

January 27, 2012

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Federal Issues

President Obama Announces New Mortgage-Related and Financial Fraud Programs. On January 24, during the State of the Union Address, President Obama announced two mortgage-related initiatives, and a broader financial fraud effort. First, the President outlined a plan he will submit to Congress to expand government support for mortgage refinancing. The costs of the program would be covered by a fee imposed on large financial institutions. Second, the President publicly asked the U.S. Attorney General to create a special investigative unit comprised of federal prosecutors and state attorneys general to expand existing government investigations of "the abusive lending and packaging of risky mortgages that led to the housing crisis." Finally, the President announced his intention to establish a "Financial Crimes Unit of highly trained investigators to crack down on large-scale fraud," and called for Congress to enhance statutory penalties for financial fraud. Previously, Securities and Exchange Commission (SEC) Chairman Mary Shapiro wrote to Congress seeking higher fraud penalties ([see InfoBytes, December 2, 2011](#)). [Click here for a copy of the President's remarks.](#)

On January 27, the U.S. Attorney General officially introduced the special unit that will coordinate federal and state government investigations into residential mortgage-backed securities (RMBS). The unit is being co-chaired by multiple senior officials from the Department of Justice (DOJ) and the SEC, as well as New York Attorney General Eric Schneiderman. It will consist of at least fifty-five DOJ attorneys and other investigative staff, and will include the active participation by numerous additional federal and state entities, including the Consumer Financial Protection Bureau. According to a memorandum issued by Attorney General Holder, the working group will focus on, among other things, (i) alleged misrepresentations concerning the quality of mortgages backing the RMBS; (ii) alleged failures by trustees to manage adequately the assets within securitized pools of loans; and (iii) alleged failures by RMBS sponsors to repurchase problematic loans or remit loan proceeds to RMBS trusts. In his remarks introducing the new unit, Attorney General Holder noted that civil subpoenas recently have been issued to eleven financial institutions in connection with this new

group's efforts. [Click here for a copy the DOJ press release with a link to the Attorney General's memorandum.](#)

House Subcommittee Holds Hearing on CFPB Under Director Cordray. On January 24, the House Oversight Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs held a hearing to receive testimony from newly appointed Consumer Financial Service Bureau (CFPB) Director Richard Cordray. Committee members (i) sought the Director's interpretation of the term "abusive" as it is used in the Dodd-Frank Act, (ii) requested more transparency into the CFPB's planned regulatory actions, and (iii) requested CFPB action to mitigate the impacts of its regulations on small and community institutions. Mr. Cordray declined to offer a definition of "abusive", relying instead on the statutory language. The Director did state that abusive practices that are not also either "unfair or deceptive", likely would be addressed on a "facts and circumstances" basis rather than through an "abstract" regulatory definition. He did not rule out using "abusive practices" as the basis of an enforcement action prior to issuing any further guidance or rulemaking. The Director committed to consider following the SEC's model of periodically publishing a regulatory agenda. He also explained that the CFPB will consider and address impacts of its regulatory actions on community banks and financial institutions with under \$10 billion in assets. [Click here for the subcommittee's hearing statement, including links to Mr. Cordray's written testimony and video of the hearing.](#)

CFPB, DOD, FTC, and State AGs Partner to Develop Enforcement Action Database. On January 25, the CFPB, the Department of Defense (DOD), the Federal Trade Commission (FTC), and the New York Attorney General announced a partnership to develop the Repeat Offenders Against Military (ROAM) Database to track enforcement actions against entities or individuals engaged in consumer financial frauds against military personnel, veterans, and their families. The database, which should be available by mid-February, will compile publicly available information about completed civil and criminal legal actions and will be accessible and searchable by state attorneys general, U.S. Attorneys, and Judge Advocates from all branches of the armed services. The Consumer Protection Committee of the National Association of Attorneys General already has sent a letter to state attorneys general asking them to populate the new database with their enforcement action information. The FTC noted that the ROAM database will complement its Consumer Sentinel Network, which collects and provides wide access to consumer complaints, including those related to the frauds against servicemembers and their families. [Click here for the CFPB announcement;](#) [click here for the New York attorney general's announcement.](#)

