

November 16, 2012

TOPICS COVERED THIS WEEK (CLICK TO VIEW)[FEDERAL ISSUES](#)[COURTS](#)[FIRM NEWS](#)[FIRM PUBLICATIONS](#)[MORTGAGES](#)[BANKING](#)[CONSUMER FINANCE](#)[SECURITIES](#)[E-COMMERCE](#)[CRIMINAL ENFORCEMENT](#)**FEDERAL ISSUES**

CFPB Delays Implementation of Certain Mortgage Disclosure Requirements. On November 16, the CFPB [announced](#) that it is providing a [temporary exemption](#) from the mortgage disclosure requirements in title XIV of the Dodd-Frank Act, including new disclosures regarding (i) cancellation of escrow accounts, (ii) a consumer's liability for debt payment after foreclosure, and (iii) the creditor's policy for accepting partial payment. The Federal Reserve Board proposed a rule in March 2011 to implement these requirements, but did not finalize the rule prior to July 21, 2011, when authority transferred to the CFPB. Subsequently, the CFPB issued a [proposal to integrate the TILA and RESPA disclosures](#) and create new disclosure forms, which, as proposed, include many of the additional disclosures required by title XIV. In light of the overlap in the two rulemakings, and given that the title XIV requirements are required by statute to take effect on January 21, 2013, the CFPB effectively agreed to delay the compliance date pending completion of the TILA/RESPA disclosures proposal.

CFPB Deputy Director Expected to Depart in January 2013. On November 12, major news outlets [reported](#) that CFPB Deputy Director Raj Date will leave the Bureau at the end of January 2013. Mr. Date joined the CFPB in the fall of 2010 and led the agency following the departure of Elizabeth Warren in July 2011 until the appointment of Director Richard Cordray in January 2012. Mr. Date will depart after the CFPB finalizes a series of mortgage-related rules required by the Dodd-Frank Act to be adopted by January 21, 2013.

CFPB Launches Financial Product Innovation Initiative. On November 14, the CFPB [announced](#) an initiative designed to encourage "consumer-friendly innovation and entrepreneurship" in financial product markets. The CFPB stated that the "Project Catalyst" initiative will allow the Bureau to (i) establish firm communication with innovators that will allow the Bureau to better understand the current situations in the market, (ii) understand new and emerging products in the

market and the sufficiency of the existing regulatory environment for such products, and (iii) engage with innovators to help the Bureau better understand what works and does not work for consumers. The first phase of the project involves three companies that will share anonymized data about consumer behaviors and trends with the CFPB, which the CFPB intends to use to inform policy decisions. The initial phase participants will provide (i) consumer credit and debit card billing dispute data, (ii) data regarding the value consumers place on easily depositing and obtaining immediate access to their funds, and (iii) a product that helps consumers gain insight into their spending habits. Through the [Project Catalyst website](#), interested parties can identify financial regulations that hamper consumer-friendly innovation or seek to collaborate with the CFPB on new financial products or services.

DOJ and SEC Publish Long-Awaited FCPA Resource Guide. On November 14, the DOJ and the SEC [released](#) A Resource Guide to the Foreign Corrupt Practices Act. The [long-awaited release](#) comes almost a year to the day after Assistant Attorney General Lanny Breuer [announced](#) that the agencies would prepare an FCPA guidance document. Overall, the [Resource Guide](#) is a compilation of previously-issued guidance and litigation positions set forth by the DOJ and the SEC with regard to (i) who and what is covered by the FCPA's anti-bribery and accounting provisions, (ii) the definition of a "foreign official", (iii) what constitute proper and improper gifts, travel and entertainment expenses, (iv) facilitating payments, (v) how successor liability applies in the mergers and acquisitions context, and (vi) the different types of civil and criminal resolutions available in the FCPA context. The Guide also provides what the DOJ refers to as "the hallmarks of an effective corporate compliance program," which may serve as a useful starting point for constructing, testing or revising an FCPA compliance program. At an industry conference this week, Assistant Attorney General Breuer [explained](#) that the Guide represents "the most comprehensive effort ever undertaken by either the Justice Department or the SEC to explain our approach to enforcing a particular statute." [BuckleySandler's FCPA Practice](#) plans to prepare an analysis and perspectives on the Resource Guide, drawing from recent trial and international compliance counseling experience.

