Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

June 18, 2010

Topics In This Issue

Federal Issues

HUD Issues Mortgage Letter Addressing Final Rule Amending Net Worth Requirement, Eliminating Loan Correspondent Approval. The U.S. Department of Housing and Urban Development (HUD) recently issued Mortgagee Letter (ML) 2010-20 (dated June 11 and published on Hudclips June 15) to explain and clarify the implementation of HUD's recently-issued final rule that, among other things, (i) has increased the net worth required for approved mortgagees, (ii) has eliminated the Federal Housing Administration (FHA) approval requirement for loan correspondents (LCs), and (iii) will affect the relationship of principals and authorized agents (the final rule was reported in *InfoBytes* Special Alert, Apr. 15, 2010).

Increased Net Worth Required for FHA-Approved Mortgagees. The list below describes the timeline for implementation of the final rule's net worth requirements:

Effective May 20, 2010:

- New lender applicants must possess a net worth of at least $1 million.

Effective May 20, 2011:

- Each lender or mortgagee with FHA approval as of May 20, 2010 that exceeds the Small Business Administration's (SBA) size standards for a small business must possess a net worth of at least $1 million. (SBA's current requirements for classification as a small business in this subsector are less than $7 million in annual receipts for non-depository institutions and less than $175 million in assets for depository institutions.)
- Each lender or mortgagee with FHA approval as of May 20, 2010 that meets the size standards for a small business as defined by SBA must possess a net worth of at least $500,000.

Effective May 20, 2013:

- *Single-Family* – Irrespective of size, approved lenders and applicants must have a net worth of at least $1 million plus 1% of total FHA loan volume in excess of $25 million, up to a maximum required net worth of $2.5 million.
- *Multi-Family* – Irrespective of size, approved lenders and applicants must have a net worth of $1 million.
    - If performing mortgage servicing—must have an additional 1% of total FHA loan volume in excess of $25 million, up to a maximum required net worth of $2.5 million.
    - If not performing mortgage servicing—must have an additional 0.5% of total FHA loan volume in excess of $25 million, up to a maximum required net worth of $2.5 million.
- If a mortgagee participates in both Single-Family and Multi-Family, it must meet the Single-Family net worth requirement.

Expiration of Loan Correspondent Approval. As of May 20, 2010, FHA no longer accepts applications for LC approval. Previously-approved LCs that are in good standing with FHA will retain their approval through December 31, 2010, and may continue to originate FHA loans through the end of the calendar year. LCs that were required to renew between March 31, 2010 and May 20, 2010, but have not yet done so, must complete their online annual certification and submit a renewal fee to remain in good standing. The failure to renew is subject to administrative action or to withdrawal.

Third-Party Originators (TPOs). TPOs, including a previously-approved LC whose approval has expired, may participate in FHA programs through sponsorship by an FHA-approved Direct Endorsement (DE) mortgagee. However, TPOs will not receive independent FHA eligibility approval. At the discretion of the sponsoring mortgagee, TPOs may perform all origination and processing tasks (other than tasks performed via FHA Connection) that are executed relating to an FHA loan transaction. Additionally, an approved mortgagee may permit a sponsored TPO to originate Home Equity Conversion Mortgages (HECMs), subject to all other HECM origination requirements. However, TPOs are prohibited from conducting several activities. Specifically, a TPO may not (i) close loans in its own name, (ii) perform underwriting and loan approval, (iii) insure the loan, or (iv) submit the loan to HUD for insurance endorsement. The failure of a TPO to comply with these and other FHA requirements may result in sanctions against the sponsoring mortgagee.

Principal-Authorized Agent Relationships. The ML clarifies several changes to principal-authorized agent relationships, which will become effective January 1, 2011:

- Loans originated through principal-authorized agent relationships will be permitted to close in either party's name if both parties must possess unconditional DE approval;
    - For forward mortgages, the principal can have either unconditional DE or unconditional HECM approval. The authorized agent must have unconditional DE approval;
    - For HECM mortgages, the principal can have either unconditional DE or unconditional HECM approval. The authorized agent must have unconditional HECM approval;
- The principal must originate the loan and the authorized agent must underwrite the loan;
- Either a principal or an authorized agent may submit the loan for insurance; and

- The parties' roles as principal and authorized agent must be documented in FHA Connection.

For a copy of the ML, please click here.

Federal Reserve Board Approves Final Rule to Implement CARD Act. On June 15, the Federal Reserve Board approved a final rule to amend Regulation Z, which implements the Truth in Lending Act. The promulgation of the rule is the third and final stage in the implementation of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act). Specifically, the rule:

- Prohibits credit card issuers from charging a penalty fee of more than $25 for an initial violation and $35 per additional violation occurring within the next six billing cycles. In lieu of these safe harbor amounts, an issuer can charge a higher fee representing a reasonable proportion of the costs it incurs as a result of violations. In addition, a charge card issuer may charge up to 3% of the delinquent balance when it has not received payment for two or more consecutive billing cycles;
- Prohibits credit card issuers from charging penalty fees that exceed the dollar amount associated with the consumer's violation;
- Prohibits (i) account inactivity fees, (ii) termination fees, (iii) fees for transactions that the issuer declines to authorize (except for declined access checks), and (iv) multiple fees based on a single transaction;
- Requires that notices of rate increases for credit card accounts disclose the principal reasons for the increase; and
- Requires issuers to review rate increases imposed on or after January 1, 2009 and, if appropriate, to reduce the rate (the so-called "look-back" provision).

Issuers must comply with the provisions of the rule by August 22, 2010. The rule also amends other penalty fee disclosures, which issuers must comply with by December 1, 2010. For the full text of the rule, please see http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100615a1.pdf.

Federal Banking Agencies Issue NPR to Expand "Community Development" under CRA. On June 17, federal banking and thrift regulatory agencies issued a notice of proposed rulemaking (NPR) to expand the definition of "community development" in the Community Reinvestment Act (CRA) to include loans, investments, and services by financial institutions that support projects and activities that meet Housing and Economic Recovery Act of 2008 criteria and are conducted in U.S. Department of Housing and Urban Development-approved Neighborhood Stabilization Program (NSP) areas. According to the NPR, a financial institution making these community development loans and investments would receive favorable CRA consideration in its own assessment area and, as long as it has addressed the needs of its area, receive CRA consideration for NSP-eligible activities outside of its area. The agencies are seeking comments on, among other things, whether (i) the agencies should set a date certain for the rule to "sunset," (ii) CRA consideration should be limited to NSP-eligible activities reflected in HUD-approved NSP plans or to activities undertaken by financial institutions that support activities that have been funded by the NSP, (iii) NSP-eligible activities outside of an institution's assessment area(s) should be recognized, and (iv) the proposed rule will impact an institution's decisions about the amount and type of community development loans, investments, and services it provides or the areas it will target. Comments on the proposed rule are

due within 30 days of publication in *Federal Register*. For a copy of the proposed rule, please see http://www.fdic.gov/news/news/press/2010/pr10135a.pdf.

Agencies Announce Public Hearings on CRA. On June 17, the federal bank and thrift regulatory agencies announced four public hearings to discuss the modernization of the regulations implementing the Community Reinvestment Act (CRA). The hearings will take place in the following cities: Arlington, Virginia (July 19); Atlanta, Georgia (August 6); Chicago, Illinois (August 12); and Los Angeles, California (August 17). The hearings will specifically discuss (i) the scope of CRA geographic coverage, (ii) performance tests for asset thresholds and designations, (iii) affiliate activities, (iv) small business and consumer lending evaluations and data, (v) expanding access to banking services, (vi) how better to facilitate community development, (vii) the impact of discriminatory or other illegal credit practices on CRA evaluations, and (viii) changes to CRA disclosures and evaluations. Interested parties can submit written comments or oral testimony. Registration is required to attend the sessions and to provide oral testimony. Written comments are due by August 31, 2010. For more information on registration, please see http://www.ffiec.gov/cra/hearings.htm. For a copy of the proposed topics and questions, please see http://www.fdic.gov/news/news/press/2010/pr10134a.pdf.

Federal Reserve Board Panels to Discuss Potential Revisions to HMDA Regulations. On June 17, the Federal Reserve Board announced the discussion topics for its upcoming public hearings to address potential revisions to Regulation C, which implements the Home Mortgage Disclosure Act (HMDA). The hearings will take place at the following locations: Atlanta, Georgia (July 15); San Francisco, California (August 5); Chicago, Illinois (September 16); and Washington, D.C. (September 26). The hearings will specifically discuss which data elements should be required under HMDA and which institutions should be required to report HMDA data. Oral testimony or written comments can be submitted for the record, and written comments must be submitted within 60 days after notice is published in the *Federal Register*. For a copy of the press release, please click here.

