Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

December 30, 2011

Topics In This Issue

Federal Issues

Federal Reserve Issues Final Notice on SLHC's Filing of Regulatory Reports. On December 23, the Federal Reserve Board (FRB) issued a final notice exempting a limited number of commercial and insurance savings and loan holding companies (SLHCs) from regulatory reporting and instituting a 2-year phase-in period for the remaining SLHCs. Following a transfer of supervisory and rulemaking authority from the Office of Thrift Supervision (OTS) under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the FRB finalized the reporting requirements of SLHCs after considering comments from earlier this year. Pursuant to the final notice, a limited number of SLHCs are exempted from regulatory reporting using the Board's existing regulatory reports and there is a two-year phase-in period for regulatory reporting for all other SLHCs. Exempt SLHCs will continue to submit (i) the Schedule HC, which is currently a part of the Thrift Financial Report, (ii) the OTS H-(b)11 Annual/Current Report, and (iii) the Federal Reserve's FR Y-6, Annual Report for Bank Holding Companies, or the FR Y-7, Annual Report for Foreign Banking Organizations. Click here for a copy of the press release. Click here for a copy of the final notice.

Massachusetts Senator Calls for Renewed Criminal Investigation of Fannie and Freddie. On December 22, in reference to a recent civil lawsuit against six former Fannie Mae and Freddie Mac executives, Senator Scott Brown expressed concern that the lawsuit "does not go nearly far enough to achieve justice" and called for a criminal investigation into the two mortgage enterprises. Writing to Attorney General Eric Holder and Chairman Mary Shapiro of the Securities and Exchange Commission (SEC), Brown insists that the Department of Justice and the SEC have been "too timid" in pursuing criminal cases against government-sponsored enterprises such as Fannie and Freddie. In particular, Brown attributes a $150 billion taxpayer loss to the two entities, while asserting that both companies hid their risk exposure to subprime and other allegedly risky loans. Despite these purported activities, Brown observes, there have been no criminal convictions related to either company since 2003. "Fannie Mae and Freddie Mac were among those institutions at the very center of the crisis," he argues. "Now is not the time to give up in the pursuit of justice." If illegal actions were taken at the two companies, he says, "criminal prosecution should be pursued and people should go to jail." Click here for a copy of the letter.

Federal Banking Agencies Amend CRA Regulations to Adjust Asset-Size Thresholds. On December 22, the Office of the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance

Corporation amended their Community Reinvestment Act (CRA) regulations to adjust the asset-size thresholds used to define "small" and "intermediate" banks and savings associations. Effective January 1, 2012, banks and savings associations that, as of December 31 of either of the prior two calendar years, had assets of less than $1.160 billion are considered "small banks" or "small savings associations"; small banks or savings associations with assets of at least $290 million as of December 31 of both of the prior two calendar years and less than $1.160 billion as of December 31 of either of the prior two calendar years are considered "intermediate small banks" or "intermediate small savings associations." As required by the CRA regulations, the annual adjustments to the threshold amounts were based on the annual percentage change in the Consumer Price Index. Click here for a copy of the amended regulations.

State Issues

California DRE Continues to Fight Mortgage Scams. On December 21, the California State Department of Real Estate (DRE) issued a press release warning consumers about illegal loan modification scams, urging victims to file complaints, and highlighting its recent actions to tackle and prevent illegal loan modifications. The most typical loan modification scam is the guarantee of a loan modification in exchange for an upfront fee (which is illegal in California), but once the fee is paid little or nothing is done to obtain the loan modification. Since 2009, DRE has filed over 1,100 administrative actions for illegal loan modifications - typically obtaining a Desist and Refrain Order. DRE commended the California Attorney General (AG) and the Federal Trade Commission (FTC) for building on DRE's work by seeking criminal prosecution and million-dollar judgments against loan modification scammers. DRE also offered several tips to consumers seeking loan modification assistance: (i) never pay an upfront fee for loan modification services, (ii) watch out for promises of guaranteed success, (iii) ask questions, get referrals, and be wary of offers that seem too good to be true, (iv) contact a Department of Housing and Urban Development (HUD)-approved counseling agency for free loan modification services, and (v) report any loan modification scams to DRE, FTC, and the AG.

