Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

December 10, 2010

Topics In This Issue

Federal Issues

OCC Rule Strengthens Confidentiality of Suspicious Activity Reports. Effective on January 3, 2011, the OCC will amend its regulations governing the release of non-public OCC information under 12 CFR part 4, subpart C. Under the new rule, the OCC will release a Suspicious Activity Report (SAR), or any information that would reveal the existence of a SAR (SAR information) only when necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act (BSA). The standards also state that "official duties" do not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public OCC information under § 4.33. Consequently, the OCC will not release SAR information in response to a request from a private litigant arising out of a private legal proceeding. Furthermore, the OCC will deny a request for non-public information made under 12 CFR § 4.33 if the release is prohibited by law. For more on this Rule, please click here. To reflect changes made by the USA PATRIOT Act, the amendments also modify the scope of the rule's safe harbor provision to include the voluntary disclosure of possible violations of law and regulations to a government agency and expands the limit on civil liability to include "any liability that may exist under a contract or other legally enforceable agreement (including any arbitration agreement)." Contemporaneous with the publication of the OCC rule, the Financial Crimes Enforcement Network (FinCen) issued rules, two guidance documents, and an advisory letter regarding the sharing of SARs which may be used to interpret the new OCC provisions. The OCC and FinCen rules and guidance become effective January 3, 2011. For a copy of the final OCC rule, please click here.

FTC Settles with Telemarketers Who Falsely Promised to Reduce Credit Card Interest Rates. On December 6, the U.S. District Court for the Middle District of Florida, Orlando Division, at the request of the Federal Trade Commission (FTC), approved a settlement shutting down two groups of telemarketers who misled consumers by falsely promising to lower their credit card interest rates. The settlement permanently bans JPM Accelerated Services (JPM) and IXE Accelerated Financial Centers, LLC (IXE) from making robocalls and selling debt relief services. The orders also impose judgments of $5.9 million against defendants associated with JPM and $3.2 million against six individual defendants associated with IXE. The FTC alleged in its complaint that JPM and related

defendants made thousands of pre-recorded robocalls in violation of the Telemarketing Sales Rule. Consumers who responded to the robocalls were transferred to live telemarketers and were told that for an up-front fee ranging from $495 to $995, they could save thousands of dollars as a result of lower interest rates. After collecting the fees, JPM allegedly failed to deliver the promised interest rate reductions and savings and routinely refused to honor its full money-back guarantee. In the same press release, the FTC announced the National Do Not Call Registry Data Book for Fiscal Year 2010 (Data Book) containing information such as the number of active registrations and consumer complaint figures since the Registry began in 2003. For a copy of the press release, please see http://www.ftc.gov/opa/2010/12/jpm.shtm.

FTC Settlement Agreement Bans Marketer From Debt Relief Business. On December 6, the Federal Trade Commission (FTC) announced a settlement agreement with Debt.com Marketing, LLC, Media Choice, LLC, 800 Credit Card Debt, LLC, and Stephen Todd Cook. The FTC's complaint alleged that the defendants deceptively claimed they would eliminate or reduce consumers' debts quickly and would end calls from debt collectors. The complaint also alleged the defendants falsely advertised that they provided debt elimination or reduction services when in fact they sold sales leads to debt settlement providers or to other lead generators or lead brokers that re-sold them. The settlement order imposed a $28.2 million judgment that will be suspended when the defendants surrender all funds in their corporate bank accounts, as well as proceeds from the sale of properties owned by Cook. The settlement order also bans the defendants from the debt relief business and prohibits them from making unsubstantiated claims about financial related product or services or misrepresenting material facts about any product or service. For a copy of the FTC's press release, please see http://www.ftc.gov/opa/2010/12/creditdebt.shtm.

FinCen Proposes Requiring Non-Bank Mortgage Lenders to Adopt Anti-Money Laundering Programs. On December 6, the Financial Crimes Enforcement Network (FinCen) proposed requiring that non-bank residential mortgage originators and brokers establish anti-money laundering (AML) programs and comply with suspicious activity report (SAR) regulations. Under current FinCen regulations, the only mortgage lenders required to operate an anti-money laundering program and file SARs are banks and insured depository institutions. With the proposal, FinCen is attempting to close what it perceives as a regulatory gap that money launderers have exploited between the obligations of bank and non-bank mortgage lenders. The deadline for comments on the proposed rule is February 7, 2011. For a copy of the press release, please see http://www.fincen.gov/news_room/nr/pdf/20101206.pdf. For a copy of the proposed rule, please see http://edocket.access.gpo.gov/2010/pdf/2010-30765.pdf.