Revised FAQs on HAMP Supplemental Directives Available. On June 14, a revised Frequently Asked Questions (FAQs) document, directed at servicers participating in the Home Affordable Modification Program (HAMP), was released to clarify existing Supplemental Directives issued for HAMP. For a copy of the revised FAQs, please see https://www.hmpadmin.com/portal/docs/hamp_servicer/hampfaqs.pdf.

FinCEN Supplements Loan Modification Scam SAR Reporting Guidance. On June 17, the Financial Crimes Enforcement Network (FinCEN) supplemented previously-issued guidance (reported in *InfoBytes*, Apr. 10, 2009) regarding loan modification and foreclosure rescue scams. The advisory, among other things, (i) discusses red flags to identify a foreclosure rescue scam, (ii) notes that, when applicable, "foreclosure rescue scam" must be included in the narrative portions of any relevant Suspicious Activity Reports (SARs), and (iii) indicates that SARs must include all available relevant information for each party suspected of engaging in the suspected fraudulent activity; however, the homeowner should only be listed as a suspect if there is a reasonable belief that the homeowner knowingly participated in the fraudulent activity. The advisory was precipitated by an increased prevalence of loan modification and foreclosure rescue schemes intended to capitalize on

incentives offered by federal assistance programs, including the Home Affordable Modification Program. For a copy of the guidance, please click here.

Financial Fraud Enforcement Task Force Announces Major Mortgage Fraud Operation. On June 17, the Financial Fraud Enforcement Task Force announced the results of Operation Stolen Dreams, the largest collective enforcement to date brought to confront mortgage fraud. Unlike previous mortgage fraud sweeps, the operation consisted of both criminal and civil enforcement. Begun on March 1, the nationwide operation, has, thus far, involved 1,215 criminal defendants who are allegedly responsible for more than $2.3 billion in losses, and 191 civil enforcement actions resulting in the recovery of more than $147 million. For a copy of the press release, please click here.

FTC Announces Actions Pertaining to Foreclosure Relief Services Companies. On June 17, the Federal Trade Commission (FTC) announced several actions pertaining to foreclosure relief services companies. The FTC announced (i) a settlement order to ban 16 marketers from offering foreclosure relief services, (ii) an order for a foreclosure relief services company to pay $11.4 million for allegedly violating a previous court order, and (iii) new charges against an online marketing operation that allegedly misrepresented itself as a government mortgage assistance program. For a copy of the press release, please click here.

FTC Finalizes Settlement with Company Charged with Improperly Securing Personal Information. On June 8, the Federal Trade Commission (FTC) announced that it has finalized its settlement with a national restaurant chain, Dave & Busters, in connection with alleged exposure of credit and debit card information (the FTC's proposed settlement was reported in *InfoBytes*, Mar. 26, 2010). According to the FTC, the company failed to take reasonable steps to secure the sensitive personal information of customers on its computer network, which allowed a hacker to make several hundred thousand dollars in fraudulent credit and debit card charges. Under the settlement, the company will (i) establish and maintain a program designed to protect its customers' personal information, (ii) obtain professional third-party audits every other year for 10 years, and (iii) establish and maintain certain record-keeping requirements to allow the FTC to monitor compliance. For a copy of the press release, please click here. For more information, please click here.

State Issues

South Carolina Legislature Overrides Governor's Veto of Bill Amending Mortgage Broker Licensing Requirements, Restricts Payday Lending by Supervised Lenders. On June 15, the South Carolina General Assembly overrode the veto of South Carolina Governor Mark Sanford in connection with H 3790, a bill including provisions to amend licensing requirements for mortgage loan originators that are independent contractors and prohibiting payday loans made by non-bank supervised lenders. The bill amends the South Carolina Mortgage Lending Act to require the licensure of an independent contractor who originates loans for and under the supervision of a mortgage broker licensee as a "qualified loan originator." A qualified loan originator is subject to the requirements of a loan originator and cannot (i) be compensated based upon the terms of the loan originated (except for the amount of the principal balance), (ii) offer loans other than fixed-term, fixed-rate, fully amortizing mortgages, or (iii) handle borrower or other third-party funds in connection with

the mortgage loan. The bill also excludes payday loans from the definition of "supervised loans," defined as non-mortgage consumer loans in excess of 12% interest per year, and prohibits non-bank supervised lenders from making payday loans. The bill, however, does not amend South Carolina's separate payday lending law. Initial violations of this prohibition are subject to fines while the third violation is subject to license revocation. In vetoing the bill, Governor Sanford objected to licensing independent contractors working under the supervision of a mortgage broker licensee differently than non-affiliated independent contractors and restricting consumer access to payday loans. The law becomes effective immediately. For a copy of the bill, please click here. For a copy of the Governor's veto, please see here.

Florida Office of Financial Regulation Announces License Application Deadlines; Transitions to NMLS. On June 9, the Florida Office of Financial Regulation announced that, effective July 8, 2010, it will no longer directly accept applications for mortgage broker, mortgage brokerage business, mortgage lender, and correspondent mortgage lender licenses. Beginning October 1, 2010, these licenses must be obtained via the Nationwide Mortgage Licensing System (NMLS). Current licensees must reapply for licensure via NMLS by January 1, 2011. For a copy of the press release, please click here.

Oklahoma Amends Mortgage Licensing Act; Adds Exemption for Depository Institutions. On May 28, Oklahoma Governor Brad Henry signed HB 2831, a law that amends the Oklahoma Mortgage Licensing Act (MLA). The law will:

- Expressly exempt depository institutions and their subsidiaries from registering under the MLA;
- Require all applicants for a mortgage loan originator license to be sponsored by a licensed mortgage broker. The Oklahoma Commission on Consumer Credit will establish regulations regarding the sponsors of mortgage loan originators; and
- Modify the administrative procedures provided by the MLA by creating a Hearing Examiner to consider alleged MLA violations and to propose findings to the Administrator of Consumer Credit, who retains the power to issue final agency orders.

The amendments take effect July 1, 2010. For a copy of the amendments, please click here.

Pennsylvania Department of Banking Announces Enforcement Action Against Mortgage Broker. On June 9, the Pennsylvania Department of Banking (PA DOB) announced a final order against an individual mortgage broker (doing business as the entity Veritas Mortgage Services) for allegedly closing a mortgage loan in his own name. The PA DOB's action resulted from a complaint by the purchasers in the transaction, who had attempted to cancel the transaction after failing to secure financing. The seller in the transaction refused to refund the purchasers' down payment in light of a mortgage loan commitment letter signed by the broker. The order requires restitution to the purchasers, the payment of a $500 fine, and for the entity to cease from mortgage lending activities until obtaining the appropriate license. For a copy of the order, please see http://bit.ly/ruKDAm.

Courts

Florida Federal Court Holds NBA Preempts State Law Barring Check Cashing Fees. On June 4, the U.S. District Court for the Middle District of Florida held that the National Bank Act (NBA) and Office of the Comptroller of the Currency (OCC) regulations preempt a Florida law prohibiting check cashing fees. *Baptista v. JP Morgan Chase Bank*, No. 6:10-cv-139, 2010 WL 2342436 (M.D. Fla. June 4, 2010). In this putative class action, the defendant bank charged the plaintiff a fee for cashing a check at the bank because she was a non-account holder. The plaintiff sued, claiming unjust enrichment and arguing that Fla. Stat. § 655.85 forbids banks from cashing checks at less than par value. The court granted the bank's motion to dismiss, finding that § 655.85 only forbids check-cashing fees on bank-to-bank transactions, and, thus, does not apply to the plaintiff. The court additionally held that the NBA and OCC regulations would preempt the statute's prohibition on check cashing fees even if § 655.85 applied to the plaintiff. The court reasoned that the Florida check cashing fee statute conflicts with OCC regulations that (i) authorize national banks to charge their customers non-interest charges and fees, and (ii) provide that the establishment and amounts of non-interest charges and fees are business decisions made at their discretion. Ruling on whether the non-account holder was a "customer" under the relevant OCC regulations, the court added that OCC interpretive letters define "customer" as any party that obtains a product or service from the bank; thus, the plaintiff was a "customer" because she received check cashing services, even if she was a non-account holder. The court also dismissed the plaintiff's claim for unjust enrichment, finding that the claim sought damages from the bank for exercising federally-authorized powers, and, thus, was preempted. For a copy of the opinion, please click here.

