# InfoBytes

*September 30, 2011*

**Topics In This Issue**



## Federal Issues

**FHFA Issues Notice of Regulatory Review Plan**. On September 23, the Federal Housing Finance Agency (FHFA) issued a notice of and requested comments on its proposed plan to review existing regulations as required under Executive Order 13579. Issued July 11, 2011, the Executive Order requires independent regulatory agencies to analyze existing regulations and modify, streamline, expand, or repeal them based on the results of the analysis. FHFA proposed that its Office of General Counsel review the Agency's regulations at least every five years and that the first review begin by August 2013. The reviews will take into consideration a number of factors, including applications for revisions by Fannie Mae, Freddie Mac, or a Federal Home Loan Bank and new legal or regulatory developments. Click here for a copy of the notice.

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**FTC Urges Protection of Customer Information in Borders Bankruptcy**. On September 14, the Federal Trade Commission's Bureau of Consumer Protection Director David Vladeck sent a letter to Michael St. Patrick Baxter, the court appointed Consumer Privacy Ombudsman charged with overseeing privacy matters arising out of the possible sale of certain consumer personal information currently in the possession of Borders Group, Inc. (Borders) as part of its bankruptcy proceeding. In his letter, Director Vladeck wrote that Borders, in its normal course of business, "collected substantial amounts of personal information, including purchase history and email addresses from over 20 million customers" under "one of at least three different privacy policies." In at least two of its privacy

policies, Director Valdeck contends that Borders clearly and expressly represented that customer information would not be rented or sold to third parties except in limited circumstances and then only with the express consent of its customers. Director Vladeck expressed concern that any bankruptcy sale or transfer of the personal information of Borders' customers would contravene Borders' express promise not to disclose such information and "could constitute a deceptive or unfair practice." He urged the Consumer Privacy Ombudsman to require Borders to obtain express consent from its customers before transferring the personal information. Alternatively, Director Vladeck wrote that his concerns would be greatly diminished if: (i) Borders agreed not to sell the customer information as a standalone asset; (ii) the buyer is engaged in substantially the same line of business as Borders; (iii) the buyer expressly agreed to be bound by the terms of Borders' privacy policy, and (iv) the buyer agreed to obtain affirmative consent from consumers for any material changes to its privacy policy that would affect information collected under the Borders' policy. Click here for the full text of Director Vladeck's letter.

## Courts

**Federal District Court Grants Preliminary Injunction Postponing Piece of CARD Act Regulation**. On September 23, the U.S. District Court for South Dakota granted a preliminary injunction postponing and enjoining the October 1, 2011 effective date of the Federal Reserve Board's (FRB) amendment to Regulation Z, which would expand a limitation on credit card fees charged in the first year to include fees imposed on the customer prior to the account opening. *First Premier Bank v. U.S.*, No. 11-4103-KES (D.S.D. Sep. 23, 2011). The case arises from First Premier Bank's practice of charging certain customers an upfront fee, not to be paid from the credit being granted, prior to opening a credit card account at the First Premier Bank (the "Bank"). Under the Credit CARD Act, and in accordance with the FRB's initial regulation implementing the Act, lenders are prohibited from charging customers fees during the first year after account opening in excess of 25 percent of the credit limit in effect when the account is opened. The FRB subsequently proposed to amend that limitation to include fees charged prior to account opening. Agreeing with the Bank, the Court found that the language of the Credit CARD Act unambiguously states that the limitation applies to fees charged during the first year of the account, and not to fees assessed prior to account opening. The Court also found that Congressional intent was sufficiently clear that the FRB could not claim to be filling statutory gaps. Click here for a copy of the opinion.

**North Carolina Court of Appeals Holds that Website Terms of Service Not Binding If Not Provided to Customer and Customer is Given Contrary Information**. On September 20, the Court of Appeals of North Carolina held that common carrier terms of service posted on a website are not binding on a customer who was not provided with the terms and was affirmatively given contrary information by the carrier. *Marso v. United Parcel Service, Inc.*, No. COA11-201 (N.C. Ct. App. Sep. 20, 2011). In this case, the plaintiff visited a UPS store to ship a product to a buyer in another state using UPS's Collect on Delivery (COD) Service. The plaintiff claimed that a UPS employee assured him that UPS would collect cash from the recipient and then provide the plaintiff with a check from UPS, not from the recipient, and that payment was "guaranteed." UPS delivered the package but obtained a check from the recipient made out to the plaintiff, which was not honored. The plaintiff sued UPS for breach of contract. UPS averred that its ordinary procedures required a shipper using

the COD service to personally enter certain information into a computer in the UPS store. As part of that process, the shipper is notified that he must accept UPS's terms of service to continue. Those terms, which are available on UPS's website or from store employees, provide that UPS will not accept cash or be liable for dishonored checks. The plaintiff denied using a computer at the UPS store and contended that he was never advised of the terms of service, reiterating the assurances from the UPS employee. The Court of Appeals reversed the trial court's grant of summary judgment for UPS, holding that there was a genuine factual dispute for trial. Thus, the court held that common carrier terms of service posted on a website are not binding where the terms are not actually provided to the shipper and the shipper is given contrary information by the carrier. Click here for a copy of the opinion.