FTC Seeks Public Comments to Strengthen Caller ID Provisions of the Telemarketing Sales Rule. On December 7, the Federal Trade Commission (FTC) announced that it is seeking public comments on whether and how to strengthen the Caller ID provisions of the Telemarketing Sales Rule in order to make Caller ID more useful to consumers and to combat technologies that hide telemarketers' identities. Currently, the Caller ID provisions generally require telemarketers to provide consumers who use Caller ID services with the telephone number and name, if displayed, of either the telemarketer or the organization represented by the telemarketer. The FTC's announcement, contained in an advance notice of proposed rulemaking (ANPR), does not include a specific plan to

strengthen the Caller ID provisions. Instead, the ANPR provides information on how the benefits of Caller ID can be undermined by telemarketers' use of sophisticated technology, and seeks comments on a range of Caller ID-related questions to help the FTC decide whether to propose additional requirements. The deadline for comments is January 28, 2011. For a copy of the press release, please see http://www.ftc.gov/opa/2010/12/tsrcaller.shtm. For a copy of the proposed rule, please see http://www.ftc.gov/os/fedreg/2010/december/101207tsrcalleridfrn.pdf.

DOJ Settles Fair Lending Case With Narrow Disparity. On December 8, PrimeLending, a national mortgage lender with over 150 offices in dozens of states, agreed to pay $2 million to settle allegations by the Department of Justice (DOJ) that it violated the Fair Housing Act and Equal Credit Opportunity Act by discriminating against African American borrowers between 2006 and 2009. The DOJ alleged that during that period, PrimeLending charged African-American borrowers higher annual percentage rates of interest for prime fixed-rate home loans and for home loans guaranteed by the Federal Housing Administration and Department of Veterans Affairs than it charged to similarly-situated white borrowers. The principal reason for the disparity, according to the DOJ, was PrimeLending's policy of giving its employees wide discretion to increase their commissions by adding "overages" to loans, which increased the interest rates paid by borrowers. This policy had a disparate impact on African-American borrowers. The DOJ's case arose from a referral in 2009 by the Board of Governors of the Federal Reserve, which regulates PrimeLending's owner, PlainsCapital Bank of Lubbock, Texas. The settlement requires, in addition to the monetary payment, that Prime Lending adopt numerous policies and procedures to avoid discrimination in the future. For a copy of the press release, which includes links to the DOJ's complaint and settlement order, please see http://www.justice.gov/opa/pr/2010/December/10-crt-1406.html.

State Issues

Georgia Department of Banking and Finance Adopts Final Regulations Affecting Lenders, Brokers, and Loan Originators. Recently, the Georgia Department of Banking and Finance (Department) adopted a final rule addressing disclosure and advertising requirements, license renewal periods and fees, and administrative fines and penalties for lenders, brokers, and loan originators licensed in Georgia. The final rule also revised certain provisions of the Department's September 23 proposed rule by clarifying that when licensees take loan applications that subsequently are cancelled, they should retain copies of the applications regardless of whether they are signed or unsigned. Notably, the final rule also withdrew for further study the Department's proposed rule addressing Georgia's legal lending limit statute, which would have considered loan renewals for nonperforming loans to be an extension of credit for purposes of the statute's legal lending limit. The new rule became effective on November 22, 2010. For a copy of the final rule, please see http://1.usa.gov/pQzZkl.

Courts

Louisiana Supreme Court Holds HOEPA Points and Fees Do Not Include YSP. On November 30, the Louisiana Supreme Court held that the Court of Appeals of Louisiana, Fifth Circuit erred in finding that a lender-paid yield spread premium (YSP) constitutes points and fees within the meaning of 15 U.S.C. § 1602(aa)(1)(B) of the Home Ownership and Equity Protection Act (HOEPA).*Bank of N.Y. v. Parnell*, No. 2010-C-0435 (La. Nov. 30, 2010). The lower court, acknowledging that it had previously adopted a consumer-oriented view of HOEPA and citing federal cases that had ruled in favor of consumers on this issue, interpreted the term "payable" to mean obligated to pay rather than paid. The Louisiana Supreme Court disagreed, noting that the Federal Reserve Board's Official Staff Commentary of Regulation Z "clearly indicates that mortgage broker fees that are not paid by the consumer are not included in the HOEPA 'points and fees' calculations." The court concluded that the lender-paid YSP in this case could not be included in the points and fees calculation under HOEPA because it was paid to the mortgage broker by a secondary source. In addition, because, The court reasoned that the YSP could not be included in the points and fees calculation because only those fees "paid by the borrower at or before closing are properly included" and, in this case, the lender paid the YSP to the broker at the time the loan closed and the borrower's obligation to pay was in the form of a higher interest rate paid over the course of the loan. For a copy of the opinion, please click here.