AML Regulatory Initiatives Highlighted at ABA/ABA Money Laundering Enforcement Conference. This week, Treasury Under Secretary for Terrorism and Financial Intelligence, David Cohen, and new FinCEN Director Jennifer Shasky Calvery addressed the American Bankers Association/American Bar Association Money Laundering Enforcement Conference. Ms. Calvery and Mr. Cohen [announced](#) the formation of an interagency anti-money laundering (AML) task force comprised of Treasury officials, federal banking regulators, and enforcement agencies charged with conducting a comprehensive review of the AML regulatory and enforcement structure to address any gaps, redundancies or inefficiencies in the framework. Ms. Calvery further [explained](#) that the Bank Secrecy Act Advisory Group is exploring ways to reduce the variance between compliance risk and illicit financing risk. Ms. Calvery also stressed the importance of electronic filings, and urged financial institutions to adopt the new FinCEN reports before the April 1, 2013 deadline. Mr. Cohen discussed a [proposed](#) customer due diligence regulation, which would extend customer due diligence obligations by requiring institutions to collect information on an account's beneficial owner. In connection with that rulemaking, FinCEN this week [announced](#) the last in a series of roundtable discussions to gather information from stakeholders and discuss key issues relating to the proposed rule. This final roundtable will be held on December 3, 2012, at the Miami Branch of the Federal Reserve Bank of Atlanta.

DOJ Obtains \$100 Million Money Laundering Settlement from Money Services Business. On November 9, the DOJ [announced](#) that a money services business (MSB) agreed to enter into a deferred prosecution agreement (DPA) and pay \$100 million for failing to maintain an effective anti-money laundering program and for aiding and abetting wire fraud. The DOJ alleged that from 2004 through 2009, the MSB profited on thousands of transactions processed on behalf of agents it knew

to be involved in an international fraud scheme. According to the DOJ, the MSB's senior management deferred to sales department executives and ignored recommendations from the MSB's fraud department that certain agents known to be engaged in fraud be terminated. The DOJ also accused the MSB of systematic and willful failure to meet AML obligations under the Bank Secrecy Act. Pursuant to the DPA, the MSB must (i) create an independent compliance and ethics committee of the board of directors with direct oversight of the chief compliance officer and the compliance program, (ii) adopt a global anti-fraud and anti-money laundering standard to ensure that agents throughout the world will, at a minimum, be required to adhere to U.S. anti-fraud and anti-money laundering standards, (iii) adopt a bonus system that rates all executives on success in meeting compliance obligations, with failure making the executive ineligible for any bonus for that year, and (iv) adopt enhanced due diligence for agents deemed to be high-risk or operating in a high-risk area. The MSB also agreed to retain an independent monitor that will oversee implementation and maintenance of these enhanced compliance obligations, evaluate the overall effectiveness of its anti-fraud and anti-money laundering programs, and report regularly to the DOJ.

SEC Reports Results of 2012 Enforcement and Whistleblower Programs. On November 14, the SEC [reported](#) the results of its enforcement program for the fiscal year ending September 30, 2012. During the year, the SEC filed 734 enforcement actions, which included an increasing number of actions focused on highly complex products, transactions, and practices. The SEC obtained orders requiring more than \$3 billion in penalties and disgorgement, an 11% increase over the amount required in 2011. The SEC believes these metrics indicate "sustained high-level performance," which it attributes to various reforms and innovations put in place over the past two years. The announcement highlights certain cases related to (i) the financial crisis, (ii) insider trading, (iii) investment advisers, (iv) broker-dealers, (v) FCPA, and (vi) municipal securities. On November 15, the SEC [released](#) its Annual Report on the Dodd-Frank Whistleblower Program. The [annual report](#) provides an overview of the program and notes that the SEC received 3,001 whistleblower tips from all 50 states and from 49 countries, including a tip that resulted in the [first ever award](#) under the program. There were 143 enforcement judgments and orders issued with potential for a whistleblower award. The most common complaints related to corporate disclosures and financials (18.2%), offering fraud (15.5%), and manipulation (15.2%).