Click here for a copy of DRE's press release.

Georgia Issues Cease and Desist Order to NAARI Housing Counseling Agency. On December 21, an Order to Cease and Desist issued by the Georgia Department of Banking and Finance to the National African American Relationships Institute, Inc. (NAARI) dba NAARI Housing Counsel Agency became final. The Cease and Desist Order was first issued on November 7 after the Department obtained documentation that the NAARI Housing Counsel Agency was engaged in residential mortgage brokering or lending activities without a valid license or under an applicable exemption in violation of the Georgia Residential Mortgage Act (the Act). Specifically the Act prohibits any person from soliciting, processing, placing or negotiating mortgage loans for others without a mortgage license or pursuant to an exemption. The Order became final when NAARI failed to provide the Department with documentation that it had a valid license or was exempted within 30 days. Click here for a copy of the press release. Click here for a copy of the Cease and Desist Order.

Indiana Department of Financial Institutions Adopts Emergency Rule on Mortgage Lender and Originator Licensing. On December 15, the Indiana Department of Financial Institutions (DFI) adopted an emergency rule updating Title 750, Article 9 of the Indiana Administrative Code (IAC), which regulates mortgage lenders and originators. First, the amendments expanded the stated purpose of Title 750, Article 9 to conform the regulation of mortgage lending practices not only to state and federal laws, rules and regulations but also to policies and guidance from state and federal authorities. Second, non-profit organization employees who exclusively originate mortgages are exempt from state educational, testing, background or licensing standards and requirements unless otherwise required by the Consumer Financial Services Bureau. Third, the

rule amended the IAC to specify that an expunged criminal conviction is not considered, for licensing purposes, a conviction resulting in an automatic denial or revocation of a mortgage lender or originator's license; however, the DFI director may still consider the underlying crime or facts of that expungement for licensing eligibility. Fourth, the rule revised Article 9's revocation and suspension provisions so that they are uniform with all state consumer credit laws. Finally, the rule made changes to Article 9's pre-licensing testing, licensing qualification and renewal and regulatory reporting provisions. Click here for a copy of the rule.

Pennsylvania Bar Clarifies Lawyers' Ethical Obligations Related to Cloud Computing. In Formal Opinion 2011-200, the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility (the Committee) recently determined that it is ethical for an attorney to use "cloud computing" to store client confidential material so long as certain protective measures are taken to secure the data. Cloud computing, which includes web based email such as Gmail, Yahoo!, Hotmail, Dropbox, and Google Docs, among others, is described in the Opinion as "a fancy way of saying stuff's not on your computer." In concluding that outsourcing the storage and processing of confidential client material is permissible, the Committee noted that an attorney "may ethically allow client confidential material to be stored in 'the cloud' provided the attorney takes reasonable care to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks." In arriving at such a conclusion, the Committee conducted an expansive and sweeping review of its own related Rules of Professional Conduct and prior pronouncements, as well as those of 15 other jurisdictions and the American Bar Association pertaining to cloud computing. The Committee lays out a broad range of specific steps to be followed in, among other things, selecting and contracting with cloud vendors (including cloud-based e-mail service providers), and suggests that these steps might comprise a "standard of reasonable care for 'cloud computing,'" which include detailed due diligence, planning and policy development, and contractual provisions. Click here for a copy of the opinion.