Massachusetts Bankruptcy Court Upholds Validity of TILA/CCCDA Disclosures, Waiver. On May 28, the U.S. Bankruptcy Court for the District of Massachusetts held that (i) the use of a reduction feature to calculate the Annual Percentage Rate (APR) provided for an adjustable rate mortgage (ARM) loan does not violate the disclosure requirements of the Massachusetts Consumer Credit Cost Disclosure Act (CCCDA), the Massachusetts analog to the federal Truth in Lending Act (TILA), by failing to reflect that subprime borrowers would be more likely to be delinquent in their payments, and (ii) the waiver of TILA/CCCDA claims, even after the initial rescission period, is valid if the waiver is knowing and voluntary and communicated in a clear and conspicuous manner. *In re DiVittorio*, Adversary Proceeding No. 09-1089, 2010 WL 2204167 (Bankr. D. Mass. May 28, 2010). In this case, the debtor plaintiff brought suit seeking rescission of his loan through a bankruptcy court adversary proceeding, alleging that the defendant lender violated the CCCDA by providing an inaccurate APR on the Truth in Lending Disclosure Statement (TIL Disclosure). The debtor's ARM interest rate was subject to a performance-based rate reduction feature by which the debtor would qualify for a reduced rate if he timely made the first two years of payments. In disclosing the APR in the TIL Disclosure, the lender used the reduced interest rate that the debtor would have been entitled to under the rate reduction feature, thereby assuming that he would timely make the first two years of payments. The debtor alleged that the APR stated on the TIL Disclosure was numerically inaccurate because it was calculated using the reduction feature, which did not take into account that subprime borrowers would be more likely to be delinquent in their payments. The debtor had previously signed a waiver of any claims against the lender in connection with the making, closing, administration, collection, or the enforcement of the loan documents. The lender moved to dismiss the debtor's

claims and additionally moved for summary judgment. On the motion to dismiss, the bankruptcy court held that the CCCDA generally requires disclosures to reflect the terms of the legal obligation between the parties and, in the absence of exact information, to be based on the best information reasonably available at the time the disclosure is provided. The court reasoned that all disclosures are premised on what the parties obligate themselves to do, and to assume otherwise would render every disclosure an estimate and preclude any meaningful disclosure. Because the lender had the exact information regarding the debtor's legal obligation to make timely payments, resorting to the best information reasonably available (*e.g.*, the debtor's contention that subprime borrowers were less likely to repay), was unnecessary. On the motion for summary judgment, the lender argued, among other things, that the debtor's written waiver prohibited any loan origination claims. However, the debtor argued that it is not permissible to waive the right of rescission after the expiration of the initial three-day rescission period. The court held that the provisions in TILA and the CCCDA applicable to waiver of the right to rescind before the initial three-day rescission period do not apply to the extended right of rescission. The court noted that judicial review of a waiver or release, at a minimum, requires that it is knowing and voluntary. Here, the debtor argued that his waiver was not "knowing" because he was unaware that he had a CCCDA claim due to the lender's concealment of the "true" APR. The court disagreed, finding that the debtor's possession of the loan documents put him on inquiry notice of his purported CCCDA claims and his right to rescind. Further, by specifically referencing claims arising in connection with the making, closing, administration, collection, or the enforcement of the loan documents, the waiver should have compelled him to investigate the possibility of such claims. The court noted that it was significant that the debtor executed the waiver as part of a loan modification after eight months of negotiations, during which the debtor was represented by counsel. As such, the court found that the debtor's execution of the waiver was knowing and voluntary. Further, the court acknowledged that TILA and the CCCDA require any waiver to be clearly and conspicuously disclosed, as distinct from general waivers of "any and all claims." The court found that the debtor's waiver satisfied this burden because it expressly referenced claims arising in connection with the loan documents. For a copy of the opinion, please see here.

Ninth Circuit Affirms Right of Federal District Court to Grant Injunctive Relief Pending Arbitration. On June 17, the U.S. Court of Appeals for the Ninth Circuit affirmed the authority of federal district courts to grant injunctive relief in order to preserve the status quo pending arbitration. *Toyo Tire Holdings of Ams. v. Cont'l Tire N. Am.*, No. 10-55145 (9th Cir. June 17, 2010). In this case, the plaintiff and defendant were parties to a partnership and joint venture agreement containing an arbitration clause requiring them to submit "all disputes" to arbitration. After the defendant notified the plaintiff that it intended to dissolve the partnership, the plaintiff requested arbitration and sought interim injunctive relief. On the same day, the plaintiff also sued the defendant in California state court for breach of contract and other state law claims. The defendant then removed the case to federal district court, and the plaintiff asked the district court for a preliminary injunction to preserve the partnership until an arbitral panel itself could resolve its request for interim relief. The district court denied the plaintiff's request because the parties had agreed to arbitrate their dispute and that the arbitrator had the authority to issue interim injunctive relief. The Ninth Circuit reversed and remanded, noting that one party often has an incentive to delay arbitration proceedings and that, even without bad faith on the part of any party, the selection and formation of an arbitration panel necessarily entails delay, which could vitiate any ultimate relief awarded. Particularly in this case, where the

agreed-upon arbitral rules (the Rules of Arbitration of the International Chamber of Commerce) specifically provide for the application to "any competent judicial authority for interim or conservatory measures," the district court was empowered to issue interim injunctive relief in order "to preserve the status quo and the meaningfulness of the arbitration process." For a copy of the opinion, please see http://www.ca9.uscourts.gov/datastore/opinions/2010/06/17/1055145.pdf.

Utah Federal Court Vacates Preliminary Injunction Restraining Entities from Pursuing Foreclosures. On June 11, the U.S. District Court for the District of Utah vacated a Utah state court's recent order enjoining defendants (a bank and its trustee services company) from conducting foreclosure sales in the state. *Cox v. Reconstruct Co., N.A.*, No. 2:10-CV-492 (D. Utah June 11, 2010). The state court had granted the preliminary injunction after the plaintiff borrower, who defaulted on her mortgage loan and was facing foreclosure, alleged that the defendants, among other things, were not registered as foreign corporations with the Utah Department of Corporations and, as a result, had no authority to pursue foreclosures within the state. After removing the case to federal court, the defendants requested that the district court vacate the state court's preliminary injunction. The district court granted the request, thereby allowing the defendants to continue conducting foreclosure proceedings in Utah pending the outcome of the case. A memorandum decision from the district court is forthcoming and will be reported in an upcoming issue of *InfoBytes*. For a copy of the order vacating the preliminary injunction, please click here.

Arizona Federal Court Holds "Skip-Tracer" Not a Debt Collector Under FDCPA. On May 25, in an unpublished decision, the U.S. District Court for the District of Arizona held that a defendant "skip-tracer" company, in the business of locating debtors on behalf of debt collectors, is not a "debt collector" for the purposes of the Fair Debt Collection Practices Act (FDCPA) because it engaged in "mere information gathering." *Baker v. Trans Union LLC*, No. 10-cv-8038, 2010 WL 2104622 (D. Ariz. May 25, 2010). In *Baker*, the consumer plaintiff alleged that the skip-tracer, among other things, violated the FDCPA by failing to make certain required disclosures both when it called the consumer to make an address request and when she called back to obtain further information. While expressing reservations about the asymmetry of allowing skip-tracers to engage in practices that debt collectors cannot, the court nonetheless held that the skip-tracer was not a debt collector because (i) debt collection was not the skip-tracer's primary business purpose, and (ii) the skip-tracer did not try to deceive the plaintiff about the purpose of its call. The court distinguished the skip-tracer's business purpose and telephone practices, which it characterized as "mere information gathering," from the business purpose of a "debt collector" subject to the FDCPA and dismissed the claim. For a copy of the opinion, please click here.

Firm News

The Chambers USA 2010 edition ranks BuckleySandler as a Band 1 firm in the Financial Services Regulation: Consumer Finance (Compliance) practice area, and as a Band 2 firm in the Financial Services Regulation: Banking (Enforcement & Investigations) practice area. Chambers quotes sources as saying that BuckleySandler is "[t]he best at what they do in the country." For the full write up, please visit http://www.chambersandpartners.com/USA/Editorial/37050#org_139031.

The *National Law Journal* named Andrew Sandler a "Visionary" in its third annual Legal Times Awards. The *National Law Journal* writes that Andrew "has an impeccable sense of timing" in forming BuckleySandler LLP by combining his practice group with the former Buckley Kolar LLP in 2009. Visionaries are "attorneys whose business or legal acumen has been key to expanding their firms, improving government or advancing the law." To read the full article, please visit http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202459238721&CHAMPIONS__VISIONARIES.

Jerry Buckley and Mark Olson will present a free A.S. Pratt audio conference, "The Financial Reform Act: What You Need to Know," on July 13 and July 15. For more information and to register, please visit http://www.sheshunoff.com/wallstreetreform/2010/06/08/free/.

Andrew Sandler will participate in four webinars by the Financial Services Roundtable taking place 12:15 p.m. - 2:00 p.m. ET on July 8, July 15, July 22, and July 29. The scheduled topic is "The Restoring American Financial Stability Act of 2010: Legislative Reform Meets Regulatory Reality."

Christopher Witeck will be speaking on the "Securitization and Secondary Market" panel at ACI's Reverse Mortgage Conference in New York on July 23.