Federal Banking Regulators Launch Next Round of Stress Testing. On November 15, the [Federal Reserve Board](#), the [OCC](#), and the [FDIC](#) released the macroeconomic and financial market scenarios to be used in annual stress tests conducted by covered institutions pursuant to rules the regulators [finalized last month](#). The economic scenarios are the same for each regulator and their covered institutions and include baseline, adverse, and severely adverse scenarios with variables that reflect, among other things, economic activity, unemployment, exchange rates, prices, incomes, and interest rates. The baseline scenario represents expectations of private-sector forecasters, while the adverse and severely adverse scenarios present hypothetical conditions designed to assess the strength and resilience of financial institutions, as well as their ability to continue to meet the credit needs of households and businesses in stressful economic and financial environments. The Federal Reserve Board also published a [proposed policy statement](#) and the OCC [issued](#) interim guidance to describe how those agencies will develop and distribute stress test scenarios in future years. Comments are due on the Federal Reserve Board policy statement by February 15, 2013, and on the OCC interim guidance within 60 days after publication in the Federal Register. Finally, last week, the Federal Reserve Board [issued](#) instructions and guidelines for covered institutions, including timelines for submissions. In a shift from prior years, the Federal Reserve Board will provide covered firms an opportunity to adjust planned capital distributions based on the stress test results before the Federal Reserve Board makes a final decision on their capital adequacy.

Senate Banking Committee Holds Hearing on Proposed Basel III Rules. On November 14, the

Senate Banking Committee held a [hearing](#) regarding rules proposed by federal banking regulators to implement the Basel III international regulatory capital accords. The hearing featured testimony from representatives of the Federal Reserve Board, the FDIC, and the OCC, the federal regulators responsible for the proposed rules. Committee Chairman Tim Johnson (D-SD) and Ranking Member Richard Shelby (R-AL) asked regulators to explain the Basel III process generally, and the potential impact of implementation on community banks specifically. The committee also explored (i) the impact of proposed risk weights, particularly with regard to small banks' willingness to offer mortgages, (ii) the treatment of accumulated other comprehensive income, (iii) the treatment of insurance businesses, (iv) sovereign debt ratings, and (v) the rulemaking process. The witnesses did not provide a timeline for the final rule or discuss any specific changes to the proposed rules to accommodate small banks' concerns, but did promise a long implementation timeframe. The witnesses generally acknowledged those concerns and assured that they are considering them as regulators prepare the final rules.

Federal Reserve Board Governor Calls for New Approach to Mortgage Regulation, Highlights Potential Impacts of Qualified Mortgage Rule. On November 9, in a [speech](#) to the Community Bankers Symposium, Federal Reserve Board Governor Elizabeth Duke reviewed in detail the role community banks play in the mortgage market and the post-Dodd-Frank Act mortgage lending challenges facing community banks. Ms. Duke explained that new rules to implement the Basel III capital accords, as well as those to put in place by Dodd-Frank Act requirements regarding escrow accounts for higher-priced mortgages, loan officer compensation, and appraisal requirements will burden community banks significantly. Ms. Duke highlighted the pending qualified mortgage and qualified residential mortgage rules, noting that they could have a "profound effect on the mortgage terms offered and the underwriting conditions for all banks." Specifically, she said that these rules could "constrain community bankers from using their experience with the cash flows from a small business customer or their knowledge of local real estate markets to customize a loan for an 'irregular' situation, such loans may not be made." Given the "cost of regulation that is prescriptive with respect to underwriting, loan structure, and operating procedures" and the "lack of evidence that balance sheet lending by community banks created significant problems," relating to the financial crisis, Ms. Duke concluded that policymakers should establish a separate, simpler regulatory structure applicable to community bank mortgage lending.