Indiana Court Holds That FHA Servicing Responsibilities May Be Raised As Affirmative Defense In Foreclosure Actions. On November 19, in a case of first impression in Indiana, that state's Court of Appeals held that a borrower on a Federal Housing Administration (FHA)-insured loan may raise as an affirmative defense to a foreclosure action the servicer's failure to comply with FHA foreclosure-avoidance regulations. *Lacy-McKinney v. Taylor, Bean & Whitaker Mortg. Corp.*, No. 71A03-0912-CV-587, 2010 WL 4683464 (Ind. Ct. App. Nov. 19, 2010). The FHA's regulations require that servicers, among other things, make reasonable efforts to meet face-to-face with borrowers prior to filing a foreclosure claim, and accept or hold in trust partial payments from a delinquent borrower. The Indiana Court of Appeal, joining state courts in several other jurisdictions, rejected the mortgagee's arguments that the FHA regulations applied only to the relationship between mortgagees and the government, and that Congress did not intend for the regulations to be used as a defense by mortgagors in default. Holding that there were disputed issues of fact regarding whether the servicer improperly refused the borrower's partial payments and made reasonable efforts to conduct a face-to-face meeting with the borrower prior to foreclosure, the court reversed a lower court's grant of summary judgment in favor of the mortgagee. For a copy of the opinion, please click here.

Firm News

Jon Jerison will present a Sheshunoff Consulting + Solutions webinar, "Update on Managing HELOCs - Consumer Laws and Recent Litigation," on Wednesday, December 15. For more information, see http://www.smslp.com/events/helocs-update.

James Parkinson will speak in the Strafford web conference, "The FCPA's Exception and Affirmative Defenses: Complying with the Requirements for Gifts, Hospitality, and Facilitation Payments" at 1pm

EST on December 21. This 75-minute CLE webinar will provide guidance to counsel for U.S. Companies conducting business internationally on navigating the facilitation-payment exception and affirmative defenses under the FCPA in order to avoid violations and penalties.

James Parkinson will be speaking at the web conference "FCPA Compliance: Best Practices for Your Anti-Corruption Compliance Program," hosted by National Constitution Center Conferences on January 19, 2011.

Donna Wilson will be speaking at the ACI Privacy & Security of Consumer & Employee Information Conference on January 25-26, 2011 in Washington, DC. The topic will be "Responding to the Latest Cyber Threats: Mobile Workforces, Technology, Data Thefts, and Cloud Computing."

Andrew Sandler will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27, 2011 at 11am. The conference is taking place at The Helmsley Park Lane Hotel, 36 Central Park South, NYC. The topic will be Emerging Federal and State Regulatory and Enforcement Initiatives: FTC, DOJ, SEC, FRB, and State AGs Perspectives. Also on the panel with Andy will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

Mortgages

FinCen Proposes Requiring Non-Bank Mortgage Lenders to Adopt Anti-Money Laundering Programs. On December 6, the Financial Crimes Enforcement Network (FinCen) proposed requiring that non-bank residential mortgage originators and brokers establish anti-money laundering (AML) programs and comply with suspicious activity report (SAR) regulations. Under current FinCen regulations, the only mortgage lenders required to operate an anti-money laundering program and file SARs are banks and insured depository institutions. With the proposal, FinCen is attempting to close what it perceives as a regulatory gap that money launderers have exploited between the obligations of bank and non-bank mortgage lenders. The deadline for comments on the proposed rule is February 7, 2011. For a copy of the press release, please see http://www.fincen.gov/news_room/nr/pdf/20101206.pdf. For a copy of the proposed rule, please see http://edocket.access.gpo.gov/2010/pdf/2010-30765.pdf.

DOJ Settles Fair Lending Case With Narrow Disparity. On December 8, PrimeLending, a national mortgage lender with over 150 offices in dozens of states, agreed to pay $2 million to settle allegations by the Department of Justice (DOJ) that it violated the Fair Housing Act and Equal Credit Opportunity Act by discriminating against African American borrowers between 2006 and 2009. The DOJ alleged that during that period, PrimeLending charged African-American borrowers higher annual percentage rates of interest for prime fixed-rate home loans and for home loans guaranteed by the Federal Housing Administration and Department of Veterans Affairs than it charged to similarly-situated white borrowers. The principal reason for the disparity, according to the DOJ, was PrimeLending's policy of giving its employees wide discretion to increase their commissions by adding "overages" to loans, which increased the interest rates paid by borrowers. This policy had a disparate impact on African-American borrowers. The DOJ's case arose from a referral in 2009 by the

Board of Governors of the Federal Reserve, which regulates PrimeLending's owner, PlainsCapital Bank of Lubbock, Texas. The settlement requires, in addition to the monetary payment, that Prime Lending adopt numerous policies and procedures to avoid discrimination in the future. For a copy of the press release, which includes links to the DOJ's complaint and settlement order, please see http://www.justice.gov/opa/pr/2010/December/10-crt-1406.html.