An article by Jonice Gray Tucker, Ben Saul, and Lori Sommerfield, "Regulators Target Fair Servicing," appeared in *Mortgage Banking* (June 2010).

An article by Jonice Gray Tucker, Lori Sommerfield, and Thomas Dowell, "Fair-Lending Principles Must Underpin Loss Mit," appeared in *Servicing Management* (June 2010). The article is available at http://www.mortgageorb.com/e107_plugins/content/content.php?content.6024.

Christopher Witeck spoke on the "Reverse Mortgage Secondary Market Panel" at the MBA's Secondary Market/Government Housing Conference in New York on May 24.

Kirk Jensen spoke on "Overcoming Problem Areas in Issuance and Utilization of Gift Cards" at the American Conference Institute's 4th National Advanced Forum on Financial Services Marketing Compliance in New York on May 26.

Sara Emley spoke on a DC Bar panel, "What the Card Act Means for You: The Impact of the New Credit Card Rules on Banks, Consumers, and Businesses," on June 1.

Margo Tank and Donna Wilson participated in the ACI Data Privacy & Information Security Conference June 3-4 in Dallas, TX. Margo spoke on the "Preventing and Managing Litigation Associated with the Complex Array of State Breach Notification Laws" panel. Donna's presentation was titled "Business-to-Business Litigation Risks and Realities."

Andrew Sandler spoke on June 6-7 at CBA Live, the Consumer Banker Association Conference in Hollywood, Florida. Andrew presented a Fair Lending Industry Overview on June 6 and spoke on Auto Fair Lending on June 7.

Jon Langlois spoke on the panel "Financial Regulatory Reform: How Will It Affect Us?" at the National Reverse Mortgage Lenders Association Policy Conference on June 7.

Andrew Sandler and Bob Cook spoke at the American Bankers Association's Regulatory Compliance Conference in San Diego, CA on June 14.

Clinton Rockwell and Joe Kolar spoke about buyback strategies at the American Mortgage Lenders Conference in Washington, DC on June 15.

Mortgages

HUD Issues Mortgage Letter Addressing Final Rule Amending Net Worth Requirement, Eliminating Loan Correspondent Approval. The U.S. Department of Housing and Urban Development (HUD) recently issued Mortgagee Letter (ML) 2010-20 (dated June 11 and published on Hudclips June 15) to explain and clarify the implementation of HUD's recently-issued final rule that, among other things, (i) has increased the net worth required for approved mortgagees, (ii) has eliminated the Federal Housing Administration (FHA) approval requirement for loan correspondents (LCs), and (iii) will affect the relationship of principals and authorized agents (the final rule was reported in *InfoBytes* Special Alert, Apr. 15, 2010).

Increased Net Worth Required for FHA-Approved Mortgagees. The list below describes the timeline for implementation of the final rule's net worth requirements:

Effective May 20, 2010:

- New lender applicants must possess a net worth of at least $1 million.

Effective May 20, 2011:

- Each lender or mortgagee with FHA approval as of May 20, 2010 that exceeds the Small Business Administration's (SBA) size standards for a small business must possess a net worth of at least $1 million. (SBA's current requirements for classification as a small business in this subsector are less than $7 million in annual receipts for non-depository institutions and less than $175 million in assets for depository institutions.)
- Each lender or mortgagee with FHA approval as of May 20, 2010 that meets the size standards for a small business as defined by SBA must possess a net worth of at least $500,000.

Effective May 20, 2013:

- *Single-Family* – Irrespective of size, approved lenders and applicants must have a net worth of at least $1 million plus 1% of total FHA loan volume in excess of $25 million, up to a maximum required net worth of $2.5 million.

- *Multi-Family* – Irrespective of size, approved lenders and applicants must have a net worth of $1 million.
    - If performing mortgage servicing—must have an additional 1% of total FHA loan volume in excess of $25 million, up to a maximum required net worth of $2.5 million.
    - If not performing mortgage servicing—must have an additional 0.5% of total FHA loan volume in excess of $25 million, up to a maximum required net worth of $2.5 million.
- If a mortgagee participates in both Single-Family and Multi-Family, it must meet the Single-Family net worth requirement.

Expiration of Loan Correspondent Approval. As of May 20, 2010, FHA no longer accepts applications for LC approval. Previously-approved LCs that are in good standing with FHA will retain their approval through December 31, 2010, and may continue to originate FHA loans through the end of the calendar year. LCs that were required to renew between March 31, 2010 and May 20, 2010, but have not yet done so, must complete their online annual certification and submit a renewal fee to remain in good standing. The failure to renew is subject to administrative action or to withdrawal.

Third-Party Originators (TPOs). TPOs, including a previously-approved LC whose approval has expired, may participate in FHA programs through sponsorship by an FHA-approved Direct Endorsement (DE) mortgagee. However, TPOs will not receive independent FHA eligibility approval. At the discretion of the sponsoring mortgagee, TPOs may perform all origination and processing tasks (other than tasks performed via FHA Connection) that are executed relating to an FHA loan transaction. Additionally, an approved mortgagee may permit a sponsored TPO to originate Home Equity Conversion Mortgages (HECMs), subject to all other HECM origination requirements. However, TPOs are prohibited from conducting several activities. Specifically, a TPO may not (i) close loans in its own name, (ii) perform underwriting and loan approval, (iii) insure the loan, or (iv) submit the loan to HUD for insurance endorsement. The failure of a TPO to comply with these and other FHA requirements may result in sanctions against the sponsoring mortgagee.

Principal-Authorized Agent Relationships. The ML clarifies several changes to principal-authorized agent relationships, which will become effective January 1, 2011:

- Loans originated through principal-authorized agent relationships will be permitted to close in either party's name if both parties must possess unconditional DE approval;
    - For forward mortgages, the principal can have either unconditional DE or unconditional HECM approval. The authorized agent must have unconditional DE approval;
    - For HECM mortgages, the principal can have either unconditional DE or unconditional HECM approval. The authorized agent must have unconditional HECM approval;
- The principal must originate the loan and the authorized agent must underwrite the loan;
- Either a principal or an authorized agent may submit the loan for insurance; and
- The parties' roles as principal and authorized agent must be documented in FHA Connection.For a copy of the ML, please click here.

Revised FAQs on HAMP Supplemental Directives Available. On June 14, a revised Frequently Asked Questions (FAQs) document, directed at servicers participating in the Home Affordable Modification Program (HAMP), was released to clarify existing Supplemental Directives issued for HAMP. For a copy of the revised FAQs, please see https://www.hmpadmin.com/portal/docs/hamp_servicer/hampfaqs.pdf.

FinCEN Supplements Loan Modification Scam SAR Reporting Guidance. On June 17, the Financial Crimes Enforcement Network (FinCEN) supplemented previously-issued guidance (reported in *InfoBytes*, Apr. 10, 2009) regarding loan modification and foreclosure rescue scams. The advisory, among other things, (i) discusses red flags to identify a foreclosure rescue scam, (ii) notes that, when applicable, "foreclosure rescue scam" must be included in the narrative portions of any relevant Suspicious Activity Reports (SARs), and (iii) indicates that SARs must include all available relevant information for each party suspected of engaging in the suspected fraudulent activity; however, the homeowner should only be listed as a suspect if there is a reasonable belief that the homeowner knowingly participated in the fraudulent activity. The advisory was precipitated by an increased prevalence of loan modification and foreclosure rescue schemes intended to capitalize on incentives offered by federal assistance programs, including the Home Affordable Modification Program. For a copy of the guidance, please click here.

Financial Fraud Enforcement Task Force Announces Major Mortgage Fraud Operation. On June 17, the Financial Fraud Enforcement Task Force announced the results of Operation Stolen Dreams, the largest collective enforcement to date brought to confront mortgage fraud. Unlike previous mortgage fraud sweeps, the operation consisted of both criminal and civil enforcement. Begun on March 1, the nationwide operation, has, thus far, involved 1,215 criminal defendants who are allegedly responsible for more than $2.3 billion in losses, and 191 civil enforcement actions resulting in the recovery of more than $147 million. For a copy of the press release, please click here.

FTC Announces Actions Pertaining to Foreclosure Relief Services Companies. On June 17, the Federal Trade Commission (FTC) announced several actions pertaining to foreclosure relief services companies. The FTC announced (i) a settlement order to ban 16 marketers from offering foreclosure relief services, (ii) an order for a foreclosure relief services company to pay $11.4 million for allegedly violating a previous court order, and (iii) new charges against an online marketing operation that allegedly misrepresented itself as a government mortgage assistance program. For a copy of the press release, please click here.