National Mortgage Settlement Monitor Seeks Servicemember Complaints. On November 12, National Mortgage Settlement Monitor Joseph Smith, Jr. [launched](#) a military-specific outreach program to encourage servicemembers to report mortgage servicing complaints using an online form. The Monitor released a separate form for complaints by attorneys, caseworkers, counselors or other professionals assisting servicemembers with their mortgages, as well as a servicemember-specific [fact sheet](#). The national settlement does not require that the Monitor collect or address individual borrower complaints. The Monitor intends to use the complaint process to identify and investigate any trends in servicing complaints.

Fannie Mae and Freddie Mac Announce New Guidelines for Management of Law Firms. On November 9, Fannie Mae and Freddie Mac announced new, coordinated requirements with respect to the management of law firms for default servicing, bankruptcies, and related litigation. As described in Freddie Mac [Bulletin 2012-25](#), effective June 1, 2013, servicers (i) will be permitted to choose their own attorneys, create their own processes for managing foreclosure processing, and maintain direct relationships with their law firms, (ii) will be required to establish procedures to manage and monitor all aspects of the law firm's performance and compliance with applicable requirements, and (iii) upon request, will be required to perform a due diligence review and provide Freddie Mac with the results. Fannie Mae Servicing Guide [Announcement SVC-2012-22](#) similarly details new servicer requirements with regard to the use of outside law firms. Both Fannie Mae and Freddie Mac will accept and respond to servicer recommendations of law firms beginning March 1,

2013, and will begin conducting new firm training in April 2013. Law firms that are currently in the retained attorney network are not exempt from the new selection and retention processes.

Federal Reserve Board and OCC Renew Efforts to Market Independent Foreclosure Reviews.

On November 13, the Federal Reserve Board and the OCC [announced](#) renewed efforts to remind eligible borrowers to participate in the [Independent Foreclosure Review Program](#) by December 31, 2012. Under the program, an eligible borrower can have his or her foreclosure reviewed for free by independent consultants to determine whether the borrower was financially injured due to errors, misrepresentations, or other deficiencies in the foreclosure process. An injured borrower may be eligible for compensation or other remedies. The program [originally was scheduled to close April 30, 2012](#), but has been extended numerous times over the past year. The renewed marketing effort includes targeted print, radio, and online advertising, as well as direct coordinated outreach by community, housing, and faith-based groups.

Federal Banking Regulators Issue Supplemental Statement Regarding Borrower and Institution Relief Following Hurricane Sandy.

On November 14, the Federal Reserve Board, the OCC, the National Credit Union Administration, and the FDIC supplemented a [prior statement](#) on the impact of Hurricane Sandy on customers and the operations of financial institutions. The [supplemental guidance](#) identifies activities that could be considered "reasonable and prudent" steps to assist affected customers, including, for example (i) waiving certain fees and penalties, including ATM and overdraft fees, (ii) easing credit limits and terms for new loans, and (iii) offering payment accommodations. The regulators also provide post-storm guidance regarding loan modifications, the Community Reinvestment Act, and customer identification. The guidance largely mirrors guidance issued by the FDIC on November 9, 2012 in Financial Institution Letter [FIL-47-2012](#).

COURTS

Eighth Circuit Reinstates Portions of Minnesota Quiet Title Action, Upholds Dismissal of "Show-Me-The-Note" Claims. On November 8, the U.S. Court of Appeals for the Eighth Circuit [revived](#) two claims brought by a group of borrowers alleging that the nominal mortgagee on their mortgage loans, and the servicer to whom the mortgagee assigned each mortgage, were not entitled to foreclose on their properties. *Murphy v. Aurora Loan Servs. LLC*, No. 12-1398, 2012 WL 5439284 (8th Cir. Nov. 8, 2012). The Eighth Circuit, following the Minnesota Supreme Court's interpretation of state law, [has previously held](#) that the servicer has an undeniable right to initiate foreclosure as the legal holder of title. Here, the district court earlier dismissed claims that the servicer and mortgagee lacked authority to foreclose as repackaged "show-me-the-note" claims. The appeals court determined that two of the borrowers' theories do not rely on the failure of the foreclosing party to produce the note, and therefore should be reinstated. The court reinstated theories that the assignments from the mortgagee to the servicer either were unrecorded or executed by individuals who lacked authority to do so, resulting in a defective chain of title that would undermine the servicer's authority to foreclose. Because the parties did not specifically brief these theories the court remanded to allow the district court to address the two claims at issue. Specifically, the court directed that additional briefing should address whether the borrowers still have any interest in the properties and whether the borrowers' interest is adverse to the interests of the mortgagee or servicer.