Georgia Department of Banking and Finance Adopts Final Regulations Affecting Lenders, Brokers, and Loan Originators. Recently, the Georgia Department of Banking and Finance (Department) adopted a final rule addressing disclosure and advertising requirements, license renewal periods and fees, and administrative fines and penalties for lenders, brokers, and loan originators licensed in Georgia. The final rule also revised certain provisions of the Department's September 23 proposed rule by clarifying that when licensees take loan applications that subsequently are cancelled, they should retain copies of the applications regardless of whether they are signed or unsigned. Notably, the final rule also withdrew for further study the Department's proposed rule addressing Georgia's legal lending limit statute, which would have considered loan renewals for nonperforming loans to be an extension of credit for purposes of the statute's legal lending limit. The new rule became effective on November 22, 2010. For a copy of the final rule, please see http://1.usa.gov/pQzZkl.

Banking

OCC Rule Strengthens Confidentiality of Suspicious Activity Reports. Effective on January 3, 2011, the OCC will amend its regulations governing the release of non-public OCC information under 12 CFR part 4, subpart C. Under the new rule, the OCC will release a Suspicious Activity Report (SAR), or any information that would reveal the existence of a SAR (SAR information) only when necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act (BSA). The standards also state that "official duties" do not include the disclosure of SAR information in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public OCC information under § 4.33. Consequently, the OCC will not release SAR information in response to a request from a private litigant arising out of a private legal proceeding. Furthermore, the OCC will deny a request for non-public information made under 12 CFR § 4.33 if the release is prohibited by law. For more on this Rule, please click here. To reflect changes made by the USA PATRIOT Act, the amendments also modify the scope of the rule's safe harbor provision to include the voluntary disclosure of possible violations of law and regulations to a government agency and expands the limit on civil liability to include "any liability that may exist under a contract or other legally enforceable agreement (including any arbitration agreement)." Contemporaneous with the publication of the OCC rule, the Financial Crimes Enforcement Network (FinCen) issued rules, two guidance documents, and an advisory letter regarding the sharing of SARs which may be used to interpret the new OCC provisions. The OCC and FinCen rules and guidance become effective January 3, 2011. For a copy of the final OCC rule, please click here.

Consumer Finance

FTC Settlement Agreement Bans Marketer From Debt Relief Business. On December 6, the Federal Trade Commission (FTC) announced a settlement agreement with Debt.com Marketing, LLC, Media Choice, LLC, 800 Credit Card Debt, LLC, and Stephen Todd Cook. The FTC's complaint alleged that the defendants deceptively claimed they would eliminate or reduce consumers' debts quickly and would end calls from debt collectors. The complaint also alleged the defendants falsely advertised that they provided debt elimination or reduction services when in fact they sold sales leads to debt settlement providers or to other lead generators or lead brokers that re-sold them. The settlement order imposed a $28.2 million judgment that will be suspended when the defendants surrender all funds in their corporate bank accounts, as well as proceeds from the sale of properties owned by Cook. The settlement order also bans the defendants from the debt relief business and prohibits them from making unsubstantiated claims about financial related product or services or misrepresenting material facts about any product or service. For a copy of the FTC's press release, please see http://www.ftc.gov/opa/2010/12/creditdebt.shtm.

FTC Seeks Public Comments to Strengthen Caller ID Provisions of the Telemarketing Sales Rule. On December 7, the Federal Trade Commission (FTC) announced that it is seeking public comments on whether and how to strengthen the Caller ID provisions of the Telemarketing Sales Rule in order to make Caller ID more useful to consumers and to combat technologies that hide telemarketers' identities. Currently, the Caller ID provisions generally require telemarketers to provide consumers who use Caller ID services with the telephone number and name, if displayed, of either the telemarketer or the organization represented by the telemarketer. The FTC's announcement, contained in an advance notice of proposed rulemaking (ANPR), does not include a specific plan to strengthen the Caller ID provisions. Instead, the ANPR provides information on how the benefits of Caller ID can be undermined by telemarketers' use of sophisticated technology, and seeks comments on a range of Caller ID-related questions to help the FTC decide whether to propose additional requirements. The deadline for comments is January 28, 2011. For a copy of the press release, please see http://www.ftc.gov/opa/2010/12/tsrcaller.shtm. For a copy of the proposed rule, please see http://www.ftc.gov/os/fedreg/2010/december/101207tsrcalleridfrn.pdf.