New Jersey Amends Provisions Regarding Foreclosure Consultants. Recently, New Jersey amended provisions under the Foreclosure Rescue Fraud Prevention Act (the Act), requiring foreclosure consultants and distressed property purchasers who contract with owners of residential properties in financial distress, to adhere to certain practices in providing foreclosure prevention services to owners. The law is scheduled to take effect 180 days from its enactment. Among other provisions, the Act requires foreclosure consultants (a defined term under the Act) to (i) obtain a license from the Commissioner of Banking and Insurance prior to conducting any business in the state, (ii) ensure that a contract for foreclosure consulting services include the services to be performed, the foreclosure consultants representations, and the distressed property relief to be secured. In addition the Act provides a homeowner the right to cancel the foreclosure consulting contract at any time until after the foreclosure consultant has fully performed every service and secured the relief the consultant contracted to perform. Click here for a copy of the Act as amended.

Courts

Federal Court of Appeals Finds that FCRA Preempts Consumer's State Common Law Claims. On December 23, the U.S. Court of Appeals for the Second Circuit found that the Fair Credit Reporting Act (FCRA), preempts a consumer's state common law claims for defamation and intentional infliction of emotional distress. *MacPherson v. JPMorgan Chase Bank, N.A.*, No. 10-3722-cv, 2011 WL 6450777 (2nd Cir. Dec. 23, 2011). The plaintiff sued JPMorgan Chase (Chase) in state court in Connecticut alleging that Chase willfully and maliciously provided false information about his finances to Equifax causing a reduction in his credit score, to his detriment. Chase removed the case to federal court and obtained a dismissal in the district court on the basis of federal preemption under FCRA § 1681t(b)(1)(F), a general preemption provision enacted in 1996 (the 1996 Amendment), over 20 years after FCRA first became effective. The Plaintiff argued on appeal that his

allegation of false reporting is covered under § 1681h(e) of the FCRA which is part of the original statute enacted in 1970. That section provides for a limitation of actions in the nature of defamation "except as to false information furnished with malice or willful intent to injure such consumer." The plaintiff' argued that the 1996 Amendment was only intended to apply to state statutes and not state common law claims that are inconsistent with FCRA. The Court noted that it had previously rejected the argument that the 1996 Amendment preempts only state statutory law in *Premium Mortgage Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009). The court held that the 1996 Amendment was a more broadly sweeping preemption and cited the Seventh Circuit case of *Purcell v. Bank of America*, 659 F.3d 622 (7th Cir. 2011), where that court held "[s]ection 1681h(e) preempts some state claims that could arise out of reports to credit agencies; [the 1996 Amendment] [simply] preempts *more* of these claims." *Id.*at 625 (emphasis added)." Therefore, the court rejected the plaintiff's arguments and held that § 1681h(e) is compatible with the 1996 Amendment, and that the plaintiff's state law claims were preempted by the plain language of the 1996 Amendment.

Click here for a copy of the opinion.

Tenth Circuit Rules that Faxed Employment Verification Request Does not Violate FDCPA. On December 21, the U.S. Court of Appeals for the Tenth Circuit found that a creditor's faxed request to a debtor's employer requesting employment verification was not a communication with a third party and therefore did not violate the Fair Debt Collection Practices Act (FDCPA). *Marx v. General Revenue Corp.*, No. 1:08-CV-02243, 2011 WL 6396478 (10th Cir. Dec. 21, 2011). In rendering its decision, the court relied on the employee's failure to present evidence that the employer became aware of her debt as a result of the creditor's fax, which contained only an account number, the creditor's letterhead, and the request itself. While the creditor sent the request in preparation for seeking wage garnishment, the court held that it was not an impermissible "communication" because it did not tell the employer anything about the employee's debt. The court noted that the outcome would have been different if the evidence had shown that the creditor's identity as a debt collector was known to the employer, or if the fax otherwise alerted the employer of the debt. Then, in the court's view, the fax may have conveyed enough information to constitute a communication under the FDCPA thereby violating the FDCPA's prohibition on creditor communications with third parties regarding a debt. The court also held that the prevailing creditor defendant could be awarded costs under Federal Rule of Civil Procedure 54(d) even where the FDCPA's cost-shifting provision was inapplicable. Click here for a copy of the opinion please.

Miscellany

Telecommunications Company Reaches Agreement to Resolve FCPA Violations. On December 29, the United States Department of Justice (DOJ) and the United States Securities and Exchange Commission (SEC) announced they had entered into agreements with Deutsche Telecom and its subsidiary, Magyar Telekom, to resolve civil and criminal charges stemming from violations of the Foreign Corrupt Practices Act (FCPA). According to the agreements, the companies will pay penalties of more than $95 million. For copies of the press releases, complaints, and agreements, please see

BuckleySandler LLP's FCPA Score Card.

Insurance Broker Reaches Non-Prosecution Agreement with DOJ to Resolve FCPA Violations. On December 20, the United States Department of Justice (DOJ) announced it had entered into a non-prosecution agreement with Aon Corporation stemming from violations of the Foreign Corrupt Practices Act (FCPA). According to the agreement, a subsidiary of Aon administered funds in connection with its reinsurance

business with Costa Rica's state-owned insurance company, Instituto Nacional De Seguros (INS), for uses other than legitimate business purposes, and failed to accurately reflect the purpose of those expenditures in the subsidiary's accounting records. Aon also admitted that its system of internal accounting controls regarding foreign sales activities was insufficient to ensure compliance with the FCPA. In addition to paying a $1.76 million penalty, Aon is also required under the agreement to adhere to rigorous compliance, bookkeeping and internal controls standards and to cooperate fully with the DOJ. In its release, the DOJ praised Aon's "extraordinary cooperation" with the DOJ and the United States Securities and Exchange Commission (SEC), and its other self-imposed remedial efforts, which led to a "substantially reduced" monetary penalty. Also on December 20, Aon reached a settlement with the SEC in a related matter and agreed to pay approximately $14.5 million in disgorgement and prejudgment interest. Click here for a copy of the press release. For links to the settlement papers, please see this BuckleySandler FCPA Update.

DOJ Announces Settlement with Americall Group, Inc. for Violating Do Not Call Provisions of the Telemarketing Sales Rule. On December 19, the Department of Justice (DOJ) announced a settlement with Americall Group, Inc. (AGI) for failing to honor consumers' requests under the Telemarketing Sales Rule's "do not call" provisions (the Rule). The complaint, filed in November in the Northern District of Illinois, alleged that AGI, a company specializing in sales for financial service and insurance companies, provided inaccurate caller ID information when calling consumers and failed to honor consumer do-not-call requests even when they conformed to the requirements of the Rule. AGI agreed to pay $500,000 in civil penalties in addition to being subject to a court injunction prohibiting any future violation of the Telemarketing Sales Rule. The case was referred to the DOJ after the Federal Trade Commission received more than 3,000 complaints from consumers against AGI. Click here for a copy of the press release.

Firm News

Donna Wilson will be participating as a panelist at the Round Table on 2011-2012 Legal Developments and Trends for the Retail and Fashion Industries on January 19, 2012 in New York, New York.

James Parkinson will be speaking at the Activist Investor Conference on January 23-24, 2012 in New York, on a panel entitled "Activism in China: Understanding Foreign Corrupt Practices Act (FCPA) Enforcement."

Benjamin Klubes will be participating on a panel addressing fair lending enforcement legal theories at the Mortgage Bankers Association Fair Lending Workshop on January 24, 2012 in Washington, DC.

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 program on worldwide anti-corruption laws in Palm Springs in February 2012.

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."

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."

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

Donna Wilson published an article entitled "Litigation: Recent Developments in Privacy Class Actions; 1st Circuit Decision Could Bring a New Dawn for Plaintiffs or Doom History to Repeat Itself" in *InsideCounsel* on December 22, 2011. The article reviews recent privacy class action court decisions, including a decision by the First Circuit Court of Appeals which may improve plaintiffs' ability to proceed past the motion to dismiss stage in litigation arising out of data security breaches, even absent actual theft or misuse of customers' data by a third party. Click here for the full article.

Mortgages

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Banking

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Privacy/Data Security

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Criminal Enforcement Action

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