Federal District Court Finds Valid Agreement under ESIGN Based on Upload of Images in Accordance with Website Terms of Use. On November 13, the United States District Court for the District of Maryland [held](#) that uploaded pictures to a website disclosing in its Terms of Use (TOU) that uploading images creates valid assignments of the rights to use those images were electronic signatures creating valid assignments. *Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, No. 12-cv-00954 (D. Md. Nov. 13, 2012). The plaintiff had obtained a preliminary

injunction against the defendant's use of images that appeared on the plaintiff's website, and the defendant appealed the injunction, arguing, *inter alia*, that no valid assignment of the images had occurred under Section 204(a) of the Copyright Act, which requires assignments to be in writing and signed by the assignor. Citing Section 101(a) of the Electronic Signature in Global and National Commerce Act (ESIGN Act), the court found that users' acts of uploading images constituted electronic signatures sufficient to satisfy the requirements of the Copyright Act. The court thus denied the defendant's motion to suspend the preliminary injunction.

FIRM NEWS

Complimentary Webinar - The CFPB: Investigations and Enforcement Actions in Focus

[BuckleySandler LLP](#) will host a webinar on Thursday, December 6, 2012 from 2:00-3:15 PM ET, to discuss the CFPB's rules governing investigations, enforcement actions, and adjudications. BuckleySandler attorneys [Jeff Naimon](#), [Jonice Gray Tucker](#), and [Lori Sommerfield](#), also will discuss themes prevalent in the first three public enforcement actions undertaken by the CFPB, all of which were predicated, in part, on allegations of unfair and deceptive practices.

This webinar will be of particular interest to in-house legal, compliance, and risk management personnel at banks and other financial services providers subject to CFPB oversight. Please no outside law firms, government agency personnel, consulting firms, or media. After registering and being approved, you will receive a confirmation email containing instructions for joining the webinar. **Click [here](#) to register.**

[Andrew Sandler](#) will participate in an American Bankers Association telephone briefing entitled "[Fair Lending and HMDA Update](#)" on November 28, 2012. The briefing, which also will feature representatives from the CFPB, the Federal Reserve Board, and the FDIC, will review the 2011 HMDA data, the CFPB's role in HMDA data collection, fair lending enforcement trends, and other fair lending topics.

[James Shreve](#) will speak at the American Conference Institute's [Advanced Forum on International & Cross-Border Payments](#) on November 28, 2012 in New York. The panel, "Managing Privacy and Data Security Risks on a Global Scale," will address US and international compliance issues relating to payment systems.

[Valerie Hletko](#) will participate in [PLI's Banking Law Institute 2012](#), on December 5, 2012, in New York, NY. Ms. Hletko's panel is entitled "Major Non-Consumer Litigation/Enforcement and Consumer Financial Protection Supervision and Enforcement." Panelists, including Kent Markus of the CFPB, will review topics ranging from mortgage servicing enforcement to anti-money laundering enforcement.

[David Krakoff](#) will be an instructor for the [Second Annual NACDL White Collar Criminal Defense College at Stetson](#). He will participate in a panel presentation entitled "Overview of Handling a White Collar Case" on January 10, 2013.

[David Krakoff](#) will speak at ACI's [Inaugural Summit on White Collar Litigation](#) being held January 22-23, 2013, in New York, NY. Mr. Krakoff will participate in the January 22 session entitled "The FCPA Year In Review: Assessing the Biggest Cases of the Year and What Litigators Need to Take Away to Best Protect Their Clients."

[Andrew Sandler](#) will participate in the "Fair Lending Forum" at [CBA Live 2013](#), the Consumer Bankers Association's annual conference for retail banking leaders, to be held March 11-13, 2013, in Phoenix, AZ.