CFPB Seeks Third Round of Feedback on Mortgage Closing Forms. On January 24, the CFPB announced a third round of testing of prototype mortgage closing forms as part of its Know Before You Owe campaign. In this round, the CFPB asks the public to compare two versions of its prototype closing forms and consider how each works with the prototype initial disclosure form the CFPB previously developed. The CFPB asks consumers to consider certain specific questions, including whether changes to loan terms or costs are easily identifiable from initial disclosure to closing. The CFPB also seeks comment on whether the disclosures are easy for lenders and settlement agents to use and explain. As with prior rounds of testing, the CFPB will travel to local communities to review

the forms with the public. A fourth and final round of testing is expected next month. [Click here for the CFPB blog post announcing this effort and providing links to the forms.](#)

CFPB and FTC Announce Memorandum of Understanding to Coordinate Regulatory Activities.

On January 23, the CFPB and the FTC announced that the agencies had entered into a memorandum of understanding (MOU) to facilitate coordination of the agencies' consumer financial rulemaking, enforcement, and supervision activities. The MOU establishes regular meetings between the two entities, as well as processes for providing notice of enforcement activities. Under the MOU, the CFPB and the FTC will be able to share consumer complaint information, and the FTC can request CFPB examination reports and confidential supervisory information. [Click here for a copy of the CFPB press release with a link to the MOU.](#)

CFPB Finalizes Amendments to Remittance Transfer Rules (Regulation E). On January 20, the CFPB issued a final rule to amend regulations applicable to consumer remittance transfers of over fifteen dollars originating in the United States and sent internationally. Generally, the final rule requires remittance transfer providers to (i) provide written pre-payment disclosures of the exchange rates and fees associated with a transfer of funds, as well as the amount of funds the recipient will receive, and (ii) investigate consumer disputes and remedy errors. The rulemaking stems from a Dodd-Frank Act provision that expanded the scope of the Electronic Fund Transfer Act to cover international money transfers, and concludes an effort started by the Federal Reserve Board (FRB) that was transferred to the CFPB last year. The final rule closely tracks the proposed FRB rule, but among other things, provides (i) a thirty-minute cancellation period for consumers, as opposed to the proposed one-day period, (ii) additional compliance guidance for specific circumstances, including for transactions conducted by mobile applications, and (iii) revised model disclosure forms. Concurrent with the final rule, the CFPB issued a request for comment on additional revisions to the regulations, including comments and information for use in (i) setting a specific safe harbor for remittance transfer providers that do not provide such services "in the normal course of business", and (ii) applying the new disclosure and cancellation requirements in cases where the request is made several days in advance of the transfer date. Comments on the proposal will be accepted for sixty days following publication in the Federal Register. [Click here for a copy of the press release with links to the final and proposed rules.](#)

OCC Publishes Proposed Stress Test Rule. On January 24, the Office of the Comptroller of the Currency (OCC) published a proposed rule to implement annual capital-adequacy stress tests for national banks and federal savings associations with total consolidated assets of more than \$10 billion. The rule is substantially similar to a recent Federal Deposit Insurance Corporation (FDIC) stress test proposal for FDIC-insured state nonmember banks and state-chartered savings associations. ([See InfoBytes, January 20, 2012](#)). The Dodd-Frank Act requires these stress tests to aid regulators in assessing risk presented by an institution's capitalization and help ensure the institution's financial stability. Under the proposal, the OCC would annually provide covered institutions with at least three sets of conditions - baseline, adverse, and severely adverse - that must be used in conducting an annual stress test. The tests would include calculations showing, for each quarter-end within a defined planning horizon, (i) estimates of revenues, (ii) potential losses, (iii) loan loss provisions, and (iv) potential impact on regulatory capital levels and ratios. Covered institutions

also would be required to establish an oversight and documentation system to ensure that stress testing procedures are effective. Stress test results would have to be submitted to the OCC and the Federal Reserve Board by January 5 of each year, and a summary would have to be released to the public within ninety days thereafter. The OCC would plan to provide covered institutions with the scenarios at least two months before the January 5 deadline. The OCC is accepting public comment on the rule through March 26, 2012. [Click here for a copy of the proposed rule.](#)

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FINRA Issues Notice Regarding Increasing Account Attacks and Theft of Funds. On January 26, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 12-05, notifying institutions of an increase in reports of customer funds being stolen through improper access to customer email accounts and unauthorized electronic instructions to transfer or withdraw funds. FINRA urged firms to review policies and procedures to ensure protection of customer funds,

particularly in cases where the request for funds and transmittal are handled electronically. FINRA recommends that policies and procedures include methods for confirming the identity of the requestor, as well as a system to identify and respond to "red flags." Concurrent with the regulatory notice, FINRA issued an alert to investors warning about the increased account breach activity and providing tips for protecting account information and funds. [Click here for a copy of the Regulatory Notice](#); [click here for the investor alert](#).

Courts

Third Circuit Affirms Partial Expiration Date on Receipt Violates FACTA. On January 24, the U.S. Court of Appeals for the Third Circuit affirmed a district court holding that printing of partial expiration dates does constitute a Fair and Accurate Credit Transactions Act (FACTA) violation, but held that the merchant, in this case, did not willfully violate FACTA by printing a portion of credit card expiration dates on customer receipts. *Long v. Tommy Hilfiger U.S.A., Inc.*, No. 11-1554, 2012 WL 180874 (3rd Cir. Jan. 24, 2012). The consumer alleged, on behalf of a putative nationwide class, that the merchant's practice of printing receipts that included the expiration month, but not year, willfully violated FACTA's prohibition against printing "more than the last five digits of a credit card number or the expiration date upon any receipt provided" at the time of a transaction. On appeal, the court considered two questions: (i) whether the consumer properly alleged a FACTA violation, and (ii) whether the merchant's alleged conduct constituted a willful violation of FACTA. The court held that FACTA prohibits printing of partial expiration dates, and that therefore plaintiff did properly allege a FACTA violation. The court explained that "expiration date" is not defined in the law, and found that "the most natural reading of the phrase" prohibits merchants from printing any of the numbers that appear in the expiration date field on a credit or debit card. If Congress had intended to allow partial expiration dates, the court stated, it would have used language similar to that used with regard to partial credit card numbers. However, the court held that the consumer could not recover statutory damages of \$100 to \$1,000 per violation, punitive damages, and attorneys fees, because the merchant's action was not willful. Relying on a standard set in *Safeco Insurance Company of America v Burr*, 551 U.S. 47 (2007), the court held that the merchant's interpretation that the statute permits partial expiration dates was not "objectively unreasonable", because the statute does not provide a definition for "expiration date" and the interpretation has some foundation in the statutory text. According to the court, although the merchant's interpretation of FACTA was wrong, it did not constitute a willful violation of the law.

[Click here for a copy of the court's decision.](#)

California Federal Court Dismisses Data Loss Class Action Because No Immediate Harm Exists. On January 20, the U.S. District Court for the Eastern District of California dismissed a putative class action brought on behalf of California residents against a company that lost multiple server drives containing personal and medical information. *Whitaker v. Health Net of Cal., Inc.*, No. 11-910, 2012 WL 174961 (E.D. Cal. Jan. 20, 2012). The named plaintiff alleged that the loss of the drives and personal information violated California's Confidentiality of Medical Information Act. Relying on Ninth Circuit decisions in *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010) and *Ruiz v. Gap Inc.*, No. 09-15971, 380 F. Appx. 689 (9th Cir. May 28, 2010), the plaintiff argued that the

threat of harm naturally stems from a loss of data alone. The court held, however, that there is a difference between theft and loss of data. Unlike those prior cases in which personal data was obtained by hacking or data breach, loss of data does not present any actual or immediate harm, only conjectural or hypothetical harm. The court held that the plaintiff lacked standing and dismissed the case with leave to amend because the possibility of harm is not sufficient to meet the constitutional injury-in-fact standard. [Click here for a copy of the court's decision.](#)

Georgia Federal Court Allows RESPA Class Action to Proceed. On January 18, the U.S. District Court for the Northern District of Georgia denied a motion to dismiss a putative class action suit alleging violations of the Real Estate Settlement Procedures Act (RESPA). *Bolinger v. First Multiple Listing Serv., Inc.*, No. 10-00211-RWS, 2012 WL 137883 (N.D. Ga. Jan. 18, 2012). Georgia residents who purchased properties listed on the First Multiple Listing Service, Inc. (FMLS) database claim that member agents and brokers paid fees to FMLS out of settlement proceeds but did not disclose those fees on the HUD-1 settlement statement. Plaintiffs also claim that FMLS used those fees to pay kickbacks to member brokers for referrals of listing business. As such, plaintiffs allege that defendants violated (i) Section 8 of RESPA; (ii) the Sherman Act; and (iii) several Georgia state laws. The court found that plaintiffs alleged sufficient facts for their RESPA claims to survive the motion to dismiss. The Court did, however, dismiss plaintiffs' claims under the Sherman Act, holding that the plaintiffs failed to allege facts showing that defendants engaged in price-fixing by agreeing to fix broker commissions. [Click here for a copy of the court's decision.](#)

Miscellany

EU Commission Officially Releases Proposed Replacement for Data Protection Directive. On January 25, the European Union Commission officially released a proposed Regulation designed to update and replace the 1995 Data Protection Directive and national laws issued under that directive. This proposal is designed as a regulation rather than a directive, allowing it to take effect without national implementing legislation. Instead, the proposal will be submitted to the European Parliament and member states for adoption and would become effective two years after adoption. Notably, the proposed Regulation contains a "right to be forgotten" provision, which provides individuals the right, under certain circumstances, to seek the erasure of personal data and a halt to further dissemination of such data. Other provisions of the Regulation would (i) require explicit data subject consent for processing, where previously consent could be inferred in some cases; (ii) require data breaches to be reported to the national supervisory authority and, in certain cases, to the data subject; and (iii) provide data subjects the right to file complaints with national data protection authorities and seek judicial remedies, including damages, for violations of the Regulation. An earlier unofficial draft of this regulation was reported in

[InfoBytes, December 23, 2011.](#) The two proposals are substantially similar, though the officially released version does lower the limits for penalties under the Regulation. [Click here for a copy of the proposed Regulation and related materials.](#)

Firm News

[James Parkinson](#) will be speaking on a panel at the [ACI Latin America Summit on Anti-Corruption](#) held in Sao Paulo, Brazil on February 8, 2012. The panel is entitled: "Assessing the Risk of Personal Liability in Bribery Investigations."

[David Krakoff](#) will be participating in a panel at the [International Association of Defense Counsel's Midyear Meeting](#) in Palms Springs, California on February 15, 2012. The panel is entitled "Worldwide Enforcement of Anti-Corruption Laws-Navigating the International Business Minefield."

[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."

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

[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 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."

[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.

Firm Publications

[Warren Traiger](#) published an article entitled, "Regulators Drop the Ball on CRA's Original Purpose" in American Banker on December 28, 2011. The article discusses federal regulators' approach to the Community Reinvestment Act. Even though its congressional purpose makes no mention of proscribing lending discrimination based on race, ethnicity, sex, or other prohibited factors, the CRA has become an important tool for enforcing laws that do, like the Fair Housing and Equal Credit Opportunity Acts. [Click here for a copy of the full article](#).

[Donna Wilson](#) published an article entitled, "Neutralizing the Putative Lead Plaintiff" in InsideCounsel on January 5, 2012. The article discusses two recent cases -- *Damasco v. Clearwire Corp.* and *Pitts v. Terrible Herbst, Inc.* -- in which the 7th and 9th Circuits, respectively, reached conflicting results on the issue of whether an offer of judgment for the full amount of a putative lead plaintiff's own claim moots a class action complaint if the offer predates the plaintiff's filing of a motion to certify the action as a class. [Click here for a copy of the full article](#).

[Donna Wilson](#) published an article entitled, "Courts Take a Broad View of Protected Personal Identification Information" in InsideCounsel on January 19, 2012. The article discusses the recent decision in *Tyler v. Michaels Stores, Inc.* and what it means for the definition of personal identification information and the common marketing practice of reverse data mining. [Click here for a copy of the full article](#).

[Kirk Jensen](#) and [Jeffrey Naimon](#) published an article entitled, "The Fair Housing Act, Disparate Impact Claims, and *Magner v. Gallagher*: An Opportunity to Return to the Primacy of the Statutory Text" in the February 2012 volume of *The Banking Law Journal*. The authors discuss the text of the Fair Housing Act, its legislative history, and the past federal appellate court decisions holding that the FHA permits disparate impact claims. They argue that recent Supreme Court decisions cast doubt on the past federal appellate court decisions, and show that the statutory text of the FHA, unlike the text of some other civil rights laws, does not permit disparate impact claims. They also discuss the case

currently pending before the Court in which the Court may address for the first time whether the FHA permits disparate impact claims. [Click here for a copy of the full article.](#)

Mortgages

President Obama Announces New Mortgage-Related and Financial Fraud Programs. On January 24, during the State of the Union Address, President Obama announced two mortgage-related initiatives, and a broader financial fraud effort. First, the President outlined a plan he will submit to Congress to expand government support for mortgage refinancing. The costs of the program would be covered by a fee imposed on large financial institutions. Second, the President publicly asked the U.S. Attorney General to create a special investigative unit comprised of federal prosecutors and state attorneys general to expand existing government investigations of "the abusive lending and packaging of risky mortgages that led to the housing crisis." Finally, the President announced his intention to establish a "Financial Crimes Unit of highly trained investigators to crack down on large-scale fraud," and called for Congress to enhance statutory penalties for financial fraud. Previously, Securities and Exchange Commission (SEC) Chairman Mary Shapiro wrote to Congress seeking higher fraud penalties (

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House Subcommittee Holds Hearing on CFPB Under Director Cordray. On January 24, the House Oversight Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs held a hearing to receive testimony from newly appointed Consumer Financial Service Bureau (CFPB) Director Richard Cordray. Committee members (i) sought the Director's interpretation of the term "abusive" as it is used in the Dodd-Frank Act, (ii) requested more transparency into the CFPB's planned regulatory actions, and (iii) requested CFPB action to mitigate the impacts of its regulations on small and community institutions. Mr. Cordray declined to offer a definition of "abusive", relying instead on the statutory language. The Director did state that abusive practices that are not also either "unfair or deceptive", likely would be addressed on a "facts and circumstances" basis rather than through an "abstract" regulatory definition. He did not rule out using "abusive practices" as the basis of an enforcement action prior to issuing any further guidance or rulemaking. The Director committed to consider following the SEC's model of periodically publishing a regulatory agenda. He also explained that the CFPB will consider and address impacts of its regulatory actions on community banks and financial institutions with under \$10 billion in assets.

[Click here for the subcommittee's hearing statement, including links to Mr. Cordray's written testimony and video of the hearing.](#)

CFPB, DOD, FTC, and State AGs Partner to Develop Enforcement Action Database. On January 25, the CFPB, the Department of Defense (DOD), the Federal Trade Commission (FTC), and the New York Attorney General announced a partnership to develop the Repeat Offenders Against Military (ROAM) Database to track enforcement actions against entities or individuals engaged in consumer financial frauds against military personnel, veterans, and their families. The database, which should be available by mid-February, will compile publicly available information about completed civil and criminal legal actions and will be accessible and searchable by state attorneys general, U.S. Attorneys, and Judge Advocates from all branches of the armed services. The Consumer Protection Committee of the National Association of Attorneys General already has sent a letter to state attorneys general asking them to populate the new database with their enforcement action information. The FTC noted that the ROAM database will complement its Consumer Sentinel Network, which collects and provides wide access to consumer complaints, including those related to the frauds against servicemembers and their families. [Click here for the CFPB announcement](#); [click here for the New York attorney general's announcement](#).

CFPB and FTC Announce Memorandum of Understanding to Coordinate Regulatory Activities. On January 23, the CFPB and the FTC announced that the agencies had entered into a memorandum of understanding (MOU) to facilitate coordination of the agencies' consumer financial rulemaking, enforcement, and supervision activities. The MOU establishes regular meetings between the two entities, as well as processes for providing notice of enforcement activities. Under the MOU, the CFPB and the FTC will be able to share consumer complaint information, and the FTC can request CFPB examination reports and confidential supervisory information. [Click here for a copy of the CFPB press release with a link to the MOU.](#)

CFPB Finalizes Amendments to Remittance Transfer Rules (Regulation E). On January 20, the CFPB issued a final rule to amend regulations applicable to consumer remittance transfers of over fifteen dollars originating in the United States and sent internationally. Generally, the final rule requires remittance transfer providers to (i) provide written pre-payment disclosures of the exchange rates and fees associated with a transfer of funds, as well as the amount of funds the recipient will receive, and (ii) investigate consumer disputes and remedy errors. The rulemaking stems from a Dodd-Frank Act provision that expanded the scope of the Electronic Fund Transfer Act to cover international money transfers, and concludes an effort started by the Federal Reserve Board (FRB) that was transferred to the CFPB last year. The final rule closely tracks the proposed FRB rule, but among other things, provides (i) a thirty-minute cancellation period for consumers, as opposed to the proposed one-day period, (ii) additional compliance guidance for specific circumstances, including for transactions conducted by mobile applications, and (iii) revised model disclosure forms. Concurrent with the final rule, the CFPB issued a request for comment on additional revisions to the regulations, including comments and information for use in (i) setting a specific safe harbor for remittance transfer providers that do not provide such services "in the normal course of business", and (ii) applying the new disclosure and cancellation requirements in cases where the request is made several days in advance of the transfer date. Comments on the proposal will be accepted for sixty days following

publication in the Federal Register. [Click here for a copy of the press release with links to the final and proposed rules.](#)

Securities

President Obama Announces New Mortgage-Related and Financial Fraud Programs. On January 24, during the State of the Union Address, President Obama announced two mortgage-related initiatives, and a broader financial fraud effort. First, the President outlined a plan he will submit to Congress to expand government support for mortgage refinancing. The costs of the program would be covered by a fee imposed on large financial institutions. Second, the President publicly asked the U.S. Attorney General to create a special investigative unit comprised of federal prosecutors and state attorneys general to expand existing government investigations of "the abusive lending and packaging of risky mortgages that led to the housing crisis." Finally, the President announced his intention to establish a "Financial Crimes Unit of highly trained investigators to crack down on large-scale fraud," and called for Congress to enhance statutory penalties for financial fraud. Previously, Securities and Exchange Commission (SEC) Chairman Mary Shapiro wrote to Congress seeking higher fraud penalties (

[see InfoBytes, December 2, 2011](#)). [Click here for a copy of the President's remarks.](#)

On January 27, the U.S. Attorney General officially introduced the special unit that will coordinate federal and state government investigations into residential mortgage-backed securities (RMBS). The unit is being co-chaired by multiple senior officials from the Department of Justice (DOJ) and the SEC, as well as New York Attorney General Eric Schneiderman. It will consist of at least fifty-five DOJ attorneys and other investigative staff, and will include the active participation by numerous additional federal and state entities, including the Consumer Financial Protection Bureau. According to a memorandum issued by Attorney General Holder, the working group will focus on, among other things, (i) alleged misrepresentations concerning the quality of mortgages backing the RMBS; (ii) alleged failures by trustees to manage adequately the assets within securitized pools of loans; and (iii) alleged failures by RMBS sponsors to repurchase problematic loans or remit loan proceeds to RMBS trusts. In his remarks introducing the new unit, Attorney General Holder noted that civil subpoenas recently have been issued to eleven financial institutions in connection with this new group's efforts. [Click here for a copy the DOJ press release with a link to the Attorney General's memorandum.](#)

FINRA Issues Notice Regarding Increasing Account Attacks and Theft of Funds. On January 26, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 12-05, notifying institutions of an increase in reports of customer funds being stolen through improper access to customer email accounts and unauthorized electronic instructions to transfer or withdraw funds. FINRA urged firms to review policies and procedures to ensure protection of customer funds, particularly in cases where the request for funds and transmittal are handled electronically. FINRA recommends that policies and procedures include methods for confirming the identity of the requestor, as well as a system to identify and respond to "red flags." Concurrent with the regulatory notice, FINRA issued an alert to investors warning about the increased account breach activity and

providing tips for protecting account information and funds. [Click here for a copy of the Regulatory Notice](#); [click here for the investor alert](#).

Privacy/Data Security

Third Circuit Affirms Partial Expiration Date on Receipt Violates FACTA. On January 24, the U.S. Court of Appeals for the Third Circuit affirmed a district court holding that printing of partial expiration dates does constitute a Fair and Accurate Credit Transactions Act (FACTA) violation, but held that the merchant, in this case, did not willfully violate FACTA by printing a portion of credit card expiration dates on customer receipts. *Long v. Tommy Hilfiger U.S.A., Inc.*, No. 11-1554, 2012 WL 180874 (3rd Cir. Jan. 24, 2012). The consumer alleged, on behalf of a putative nationwide class, that the merchant's practice of printing receipts that included the expiration month, but not year, willfully violated FACTA's prohibition against printing "more than the last five digits of a credit card number or the expiration date upon any receipt provided" at the time of a transaction. On appeal, the court considered two questions: (i) whether the consumer properly alleged a FACTA violation, and (ii) whether the merchant's alleged conduct constituted a willful violation of FACTA. The court held that FACTA prohibits printing of partial expiration dates, and that therefore plaintiff did properly allege a FACTA violation. The court explained that "expiration date" is not defined in the law, and found that "the most natural reading of the phrase" prohibits merchants from printing any of the numbers that appear in the expiration date field on a credit or debit card. If Congress had intended to allow partial expiration dates, the court stated, it would have used language similar to that used with regard to partial credit card numbers. However, the court held that the consumer could not recover statutory damages of \$100 to \$1,000 per violation, punitive damages, and attorneys fees, because the merchant's action was not willful. Relying on a standard set in *Safeco Insurance Company of America v Burr*, 551 U.S. 47 (2007), the court held that the merchant's interpretation that the statute permits partial expiration dates was not "objectively unreasonable", because the statute does not provide a definition for "expiration date" and the interpretation has some foundation in the statutory text. According to the court, although the merchant's interpretation of FACTA was wrong, it did not constitute a willful violation of the law.

[Click here for a copy of the court's decision.](#)

California Federal Court Dismisses Data Loss Class Action Because No Immediate Harm Exists. On January 20, the U.S. District Court for the Eastern District of California dismissed a putative class action brought on behalf of California residents against a company that lost multiple server drives containing personal and medical information. *Whitaker v. Health Net of Cal., Inc.*, No. 11-910, 2012 WL 174961 (E.D. Cal. Jan. 20, 2012). The named plaintiff alleged that the loss of the drives and personal information violated California's Confidentiality of Medical Information Act. Relying on Ninth Circuit decisions in *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010) and *Ruiz v. Gap Inc.*, No. 09-15971, 380 F. Appx. 689 (9th Cir. May 28, 2010), the plaintiff argued that the threat of harm naturally stems from a loss of data alone. The court held, however, that there is a difference between theft and loss of data. Unlike those prior cases in which personal data was obtained by hacking or data breach, loss of data does not present any actual or immediate harm, only conjectural or hypothetical harm. The court held that the plaintiff lacked standing and dismissed the

case with leave to amend because the possibility of harm is not sufficient to meet the constitutional injury-in-fact standard. [Click here for a copy of the court's decision.](#)

EU Commission Officially Releases Proposed Replacement for Data Protection Directive. On January 25, the European Union Commission officially released a proposed Regulation designed to update and replace the 1995 Data Protection Directive and national laws issued under that directive. This proposal is designed as a regulation rather than a directive, allowing it to take effect without national implementing legislation. Instead, the proposal will be submitted to the European Parliament and member states for adoption and would become effective two years after adoption. Notably, the proposed Regulation contains a "right to be forgotten" provision, which provides individuals the right, under certain circumstances, to seek the erasure of personal data and a halt to further dissemination of such data. Other provisions of the Regulation would (i) require explicit data subject consent for processing, where previously consent could be inferred in some cases; (ii) require data breaches to be reported to the national supervisory authority and, in certain cases, to the data subject; and (iii) provide data subjects the right to file complaints with national data protection authorities and seek judicial remedies, including damages, for violations of the Regulation. An earlier unofficial draft of this regulation was reported in [InfoBytes, December 23, 2011](#). The two proposals are substantially similar, though the officially released version does lower the limits for penalties under the Regulation. [Click here for a copy of the proposed Regulation and related materials.](#)

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