South Carolina Legislature Overrides Governor's Veto of Bill Amending Mortgage Broker Licensing Requirements, Restricts Payday Lending by Supervised Lenders. On June 15, the South Carolina General Assembly overrode the veto of South Carolina Governor Mark Sanford in connection with H 3790, a bill including provisions to amend licensing requirements for mortgage loan originators that are independent contractors and prohibiting payday loans made by non-bank supervised lenders. The bill amends the South Carolina Mortgage Lending Act to require the licensure of an independent contractor who originates loans for and under the supervision of a mortgage broker licensee as a "qualified loan originator." A qualified loan originator is subject to the requirements of a loan originator and cannot (i) be compensated based upon the terms of the loan

originated (except for the amount of the principal balance), (ii) offer loans other than fixed-term, fixed-rate, fully amortizing mortgages, or (iii) handle borrower or other third-party funds in connection with the mortgage loan. The bill also excludes payday loans from the definition of "supervised loans," defined as non-mortgage consumer loans in excess of 12% interest per year, and prohibits non-bank supervised lenders from making payday loans. The bill, however, does not amend South Carolina's separate payday lending law. Initial violations of this prohibition are subject to fines while the third violation is subject to license revocation. In vetoing the bill, Governor Sanford objected to licensing independent contractors working under the supervision of a mortgage broker licensee differently than non-affiliated independent contractors and restricting consumer access to payday loans. The law becomes effective immediately. For a copy of the bill, please click here. For a copy of the Governor's veto, please see here.

Florida Office of Financial Regulation Announces License Application Deadlines; Transitions to NMLS. On June 9, the Florida Office of Financial Regulation announced that, effective July 8, 2010, it will no longer directly accept applications for mortgage broker, mortgage brokerage business, mortgage lender, and correspondent mortgage lender licenses. Beginning October 1, 2010, these licenses must be obtained via the Nationwide Mortgage Licensing System (NMLS). Current licensees must reapply for licensure via NMLS by January 1, 2011. For a copy of the press release, please click here.

Oklahoma Amends Mortgage Licensing Act; Adds Exemption for Depository Institutions. On May 28, Oklahoma Governor Brad Henry signed HB 2831, a law that amends the Oklahoma Mortgage Licensing Act (MLA). The law will:

- Expressly exempt depository institutions and their subsidiaries from registering under the MLA;
- Require all applicants for a mortgage loan originator license to be sponsored by a licensed mortgage broker. The Oklahoma Commission on Consumer Credit will establish regulations regarding the sponsors of mortgage loan originators; and
- Modify the administrative procedures provided by the MLA by creating a Hearing Examiner to consider alleged MLA violations and to propose findings to the Administrator of Consumer Credit, who retains the power to issue final agency orders.

The amendments take effect July 1, 2010. For a copy of the amendments, please click here.

Pennsylvania Department of Banking Announces Enforcement Action Against Mortgage Broker. On June 9, the Pennsylvania Department of Banking (PA DOB) announced a final order against an individual mortgage broker (doing business as the entity Veritas Mortgage Services) for allegedly closing a mortgage loan in his own name. The PA DOB's action resulted from a complaint by the purchasers in the transaction, who had attempted to cancel the transaction after failing to secure financing. The seller in the transaction refused to refund the purchasers' down payment in light of a mortgage loan commitment letter signed by the broker. The order requires restitution to the purchasers, the payment of a $500 fine, and for the entity to cease from mortgage lending activities until obtaining the appropriate license. For a copy of the order, please see http://bit.ly/ruKDAm.

Massachusetts Bankruptcy Court Upholds Validity of TILA/CCCDA Disclosures, Waiver. On May 28, the U.S. Bankruptcy Court for the District of Massachusetts held that (i) the use of a reduction feature to calculate the Annual Percentage Rate (APR) provided for an adjustable rate mortgage (ARM) loan does not violate the disclosure requirements of the Massachusetts Consumer Credit Cost Disclosure Act (CCCDA), the Massachusetts analog to the federal Truth in Lending Act (TILA), by failing to reflect that subprime borrowers would be more likely to be delinquent in their payments, and (ii) the waiver of TILA/CCCDA claims, even after the initial rescission period, is valid if the waiver is knowing and voluntary and communicated in a clear and conspicuous manner. *In re DiVittorio*, Adversary Proceeding No. 09-1089, 2010 WL 2204167 (Bankr. D. Mass. May 28, 2010). In this case, the debtor plaintiff brought suit seeking rescission of his loan through a bankruptcy court adversary proceeding, alleging that the defendant lender violated the CCCDA by providing an inaccurate APR on the Truth in Lending Disclosure Statement (TIL Disclosure). The debtor's ARM interest rate was subject to a performance-based rate reduction feature by which the debtor would qualify for a reduced rate if he timely made the first two years of payments. In disclosing the APR in the TIL Disclosure, the lender used the reduced interest rate that the debtor would have been entitled to under the rate reduction feature, thereby assuming that he would timely make the first two years of payments. The debtor alleged that the APR stated on the TIL Disclosure was numerically inaccurate because it was calculated using the reduction feature, which did not take into account that subprime borrowers would be more likely to be delinquent in their payments. The debtor had previously signed a waiver of any claims against the lender in connection with the making, closing, administration, collection, or the enforcement of the loan documents. The lender moved to dismiss the debtor's claims and additionally moved for summary judgment. On the motion to dismiss, the bankruptcy court held that the CCCDA generally requires disclosures to reflect the terms of the legal obligation between the parties and, in the absence of exact information, to be based on the best information reasonably available at the time the disclosure is provided. The court reasoned that all disclosures are premised on what the parties obligate themselves to do, and to assume otherwise would render every disclosure an estimate and preclude any meaningful disclosure. Because the lender had the exact information regarding the debtor's legal obligation to make timely payments, resorting to the best information reasonably available (*e.g.*, the debtor's contention that subprime borrowers were less likely to repay), was unnecessary. On the motion for summary judgment, the lender argued, among other things, that the debtor's written waiver prohibited any loan origination claims. However, the debtor argued that it is not permissible to waive the right of rescission after the expiration of the initial three-day rescission period. The court held that the provisions in TILA and the CCCDA applicable to waiver of the right to rescind before the initial three-day rescission period do not apply to the extended right of rescission. The court noted that judicial review of a waiver or release, at a minimum, requires that it is knowing and voluntary. Here, the debtor argued that his waiver was not "knowing" because he was unaware that he had a CCCDA claim due to the lender's concealment of the "true" APR. The court disagreed, finding that the debtor's possession of the loan documents put him on inquiry notice of his purported CCCDA claims and his right to rescind. Further, by specifically referencing claims arising in connection with the making, closing, administration, collection, or the enforcement of the loan documents, the waiver should have compelled him to investigate the possibility of such claims. The court noted that it was significant that the debtor executed the waiver as part of a loan modification after eight months of negotiations, during which the debtor was represented by counsel. As such, the court found that the debtor's execution of the waiver was knowing and voluntary. Further, the court

acknowledged that TILA and the CCCDA require any waiver to be clearly and conspicuously disclosed, as distinct from general waivers of "any and all claims." The court found that the debtor's waiver satisfied this burden because it expressly referenced claims arising in connection with the loan documents. For a copy of the opinion, please see here.

Ninth Circuit Affirms Right of Federal District Court to Grant Injunctive Relief Pending Arbitration. On June 17, the U.S. Court of Appeals for the Ninth Circuit affirmed the authority of federal district courts to grant injunctive relief in order to preserve the status quo pending arbitration. *Toyo Tire Holdings of Ams. v. Cont'l Tire N. Am.*, No. 10-55145 (9th Cir. June 17, 2010). In this case, the plaintiff and defendant were parties to a partnership and joint venture agreement containing an arbitration clause requiring them to submit "all disputes" to arbitration. After the defendant notified the plaintiff that it intended to dissolve the partnership, the plaintiff requested arbitration and sought interim injunctive relief. On the same day, the plaintiff also sued the defendant in California state court for breach of contract and other state law claims. The defendant then removed the case to federal district court, and the plaintiff asked the district court for a preliminary injunction to preserve the partnership until an arbitral panel itself could resolve its request for interim relief. The district court denied the plaintiff's request because the parties had agreed to arbitrate their dispute and that the arbitrator had the authority to issue interim injunctive relief. The Ninth Circuit reversed and remanded, noting that one party often has an incentive to delay arbitration proceedings and that, even without bad faith on the part of any party, the selection and formation of an arbitration panel necessarily entails delay, which could vitiate any ultimate relief awarded. Particularly in this case, where the agreed-upon arbitral rules (the Rules of Arbitration of the International Chamber of Commerce) specifically provide for the application to "any competent judicial authority for interim or conservatory measures," the district court was empowered to issue interim injunctive relief in order "to preserve the status quo and the meaningfulness of the arbitration process." For a copy of the opinion, please see http://www.ca9.uscourts.gov/datastore/opinions/2010/06/17/1055145.pdf.

Utah Federal Court Vacates Preliminary Injunction Restraining Entities from Pursuing Foreclosures. On June 11, the U.S. District Court for the District of Utah vacated a Utah state court's recent order enjoining defendants (a bank and its trustee services company) from conducting foreclosure sales in the state. *Cox v. Reconstruct Co., N.A.*, No. 2:10-CV-492 (D. Utah June 11, 2010). The state court had granted the preliminary injunction after the plaintiff borrower, who defaulted on her mortgage loan and was facing foreclosure, alleged that the defendants, among other things, were not registered as foreign corporations with the Utah Department of Corporations and, as a result, had no authority to pursue foreclosures within the state. After removing the case to federal court, the defendants requested that the district court vacate the state court's preliminary injunction. The district court granted the request, thereby allowing the defendants to continue conducting foreclosure proceedings in Utah pending the outcome of the case. A memorandum decision from the district court is forthcoming and will be reported in an upcoming issue of *InfoBytes*. For a copy of the order vacating the preliminary injunction, please click here.

Banking

Federal Banking Agencies Issue NPR to Expand "Community Development" under CRA. On June 17, federal banking and thrift regulatory agencies issued a notice of proposed rulemaking (NPR) to expand the definition of "community development" in the Community Reinvestment Act (CRA) to include loans, investments, and services by financial institutions that support projects and activities that meet Housing and Economic Recovery Act of 2008 criteria and are conducted in U.S. Department of Housing and Urban Development-approved Neighborhood Stabilization Program (NSP) areas. According to the NPR, a financial institution making these community development loans and investments would receive favorable CRA consideration in its own assessment area and, as long as it has addressed the needs of its area, receive CRA consideration for NSP-eligible activities outside of its area. The agencies are seeking comments on, among other things, whether (i) the agencies should set a date certain for the rule to "sunset," (ii) CRA consideration should be limited to NSP-eligible activities reflected in HUD-approved NSP plans or to activities undertaken by financial institutions that support activities that have been funded by the NSP, (iii) NSP-eligible activities outside of an institution's assessment area(s) should be recognized, and (iv) the proposed rule will impact an institution's decisions about the amount and type of community development loans, investments, and services it provides or the areas it will target. Comments on the proposed rule are due within 30 days of publication in *Federal Register*. For a copy of the proposed rule, please see http://www.fdic.gov/news/news/press/2010/pr10135a.pdf.

Agencies Announce Public Hearings on CRA. On June 17, the federal bank and thrift regulatory agencies announced four public hearings to discuss the modernization of the regulations implementing the Community Reinvestment Act (CRA). The hearings will take place in the following cities: Arlington, Virginia (July 19); Atlanta, Georgia (August 6); Chicago, Illinois (August 12); and Los Angeles, California (August 17). The hearings will specifically discuss (i) the scope of CRA geographic coverage, (ii) performance tests for asset thresholds and designations, (iii) affiliate activities, (iv) small business and consumer lending evaluations and data, (v) expanding access to banking services, (vi) how better to facilitate community development, (vii) the impact of discriminatory or other illegal credit practices on CRA evaluations, and (viii) changes to CRA disclosures and evaluations. Interested parties can submit written comments or oral testimony. Registration is required to attend the sessions and to provide oral testimony. Written comments are due by August 31, 2010. For more information on registration, please see http://www.ffiec.gov/cra/hearings.htm. For a copy of the proposed topics and questions, please see http://www.fdic.gov/news/news/press/2010/pr10134a.pdf.

Federal Reserve Board Panels to Discuss Potential Revisions to HMDA Regulations. On June 17, the Federal Reserve Board announced the discussion topics for its upcoming public hearings to address potential revisions to Regulation C, which implements the Home Mortgage Disclosure Act (HMDA). The hearings will take place at the following locations: Atlanta, Georgia (July 15); San Francisco, California (August 5); Chicago, Illinois (September 16); and Washington, D.C. (September 26). The hearings will specifically discuss which data elements should be required under HMDA and which institutions should be required to report HMDA data. Oral testimony or written comments can

be submitted for the record, and written comments must be submitted within 60 days after notice is published in the *Federal Register*. For a copy of the press release, please click here.

FinCEN Supplements Loan Modification Scam SAR Reporting Guidance. On June 17, the Financial Crimes Enforcement Network (FinCEN) supplemented previously-issued guidance (reported in *InfoBytes*, Apr. 10, 2009) regarding loan modification and foreclosure rescue scams. The advisory, among other things, (i) discusses red flags to identify a foreclosure rescue scam, (ii) notes that, when applicable, "foreclosure rescue scam" must be included in the narrative portions of any relevant Suspicious Activity Reports (SARs), and (iii) indicates that SARs must include all available relevant information for each party suspected of engaging in the suspected fraudulent activity; however, the homeowner should only be listed as a suspect if there is a reasonable belief that the homeowner knowingly participated in the fraudulent activity. The advisory was precipitated by an increased prevalence of loan modification and foreclosure rescue schemes intended to capitalize on incentives offered by federal assistance programs, including the Home Affordable Modification Program. For a copy of the guidance, please click here.

Financial Fraud Enforcement Task Force Announces Major Mortgage Fraud Operation. On June 17, the Financial Fraud Enforcement Task Force announced the results of Operation Stolen Dreams, the largest collective enforcement to date brought to confront mortgage fraud. Unlike previous mortgage fraud sweeps, the operation consisted of both criminal and civil enforcement. Begun on March 1, the nationwide operation, has, thus far, involved 1,215 criminal defendants who are allegedly responsible for more than $2.3 billion in losses, and 191 civil enforcement actions resulting in the recovery of more than $147 million. For a copy of the press release, please click here.

Florida Federal Court Holds NBA Preempts State Law Barring Check Cashing Fees. On June 4, the U.S. District Court for the Middle District of Florida held that the National Bank Act (NBA) and Office of the Comptroller of the Currency (OCC) regulations preempt a Florida law prohibiting check cashing fees. *Baptista v. JP Morgan Chase Bank*, No. 6:10-cv-139, 2010 WL 2342436 (M.D. Fla. June 4, 2010). In this putative class action, the defendant bank charged the plaintiff a fee for cashing a check at the bank because she was a non-account holder. The plaintiff sued, claiming unjust enrichment and arguing that Fla. Stat. § 655.85 forbids banks from cashing checks at less than par value. The court granted the bank's motion to dismiss, finding that § 655.85 only forbids check-cashing fees on bank-to-bank transactions, and, thus, does not apply to the plaintiff. The court additionally held that the NBA and OCC regulations would preempt the statute's prohibition on check cashing fees even if § 655.85 applied to the plaintiff. The court reasoned that the Florida check cashing fee statute conflicts with OCC regulations that (i) authorize national banks to charge their customers non-interest charges and fees, and (ii) provide that the establishment and amounts of non-interest charges and fees are business decisions made at their discretion. Ruling on whether the non-account holder was a "customer" under the relevant OCC regulations, the court added that OCC interpretive letters define "customer" as any party that obtains a product or service from the bank; thus, the plaintiff was a "customer" because she received check cashing services, even if she was a non-account holder. The court also dismissed the plaintiff's claim for unjust enrichment, finding that the claim sought damages from the bank for exercising federally-authorized powers, and, thus, was preempted. For a copy of the opinion, please click here.

Consumer Finance

FTC Announces Actions Pertaining to Foreclosure Relief Services Companies. On June 17, the Federal Trade Commission (FTC) announced several actions pertaining to foreclosure relief services companies. The FTC announced (i) a settlement order to ban 16 marketers from offering foreclosure relief services, (ii) an order for a foreclosure relief services company to pay $11.4 million for allegedly violating a previous court order, and (iii) new charges against an online marketing operation that allegedly misrepresented itself as a government mortgage assistance program. For a copy of the press release, please click here.

FTC Finalizes Settlement with Company Charged with Improperly Securing Personal Information. On June 8, the Federal Trade Commission (FTC) announced that it has finalized its settlement with a national restaurant chain, Dave & Busters, in connection with alleged exposure of credit and debit card information (the FTC's proposed settlement was reported in InfoBytes, Mar. 26, 2010). According to the FTC, the company failed to take reasonable steps to secure the sensitive personal information of customers on its computer network, which allowed a hacker to make several hundred thousand dollars in fraudulent credit and debit card charges. Under the settlement, the company will (i) establish and maintain a program designed to protect its customers' personal information, (ii) obtain professional third-party audits every other year for 10 years, and (iii) establish and maintain certain record-keeping requirements to allow the FTC to monitor compliance. For a copy of the press release, please click here. For more information, please click here.

South Carolina Legislature Overrides Governor's Veto of Bill Amending Mortgage Broker Licensing Requirements, Restricts Payday Lending by Supervised Lenders. On June 15, the South Carolina General Assembly overrode the veto of South Carolina Governor Mark Sanford in connection with H 3790, a bill including provisions to amend licensing requirements for mortgage loan originators that are independent contractors and prohibiting payday loans made by non-bank supervised lenders. The bill amends the South Carolina Mortgage Lending Act to require the licensure of an independent contractor who originates loans for and under the supervision of a mortgage broker licensee as a "qualified loan originator." A qualified loan originator is subject to the requirements of a loan originator and cannot (i) be compensated based upon the terms of the loan originated (except for the amount of the principal balance), (ii) offer loans other than fixed-term, fixed-rate, fully amortizing mortgages, or (iii) handle borrower or other third-party funds in connection with the mortgage loan. The bill also excludes payday loans from the definition of "supervised loans," defined as non-mortgage consumer loans in excess of 12% interest per year, and prohibits non-bank supervised lenders from making payday loans. The bill, however, does not amend South Carolina's separate payday lending law. Initial violations of this prohibition are subject to fines while the third violation is subject to license revocation. In vetoing the bill, Governor Sanford objected to licensing independent contractors working under the supervision of a mortgage broker licensee differently than non-affiliated independent contractors and restricting consumer access to payday loans. The law becomes effective immediately. For a copy of the bill, please click here. For a copy of the Governor's veto, please see here.

Massachusetts Bankruptcy Court Upholds Validity of TILA/CCCDA Disclosures, Waiver. On May 28, the U.S. Bankruptcy Court for the District of Massachusetts held that (i) the use of a reduction feature to calculate the Annual Percentage Rate (APR) provided for an adjustable rate mortgage (ARM) loan does not violate the disclosure requirements of the Massachusetts Consumer Credit Cost Disclosure Act (CCCDA), the Massachusetts analog to the federal Truth in Lending Act (TILA), by failing to reflect that subprime borrowers would be more likely to be delinquent in their payments, and (ii) the waiver of TILA/CCCDA claims, even after the initial rescission period, is valid if the waiver is knowing and voluntary and communicated in a clear and conspicuous manner. *In re DiVittorio*, Adversary Proceeding No. 09-1089, 2010 WL 2204167 (Bankr. D. Mass. May 28, 2010). In this case, the debtor plaintiff brought suit seeking rescission of his loan through a bankruptcy court adversary proceeding, alleging that the defendant lender violated the CCCDA by providing an inaccurate APR on the Truth in Lending Disclosure Statement (TIL Disclosure). The debtor's ARM interest rate was subject to a performance-based rate reduction feature by which the debtor would qualify for a reduced rate if he timely made the first two years of payments. In disclosing the APR in the TIL Disclosure, the lender used the reduced interest rate that the debtor would have been entitled to under the rate reduction feature, thereby assuming that he would timely make the first two years of payments. The debtor alleged that the APR stated on the TIL Disclosure was numerically inaccurate because it was calculated using the reduction feature, which did not take into account that subprime borrowers would be more likely to be delinquent in their payments. The debtor had previously signed a waiver of any claims against the lender in connection with the making, closing, administration, collection, or the enforcement of the loan documents. The lender moved to dismiss the debtor's claims and additionally moved for summary judgment. On the motion to dismiss, the bankruptcy court held that the CCCDA generally requires disclosures to reflect the terms of the legal obligation between the parties and, in the absence of exact information, to be based on the best information reasonably available at the time the disclosure is provided. The court reasoned that all disclosures are premised on what the parties obligate themselves to do, and to assume otherwise would render every disclosure an estimate and preclude any meaningful disclosure. Because the lender had the exact information regarding the debtor's legal obligation to make timely payments, resorting to the best information reasonably available (*e.g.*, the debtor's contention that subprime borrowers were less likely to repay), was unnecessary. On the motion for summary judgment, the lender argued, among other things, that the debtor's written waiver prohibited any loan origination claims. However, the debtor argued that it is not permissible to waive the right of rescission after the expiration of the initial three-day rescission period. The court held that the provisions in TILA and the CCCDA applicable to waiver of the right to rescind before the initial three-day rescission period do not apply to the extended right of rescission. The court noted that judicial review of a waiver or release, at a minimum, requires that it is knowing and voluntary. Here, the debtor argued that his waiver was not "knowing" because he was unaware that he had a CCCDA claim due to the lender's concealment of the "true" APR. The court disagreed, finding that the debtor's possession of the loan documents put him on inquiry notice of his purported CCCDA claims and his right to rescind. Further, by specifically referencing claims arising in connection with the making, closing, administration, collection, or the enforcement of the loan documents, the waiver should have compelled him to investigate the possibility of such claims. The court noted that it was significant that the debtor executed the waiver as part of a loan modification after eight months of negotiations, during which the debtor was represented by counsel. As such, the court found that the debtor's execution of the waiver was

knowing and voluntary. Further, the court acknowledged that TILA and the CCCDA require any waiver to be clearly and conspicuously disclosed, as distinct from general waivers of "any and all claims." The court found that the debtor's waiver satisfied this burden because it expressly referenced claims arising in connection with the loan documents. For a copy of the opinion, please see here.

Litigation

Florida Federal Court Holds NBA Preempts State Law Barring Check Cashing Fees. On June 4, the U.S. District Court for the Middle District of Florida held that the National Bank Act (NBA) and Office of the Comptroller of the Currency (OCC) regulations preempt a Florida law prohibiting check cashing fees. *Baptista v. JP Morgan Chase Bank*, No. 6:10-cv-139, 2010 WL 2342436 (M.D. Fla. June 4, 2010). In this putative class action, the defendant bank charged the plaintiff a fee for cashing a check at the bank because she was a non-account holder. The plaintiff sued, claiming unjust enrichment and arguing that Fla. Stat. § 655.85 forbids banks from cashing checks at less than par value. The court granted the bank's motion to dismiss, finding that § 655.85 only forbids check-cashing fees on bank-to-bank transactions, and, thus, does not apply to the plaintiff. The court additionally held that the NBA and OCC regulations would preempt the statute's prohibition on check cashing fees even if § 655.85 applied to the plaintiff. The court reasoned that the Florida check cashing fee statute conflicts with OCC regulations that (i) authorize national banks to charge their customers non-interest charges and fees, and (ii) provide that the establishment and amounts of non-interest charges and fees are business decisions made at their discretion. Ruling on whether the non-account holder was a "customer" under the relevant OCC regulations, the court added that OCC interpretive letters define "customer" as any party that obtains a product or service from the bank; thus, the plaintiff was a "customer" because she received check cashing services, even if she was a non-account holder. The court also dismissed the plaintiff's claim for unjust enrichment, finding that the claim sought damages from the bank for exercising federally-authorized powers, and, thus, was preempted. For a copy of the opinion, please click here.

Massachusetts Bankruptcy Court Upholds Validity of TILA/CCCDA Disclosures, Waiver. On May 28, the U.S. Bankruptcy Court for the District of Massachusetts held that (i) the use of a reduction feature to calculate the Annual Percentage Rate (APR) provided for an adjustable rate mortgage (ARM) loan does not violate the disclosure requirements of the Massachusetts Consumer Credit Cost Disclosure Act (CCCDA), the Massachusetts analog to the federal Truth in Lending Act (TILA), by failing to reflect that subprime borrowers would be more likely to be delinquent in their payments, and (ii) the waiver of TILA/CCCDA claims, even after the initial rescission period, is valid if the waiver is knowing and voluntary and communicated in a clear and conspicuous manner. *In re DiVittorio*, Adversary Proceeding No. 09-1089, 2010 WL 2204167 (Bankr. D. Mass. May 28, 2010). In this case, the debtor plaintiff brought suit seeking rescission of his loan through a bankruptcy court adversary proceeding, alleging that the defendant lender violated the CCCDA by providing an inaccurate APR on the Truth in Lending Disclosure Statement (TIL Disclosure). The debtor's ARM interest rate was subject to a performance-based rate reduction feature by which the debtor would qualify for a reduced rate if he timely made the first two years of payments. In disclosing the APR in the TIL Disclosure, the lender used the reduced interest rate that the debtor would have been entitled to under the rate reduction feature, thereby assuming that he would timely make the first two years of