[Jonice Gray Tucker](#) will speak at the [American Bar Association's Consumer Financial Services Committee](#) Winter Meeting on January 6, 2013 in Naples, Florida. The panel on which she is participating will address CFPB examinations and enforcement actions.

[Jonice Gray Tucker](#) will speak at the [American Bar Association's Business Law Section Spring Meeting](#) on April 4, 2013 in Washington, D.C. The panel on which she is participating will focus on CFPB enforcement actions.

[Jonice Gray Tucker](#) and [Valerie Hletko](#) will moderate a panel entitled "Extreme Makeover: Consumer Protection Edition" at the [American Bar Association's Business Law Section Spring Meeting](#) on April 4, 2013 in Washington, D.C. The panel will focus on the CFPB's new regulations and related compliance expectations.

FIRM PUBLICATIONS

[Jonice Gray Tucker](#) and [Jeff Naimon](#) wrote "[Liability for Servicers: Localities Jump in the Game](#)," which appears in Mortgage Servicing News' October 2012 issue.

[Jonice Gray Tucker](#) and [Lori Sommerfield](#) authored "[Consumer Complaint Management: Meeting Regulatory Expectations](#)," which was published in the October 2012 edition of The Review of Banking & Financial Services.

[Andrea Mitchell](#) and [Lori Sommerfield](#) authored "'Red Flags' For Fair Lending Risk - How Banks Can Identify and Resolve Them" for the [American Association of Bank Directors](#).

[Benjamin Klubes](#), [Matthew Previn](#), [Michelle Rogers](#), and [Ann Wiles](#) published "[How the DOJ is Adapting in the War on Financial Fraud](#)" in the November 9, 2012 issue of Law360.

About BuckleySandler LLP (www.buckleysandler.com)

With over 150 lawyers in Washington, New York, Los Angeles, and Orange County, BuckleySandler provides best-in-class legal counsel to meet the challenges of its financial services industry and other corporate and individual clients across the full range of government enforcement actions, complex and class action litigation, and transactional, regulatory, and public policy issues. The Firm represents many of the nation's leading financial services institutions. "The best at what they do in the country." ([Chambers USA](#)).

Please visit us at the following locations:

Washington: 1250 24th Street NW, Suite 700, Washington, DC 20037, (202) 349-8000

New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400

Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (310) 424-3900

Orange County: 3121 Michelson Drive, Suite 210, Irvine, CA 92612, (949)398-1360

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

In addition, please feel free to email our attorneys. [A list of attorneys can be found here.](#)

For back issues of InfoBytes, please see: <http://www.buckleysandler.com/infobytes/infobytes>.

InfoBytes is not intended as legal advice to any person or firm. It is provided as a client service and information herein is drawn from various public sources, including other publications.

© 2012 BuckleySandler LLP. All rights reserved.

MORTGAGES

CFPB Delays Implementation of Certain Mortgage Disclosure Requirements. On November 16, the CFPB [announced](#) that it is providing a [temporary exemption](#) from the mortgage disclosure requirements in title XIV of the Dodd-Frank Act, including new disclosures regarding (i) cancellation of escrow accounts, (ii) a consumer's liability for debt payment after foreclosure, and (iii) the creditor's policy for accepting partial payment. The Federal Reserve Board proposed a rule in March 2011 to implement these requirements, but did not finalize the rule prior to July 21, 2011, when authority transferred to the CFPB. Subsequently, the CFPB issued a [proposal to integrate the TILA and RESPA disclosures](#) and create new disclosure forms, which, as proposed, include many of the additional disclosures required by title XIV. In light of the overlap in the two rulemakings, and given that the title XIV requirements are required by statute to take effect on January 21, 2013, the CFPB effectively agreed to delay the compliance date pending completion of the TILA/RESPA disclosures proposal.

CFPB Deputy Director Expected to Depart in January 2013. On November 12, major news outlets [reported](#) that CFPB Deputy Director Raj Date will leave the Bureau at the end of January 2013. