan debts that either did not exist or were owed to another entity. The FTC asked the court to freeze the assets of the firm while it continues its investigation and prosecution. The FTC charges that the defendants, California-based American

Credit Crunchers LLC and affiliated entities and individuals, violated the FTC Act and the Fair Debt Collection Practices Act by posing as law enforcement and demanding immediate payment of payday loan debts from consumers that had no such debt.

New York State Appeals Panel Reinstates Foreclosure Action, Reversing Justice Known for Tossing Out Foreclosure Motions. On February 14, a panel of judges in the Appellate Division, Second Department of the New York State Supreme Court [reinstated the foreclosure action](#) at issue in *Aurora Loan Services, LLC v. Sookoo*, 2012 WL 503663 (N.Y. App. Div. Feb. 14, 2012). The borrower defaulted on her mortgage loan and did not later appear in the foreclosure action or answer the complaint. The plaintiff, the holder of the mortgage and note, moved for an order of reference appointing a referee to compute the amount due. Brooklyn New York State Supreme Court Justice Aaron Schack, sua sponte, directed the dismissal of the complaint with prejudice and cancelled the notice of pendency based upon the plaintiff's failure to provide the loan origination documents as required by the judge's earlier order dated March 31, 2009. Reversing the decision, the unanimous panel wrote that Justice Schack "erred in, sua sponte, directing the dismissal of the complaint with prejudice and the cancellation of the notice of pendency." The panel remitted the matter for proceedings before a different justice, deeming it "appropriate" "under the circumstances of this case." Justice Schack is known for his staunch stance against banks pursuing foreclosure actions and this is not the first instance in which he has been reversed in a foreclosure action (see, for example, [US Bank, N.A. v. Guichardo](#), 90 A.D.3d 1032 (N.Y. App. Div. 2011)).

Colorado State Court Rules Payday Lending Firms Affiliated with Native American Tribes are Immune from State Investigation and Prosecution. On February 13, the District Court for the City and County of Denver ruled that online payday lending businesses affiliated with two Native American tribes are protected from state investigation and enforcement. [Colorado v. Cash Advance](#), No. 05-1143 (Col. Dist. Ct. Feb. 13, 2012). For several years the state had been trying to investigate and regulate the payday lending practices of the firms and brought suit to enforce subpoenas and cease and desist orders issued with regard to the firms' operations. The state claimed that, among other things, the businesses were in violation of state laws that require firms doing business with Colorado consumers over the internet to have a valid state license. The defendants moved to dismiss, arguing that the firms are immune from those subpoenas and enforcement orders under the doctrine of tribal sovereign immunity. The defendant's motion to dismiss was denied. On appeal, the [state supreme court held](#) that tribal sovereign immunity applies to state investigative subpoena enforcement actions and remanded the case to the trial court for additional inquiry into the immunity status of the tribes' affiliated businesses. On remand, the state claimed that sovereign immunity did not apply because the firms engaged non-tribal members in some of their operations and designed their affiliation with two online payday lending firms to avoid state regulation and oversight, a practice sometimes referred to as "rent-a-tribe." After discovery, the court disagreed and ruled for the defendant tribes and their businesses, holding that the companies are extensions of the tribes and therefore immune from state investigatory actions and judicial enforcement.

California Class Action Suits Allege Mislabeled Privacy Policy Links. In the last three months, five class action cases filed in California under the state's "Shine a Light" statute have alleged that online businesses, including Microsoft Corp., CBS Interactive Inc., and Time Inc., failed to properly

label links to their privacy policies. The five suits, all filed by a single firm, claim \$3,000 per violation plus additional damages ([Boorstein v. CBS Interactive Inc.](#), Cal. Super. Ct., No. 476015, complaint filed 12/28/11; [Boorstein v. Men's Journal LLC](#), Cal. Super. Ct., No. 475697, complaint filed 12/22/11; [Miller v. Hearst Communications](#), C.D. Cal., No. 12-733, complaint filed 1/27/12; [Murray v. Time Inc.](#), N.D. Cal., No. 12-431, notice of removal filed 1/26/12; [Smith v. Microsoft Corp.](#), Cal. Super. Ct., No. 476413, complaint filed 1/9/12). The "Shine a Light" statute, in effect since 2005, requires businesses that collect California residents' personal data and then share that data for marketing purposes to disclose or allow consumers to opt out of that sharing. Each defendant company allegedly mislabeled links to their online privacy policies or otherwise failed to meet the statute's requirements.

Firm News

[Howard Eisenhardt](#) will be participating in an American Bar Association webinar entitled "[Privacy and Anti-Money Laundering: An Oxymoron?](#)" on February 28, 2012 from 1:00 to 2:30 PM EDT. The webinar will address how Privacy and AML can co-exist in a world of changing requirements and regulator expectations, with a focus on the interplay between the Privacy and AML laws and operationalization of those laws in the financial institution environment.

[James Shreve](#) will be participating in the panel "When the Cloud Goes Bust: Data Breaches in the Cloud" on February 28, 2012 at the [RSA Conference](#) in San Francisco, CA. The panel will examine unique issues that may arise when a data security breach involves a company's data stored in a cloud and provide guidance on addressing cloud security breach incidents.

[Margo Tank](#) will be participating in a panel at the NACHA - The Electronic Payments Association's Internet Council Meeting in Tampa, Florida on February 29, 2012. The panel will explore the beneficial and harmful effects of data collection and usage, particularly as enabled by a mobile wallet.

[Donna Wilson](#) will be speaking at the ABA Section of Litigation Insurance Coverage CLE Seminar held at the Loews Ventana Canyon Resort in Tucson, Arizona from March 1-3, 2012. Ms. Wilson will be representing the defense counsel perspective in a plenary session panel entitled "The Credit Crisis and D&O Insurance Coverage: Challenges facing Insureds, Insurers, and Regulators" on March 1 from 1:00 PM to 2:10 PM.

[Andrew Sandler](#) will be speaking at PLI's A Guide to Financial Institutions 2012 Program in New York on March 6, 2012 at 4:00 PM in a session entitled "The New Era of Consumer Protection & Enforcement: The CFPB & Other Initiatives."

[Margo Tank](#) and [James Shreve](#) will be speaking on the panel "Meeting Consumer Protection Requirements in Mobile Payments" at the International Association of Privacy Professionals Global Privacy Summit in Washington, DC on March 7, 2012. The panel will explore the unique and often complex compliance issues for those involved in mobile payments. James Shreve also will be leading the panel "Addressing the Latest Wave of Global Breach Notice Requirements" at the IAPP Summit on March 7. This panel of attorneys from several countries will explore new US and international security breach notification requirements and compliance issues in addressing cross-border incidents.

[David Baris](#) will be speaking on March 13, 2012 at the ICBA 2012 Annual Convention in Nashville, Tennessee in a session entitled "How Do Publicly Held Community Banks and Holding Companies Comply?"

[James Parkinson](#) will be chairing a panel at the International Bar Association's 10th Annual Anti-Corruption Conference in Paris, France on March 13 and 14, 2012. The panel is entitled: "The Privileged Profession: Risks faced by legal professionals advising in international transactions."

[Donna Wilson](#) will be participating in a CLE webinar entitled "[Consumer Finance Class Actions: FCRA and FACTA: Leveraging New Developments in Certification, Damages and Preemption](#)" on March 21, from 1:00pm-2:30pm EDT.

[David Baris](#) will be speaking in the ABA Business Law Section CLE panel, "[Dealing with Enforcement Actions and Insider Liability](#)," in Las Vegas on March 23, 2012.

[Jonice Gray Tucker](#) will be speaking at the [ABA Business Law Section's Spring Meeting](#) in Las Vegas on March 23, 2012 on a panel entitled "The CFPB Approaches One Year: Experiences and Exposures." The panel will include speakers from PNC Financial Services Group, PayPal, Treliant Risk Advisors, the Consumer Federation of America, and the Federal Trade Commission.

[Andrew Sandler](#) will moderate a panel at the American Conference Institute's 8th National Forum on Residential Mortgage Litigation and Regulatory Enforcement on March 29, 2012 in Washington, DC. The panel is titled, "[Complying With and Responding to New and Emerging Federal and State Enforcement Actions](#)."

[David Baris](#) will be speaking at the 2012 Virginia Bank Directors Symposium on March 29, 2012 in Tysons Corner, Virginia. Mr. Baris will discuss how bank directors can minimize their risk of personal liability.

[David Baris](#) will be speaking at the NACD/AABD Bank Director Workshop on April 12, 2012 in Fort Lauderdale, Florida. The topic of the presentation is "Bank Director Liability and Practical Steps to Minimize It."

[Donna Wilson](#) will be moderating a panel entitled "BANKS UNDER SIEGE: The Civil, Criminal, Regulatory and Insurance Fallout from Mortgage Foreclosures and Bank Failures" at the [ABA Section of Litigation annual meeting in Washington DC, April 18-21, 2012](#).

[David Krakoff](#) will be speaking at ACI's [27th National Conference on the Foreign Corrupt Practices Act](#) in New York, NY on April 17, 2012. Mr. Krakoff's session will focus on defending executives in FCPA investigations.

[James Parkinson](#) will be speaking at a PLI program seminar entitled "Foreign Corrupt Practices Act 2012" in San Francisco, California on April 17, 2012 and in New York, New York on May 4, 2012.

[Andrew Sandler](#) will be speaking at the 2012 Marquis National Compliance Conference in Fort Worth, Texas on April 18, 2012. Mr. Sandler's session will cover the view from Washington, DC on CRA, HMDA, and Fair Lending.

[David Krakoff](#) will be speaking at the ALI-ABA Environmental Crimes Conference in Washington, DC on April 26, 2012. Mr. Krakoff's session will discuss the key issues at the outset of an environmental criminal action.

Mortgages

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[Boorstein v. CBS Interactive Inc.](#), Cal. Super. Ct., No. 476015, complaint filed 12/28/11; [Boorstein v. Men's Journal LLC](#), Cal. Super. Ct., No. 475697, complaint filed 12/22/11; [Miller v. Hearst Communications](#), C.D. Cal., No. 12-733, complaint filed 1/27/12; [Murray v. Time Inc.](#), N.D. Cal., No. 12-431, notice of removal filed 1/26/12; [Smith v. Microsoft Corp.](#), Cal. Super. Ct., No. 476413, complaint filed 1/9/12). The "Shine a Light" statute, in effect since 2005, requires businesses that collect California residents' personal data and then share that data for marketing purposes to disclose or allow consumers to opt out of that sharing. Each defendant company allegedly mislabeled links to their online privacy policies or otherwise failed to meet the statute's requirements.

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[released a report](#) on consumer privacy, setting out a Consumer Privacy Bill of Rights. The proposed Bill of Rights consists of seven broad principles, including individual control, security, and transparency of data use. [The report asks](#) Congress to codify the recommendations as a statute enforceable by the Federal Trade Commission, and identifies FTC enforcement as critical to ensuring privacy protections. Pending or absent congressional action, the report promises that the Administration will work with the private sector to adopt new protections on voluntary basis. The Administration will hold stakeholder forums to develop legally enforceable codes of conduct. Finally, the report addresses the need for international interoperability and coordination of enforcement.

California AG and Mobile Platforms Agree to Require Privacy Policies for Apps. On February 22, California Attorney General Kamala Harris [announced an agreement](#) with six leading mobile platform companies to ensure that apps on those platforms have privacy policies. Privacy policies are already required under the [California Online Privacy Protection Act](#), which governs commercial websites and online services that collect personal data from California residents. The new agreement also includes commitments from the six companies - Amazon, Apple, Google, Hewlett-Packard, Microsoft, and Research in Motion - to educate app developers about user privacy obligations.

NIST Publishes Recommendations for Establishing Governance Structure for Implementation of National Trusted Identities Strategy. On February 7, the National Institute of Standards and Technology (NIST) [published a report](#) with recommendations for developing a governance system to implement the [National Strategy for Trusted Identities in Cyberspace \(NSTIC\)](#). The NSTIC directs the federal government to work with private sector stakeholders to establish and maintain an identity ecosystem for internet transactions aimed at promoting trust, privacy and security. The report summarizes comments received in response to a [June 2011 Notice of Inquiry \(NOI\)](#) that sought public input regarding the establishment and structure of a private sector-led steering group to implement the NSTIC. Based on those comments, stakeholder workshops, and best practices from similar governance efforts, the report presents recommendations in four areas: (i) steering group initiation, (ii) steering group structure, (iii) stakeholder representation, and (iv) international coordination. The report also includes a recommended charter to establish the steering group and notes that, subject to public comment and finalization of the approach outlined in the report, NIST intends to initiate a competitive grant program to fund a secretariat responsible for convening the initial steering group.

Criminal Enforcement

U.S. Dismisses Charges in Major FCPA Sting Case. On February 21, U.S. federal prosecutors abandoned one of the highest profile Foreign Corrupt Practices Act cases ever brought by the DOJ. Judge Richard Leon of the U.S. District Court for the District of Columbia granted the

[government's motion to dismiss](#) foreign bribery charges against all remaining defendants facing charges from an FBI sting operation. The defendants were charged with paying bribes to a purported government official from the country of Gabon in connection with contracts to supply Gabon with military and law enforcement products. The government sting operation resulted in the [arrests of twenty-two individuals](#) at an industry trade show in Las Vegas in 2010. [BuckleySandler represented](#)

[John Mushriqui in the case](#), and in January [successfully obtained a mistrial](#) for Mr. Mushriqui following a nearly four-month jury trial after a federal jury failed to reach a unanimous verdict for Mr. Mushriqui and two other defendants, including his sister Jeana Mushriqui.

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