**California District Court Dismisses Putative Nationwide Class Action Alleging Privacy Violations Related to Apple iPhones, iPads, and Other iOS Devices**. On September 20, the U.S. District Court for the Northern District of California granted with leave to amend Defendants' Motion to dismiss a consolidated putative class action involving Apple and eight mobile advertising and analytics companies. *In re iPhone Application Litigation*, No. 11-MD-02550-LHK (N.D. Cal. Sep. 20, 2011). In this case, the Plaintiffs claimed that the Defendants committed privacy violations by illegally collecting, using, and distributing iPhone, iPad, and App Store users' personal information without the user's knowledge or consent. The Court ruled that the Plaintiffs failed to meet the case and controversy requirement under Article III of the U.S. Constitution because their complaint failed to allege concrete, particularized injuries in fact to themselves, rather than consumers in general. The Court also found that the tracking or disclosure of personal information does not establish an "economic loss" sufficient to find an injury in fact. Despite the fact that the Plaintiffs were found not to have standing, the Court indicated additional deficiencies in the Plaintiffs' complaint related to each additional cause of action in the event that the Plaintiffs choose to file an amended complaint. The Plaintiffs were granted sixty days to file an amended complaint. Click here for a copy of the opinion.

**Iowa Federal Court Holds That State Electronic Funds Transfer Law Is Preempted**. On August 29, the U.S. District Court for the Southern District of Iowa held that a state statute regulating state bank electronic funds transfers (EFTs) was preempted with respect to how a national bank could provide services to those state banks. *U.S. Bank N.A. v. Schipper*, Case No. 4:10-cv-00064 (S.D. Iowa Aug. 29, 2011). In this case, U.S. Bank provided EFT services to Iowa state-chartered banks and sought a declaration that the State regulators could not enforce the Iowa Electronic Transfer of Funds Act against the national bank or any other financial institution engaging in business with the national bank. The District Court agreed, finding that the OCC has specified that national banks may provide to other financial institutions any service the bank may perform for itself, including EFT services without qualification or reservation. Furthermore, the Court held that the Iowa statute, while not directly enforceable against a national bank, does significantly impair the bank's ability to exercise its federally granted powers. The Court issued a permanent injunction, prohibiting the state regulatory agencies from enforcing the state statutory sections at issue against U.S. Bank or any entity to which U.S. Bank provides the EFT-related services. Importantly, the Court also stated that the Dodd-Frank Act adopted the same standard applied by the U.S. Supreme Court in its 2007 *Watters v. Wachovia* decision, and that it did not materially alter the standard for preemption the Court must apply. The court thus issued a permanent injunction. Click here for a copy of the opinion.

## Firm News

**Announcing STAGE Network: A New Initiative Focused on State Attorneys General and the Financial Services Industry**. Join us Tuesday, October 4 at 2:00 PM ET for a free webinar focused on urgent developments related to several initiatives being undertaken by state Attorneys General (AGs) which will impact the financial services industry. A highlight of the webinar will be an interview with the Honorable Roy Cooper, Attorney General of North Carolina. Click here to register.

**Jon Jerison** will be the featured speaker at a Sheshunoff webinar entitled, "Update on Managing HELOCs - Consumer Laws and Recent Litigation" on October 5 at 12:00 PM ET. For more information, please email infobytes@buckleysandler.com.

**Benjamin Klubes** will be moderating a panel titled, "The Path Ahead for Housing Finance: Just Changing Lanes or Time for a New Road?" at George Washington University Law School's "Dodd-Frank's Future Direction: On Course or Off Track" symposium on October 21. BuckleySandler is a sponsor for this symposium.

**Benjamin Klubes** will be speaking at the ACI's 7th Annual Forum on Preventing, Detecting and Resolving Mortgage Fraud from October 24-25 in Washington, DC. Mr. Klubes' session is entitled: "The New and Complex World of HUD/FHA Lending Requirements: Using Lessons Learned from Investigations of Cases by the Agencies to Avoid Costly Penalties, Including Expulsion from the Program".

**Jonice Gray Tucker**, **Robyn Quattrone**, and **Liana Prieto** will be speaking at the Women in Housing & Finance Regulatory Taskforce Lunch in Washington, D.C. on October 25. Their presentation will focus on the current state of the Consumer Financial Protection Bureau including its structure, rulemaking efforts, and anticipated regulatory and enforcement priorities.

**Andrew Sandler** and **Benjamin Klubes** will be speaking at the 15th Annual CRA & Fair Lending Colloquium which will be held in Baltimore, Maryland from November 6-8, 2011. Mr. Sandler will be addressing "Hot, Hot, Hot Compliance Topics: Reform Impact, Oversight Trends, Enforcement Actions and More!" on November 7. Mr. Klubes will be moderating a panel on "Non-Mortgage Lending: The Fair Lending Dragon is Breathing Fire" on November 8. For further details on the colloquium please see www.cracolloquium.com.

**Margo Tank** and **John Richards** will participate in the ESRA Fall Conference in Washington, D.C. on November 9 and 10. For details on registration, accommodations, and agenda, please see http://esignrecords.org/events/.

**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.

## Mortgages

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## Privacy/Data Security

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