Litigation

Louisiana Supreme Court Holds HOEPA Points and Fees Do Not Include YSP. On November 30, the Louisiana Supreme Court held that the Court of Appeals of Louisiana, Fifth Circuit erred in finding that a lender-paid yield spread premium (YSP) constitutes points and fees within the meaning of 15 U.S.C. § 1602(aa)(1)(B) of the Home Ownership and Equity Protection Act (HOEPA).*Bank of N.Y. v. Parnell*, No. 2010-C-0435 (La. Nov. 30, 2010). The lower court, acknowledging that it had previously adopted a consumer-oriented view of HOEPA and citing federal cases that had ruled in favor of consumers on this issue, interpreted the term "payable" to mean obligated to pay rather than paid. The Louisiana Supreme Court disagreed, noting that the Federal Reserve Board's Official Staff Commentary of Regulation Z "clearly indicates that mortgage broker fees that are not paid by the consumer are not included in the HOEPA 'points and fees' calculations." The court concluded that the lender-paid YSP in this case could not be included in the points and fees calculation under HOEPA

because it was paid to the mortgage broker by a secondary source. In addition, because, The court reasoned that the YSP could not be included in the points and fees calculation because only those fees "paid by the borrower at or before closing are properly included" and, in this case, the lender paid the YSP to the broker at the time the loan closed and the borrower's obligation to pay was in the form of a higher interest rate paid over the course of the loan. For a copy of the opinion, please click here.

Indiana Court Holds That FHA Servicing Responsibilities May Be Raised As Affirmative Defense In Foreclosure Actions. On November 19, in a case of first impression in Indiana, that state's Court of Appeals held that a borrower on a Federal Housing Administration (FHA)-insured loan may raise as an affirmative defense to a foreclosure action the servicer's failure to comply with FHA foreclosure-avoidance regulations. *Lacy-McKinney v. Taylor, Bean & Whitaker Mortg. Corp.*, No. 71A03-0912-CV-587, 2010 WL 4683464 (Ind. Ct. App. Nov. 19, 2010). The FHA's regulations require that servicers, among other things, make reasonable efforts to meet face-to-face with borrowers prior to filing a foreclosure claim, and accept or hold in trust partial payments from a delinquent borrower. The Indiana Court of Appeal, joining state courts in several other jurisdictions, rejected the mortgagee's arguments that the FHA regulations applied only to the relationship between mortgagees and the government, and that Congress did not intend for the regulations to be used as a defense by mortgagors in default. Holding that there were disputed issues of fact regarding whether the servicer improperly refused the borrower's partial payments and made reasonable efforts to conduct a face-to-face meeting with the borrower prior to foreclosure, the court reversed a lower court's grant of summary judgment in favor of the mortgagee. For a copy of the opinion, please click here.

Credit Cards

FTC Settles with Telemarketers Who Falsely Promised to Reduce Credit Card Interest Rates. On December 6, the U.S. District Court for the Middle District of Florida, Orlando Division, at the request of the Federal Trade Commission (FTC), approved a settlement shutting down two groups of telemarketers who misled consumers by falsely promising to lower their credit card interest rates. The settlement permanently bans JPM Accelerated Services (JPM) and IXE Accelerated Financial Centers, LLC (IXE) from making robocalls and selling debt relief services. The orders also impose judgments of $5.9 million against defendants associated with JPM and $3.2 million against six individual defendants associated with IXE. The FTC alleged in its complaint that JPM and related defendants made thousands of pre-recorded robocalls in violation of the Telemarketing Sales Rule. Consumers who responded to the robocalls were transferred to live telemarketers and were told that for an up-front fee ranging from $495 to $995, they could save thousands of dollars as a result of lower interest rates. After collecting the fees, JPM allegedly failed to deliver the promised interest rate reductions and savings and routinely refused to honor its full money-back guarantee. In the same press release, the FTC announced the National Do Not Call Registry Data Book for Fiscal Year 2010 (Data Book) containing information such as the number of active registrations and consumer complaint figures since the Registry began in 2003. For a copy of the press release, please see http://www.ftc.gov/opa/2010/12/jpm.shtm.

We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes.
Email: **infobytes@buckleysandler.com**

For back issues of INFOBYTES (or other BuckleySandler LLP publications), visit **http://www.buckleysandler.com/infobytes/infobytes**