payments. The debtor alleged that the APR stated on the TIL Disclosure was numerically inaccurate because it was calculated using the reduction feature, which did not take into account that subprime borrowers would be more likely to be delinquent in their payments. The debtor had previously signed a waiver of any claims against the lender in connection with the making, closing, administration, collection, or the enforcement of the loan documents. The lender moved to dismiss the debtor's claims and additionally moved for summary judgment. On the motion to dismiss, the bankruptcy court held that the CCCDA generally requires disclosures to reflect the terms of the legal obligation between the parties and, in the absence of exact information, to be based on the best information reasonably available at the time the disclosure is provided. The court reasoned that all disclosures are premised on what the parties obligate themselves to do, and to assume otherwise would render every disclosure an estimate and preclude any meaningful disclosure. Because the lender had the exact information regarding the debtor's legal obligation to make timely payments, resorting to the best information reasonably available (*e.g.*, the debtor's contention that subprime borrowers were less likely to repay), was unnecessary. On the motion for summary judgment, the lender argued, among other things, that the debtor's written waiver prohibited any loan origination claims. However, the debtor argued that it is not permissible to waive the right of rescission after the expiration of the initial three-day rescission period. The court held that the provisions in TILA and the CCCDA applicable to waiver of the right to rescind before the initial three-day rescission period do not apply to the extended right of rescission. The court noted that judicial review of a waiver or release, at a minimum, requires that it is knowing and voluntary. Here, the debtor argued that his waiver was not "knowing" because he was unaware that he had a CCCDA claim due to the lender's concealment of the "true" APR. The court disagreed, finding that the debtor's possession of the loan documents put him on inquiry notice of his purported CCCDA claims and his right to rescind. Further, by specifically referencing claims arising in connection with the making, closing, administration, collection, or the enforcement of the loan documents, the waiver should have compelled him to investigate the possibility of such claims. The court noted that it was significant that the debtor executed the waiver as part of a loan modification after eight months of negotiations, during which the debtor was represented by counsel. As such, the court found that the debtor's execution of the waiver was knowing and voluntary. Further, the court acknowledged that TILA and the CCCDA require any waiver to be clearly and conspicuously disclosed, as distinct from general waivers of "any and all claims." The court found that the debtor's waiver satisfied this burden because it expressly referenced claims arising in connection with the loan documents. For a copy of the opinion, please see here.

Ninth Circuit Affirms Right of Federal District Court to Grant Injunctive Relief Pending Arbitration. On June 17, the U.S. Court of Appeals for the Ninth Circuit affirmed the authority of federal district courts to grant injunctive relief in order to preserve the status quo pending arbitration. *Toyo Tire Holdings of Ams. v. Cont'l Tire N. Am.*, No. 10-55145 (9th Cir. June 17, 2010). In this case, the plaintiff and defendant were parties to a partnership and joint venture agreement containing an arbitration clause requiring them to submit "all disputes" to arbitration. After the defendant notified the plaintiff that it intended to dissolve the partnership, the plaintiff requested arbitration and sought interim injunctive relief. On the same day, the plaintiff also sued the defendant in California state court for breach of contract and other state law claims. The defendant then removed the case to federal district court, and the plaintiff asked the district court for a preliminary injunction to preserve the partnership until an arbitral panel itself could resolve its request for interim relief. The district court

denied the plaintiff's request because the parties had agreed to arbitrate their dispute and that the arbitrator had the authority to issue interim injunctive relief. The Ninth Circuit reversed and remanded, noting that one party often has an incentive to delay arbitration proceedings and that, even without bad faith on the part of any party, the selection and formation of an arbitration panel necessarily entails delay, which could vitiate any ultimate relief awarded. Particularly in this case, where the agreed-upon arbitral rules (the Rules of Arbitration of the International Chamber of Commerce) specifically provide for the application to "any competent judicial authority for interim or conservatory measures," the district court was empowered to issue interim injunctive relief in order "to preserve the status quo and the meaningfulness of the arbitration process." For a copy of the opinion, please see http://www.ca9.uscourts.gov/datastore/opinions/2010/06/17/1055145.pdf.

Utah Federal Court Vacates Preliminary Injunction Restraining Entities from Pursuing Foreclosures. On June 11, the U.S. District Court for the District of Utah vacated a Utah state court's recent order enjoining defendants (a bank and its trustee services company) from conducting foreclosure sales in the state. *Cox v. Reconstruct Co., N.A.*, No. 2:10-CV-492 (D. Utah June 11, 2010). The state court had granted the preliminary injunction after the plaintiff borrower, who defaulted on her mortgage loan and was facing foreclosure, alleged that the defendants, among other things, were not registered as foreign corporations with the Utah Department of Corporations and, as a result, had no authority to pursue foreclosures within the state. After removing the case to federal court, the defendants requested that the district court vacate the state court's preliminary injunction. The district court granted the request, thereby allowing the defendants to continue conducting foreclosure proceedings in Utah pending the outcome of the case. A memorandum decision from the district court is forthcoming and will be reported in an upcoming issue of *InfoBytes*.For a copy of the order vacating the preliminary injunction, please click here.

Arizona Federal Court Holds "Skip-Tracer" Not a Debt Collector Under FDCPA. On May 25, in an unpublished decision, the U.S. District Court for the District of Arizona held that a defendant "skip-tracer" company, in the business of locating debtors on behalf of debt collectors, is not a "debt collector" for the purposes of the Fair Debt Collection Practices Act (FDCPA) because it engaged in "mere information gathering." *Baker v. Trans Union LLC*, No. 10-cv-8038, 2010 WL 2104622 (D. Ariz. May 25, 2010). In *Baker*, the consumer plaintiff alleged that the skip-tracer, among other things, violated the FDCPA by failing to make certain required disclosures both when it called the consumer to make an address request and when she called back to obtain further information. While expressing reservations about the asymmetry of allowing skip-tracers to engage in practices that debt collectors cannot, the court nonetheless held that the skip-tracer was not a debt collector because (i) debt collection was not the skip-tracer's primary business purpose, and (ii) the skip-tracer did not try to deceive the plaintiff about the purpose of its call. The court distinguished the skip-tracer's business purpose and telephone practices, which it characterized as "mere information gathering," from the business purpose of a "debt collector" subject to the FDCPA and dismissed the claim. For a copy of the opinion, please click here.

Privacy/Data Security

FTC Finalizes Settlement with Company Charged with Improperly Securing Personal Information. On June 8, the Federal Trade Commission (FTC) announced that it has finalized its settlement with a national restaurant chain, Dave & Busters, in connection with alleged exposure of credit and debit card information (the FTC's proposed settlement was reported in *InfoBytes*, Mar. 26, 2010). According to the FTC, the company failed to take reasonable steps to secure the sensitive personal information of customers on its computer network, which allowed a hacker to make several hundred thousand dollars in fraudulent credit and debit card charges. Under the settlement, the company will (i) establish and maintain a program designed to protect its customers' personal information, (ii) obtain professional third-party audits every other year for 10 years, and (iii) establish and maintain certain record-keeping requirements to allow the FTC to monitor compliance. For a copy of the press release, please click here. For more information, please click here.

Arizona Federal Court Holds "Skip-Tracer" Not a Debt Collector Under FDCPA. On May 25, in an unpublished decision, the U.S. District Court for the District of Arizona held that a defendant "skip-tracer" company, in the business of locating debtors on behalf of debt collectors, is not a "debt collector" for the purposes of the Fair Debt Collection Practices Act (FDCPA) because it engaged in "mere information gathering." *Baker v. Trans Union LLC*, No. 10-cv-8038, 2010 WL 2104622 (D. Ariz. May 25, 2010). In *Baker*, the consumer plaintiff alleged that the skip-tracer, among other things, violated the FDCPA by failing to make certain required disclosures both when it called the consumer to make an address request and when she called back to obtain further information. While expressing reservations about the asymmetry of allowing skip-tracers to engage in practices that debt collectors cannot, the court nonetheless held that the skip-tracer was not a debt collector because (i) debt collection was not the skip-tracer's primary business purpose, and (ii) the skip-tracer did not try to deceive the plaintiff about the purpose of its call. The court distinguished the skip-tracer's business purpose and telephone practices, which it characterized as "mere information gathering," from the business purpose of a "debt collector" subject to the FDCPA and dismissed the claim. For a copy of the opinion, please click here.

Credit Cards

Federal Reserve Board Approves Final Rule to Implement CARD Act. On June 15, the Federal Reserve Board approved a final rule to amend Regulation Z, which implements the Truth in Lending Act. The promulgation of the rule is the third and final stage in the implementation of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act). Specifically, the rule:

- Prohibits credit card issuers from charging a penalty fee of more than $25 for an initial violation and $35 per additional violation occurring within the next six billing cycles. In lieu of these safe harbor amounts, an issuer can charge a higher fee representing a reasonable proportion of the costs it incurs as a result of violations. In addition, a charge card issuer may charge up to 3% of the delinquent balance when it has not received payment for two or more consecutive billing cycles;

- Prohibits credit card issuers from charging penalty fees that exceed the dollar amount associated with the consumer's violation;
- Prohibits (i) account inactivity fees, (ii) termination fees, (iii) fees for transactions that the issuer declines to authorize (except for declined access checks), and (iv) multiple fees based on a single transaction;
- Requires that notices of rate increases for credit card accounts disclose the principal reasons for the increase; and
- Requires issuers to review rate increases imposed on or after January 1, 2009 and, if appropriate, to reduce the rate (the so-called "look-back" provision).

Issuers must comply with the provisions of the rule by August 22, 2010. The rule also amends other penalty fee disclosures, which issuers must comply with by December 1, 2010. For the full text of the rule, please see http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100615a1.pdf.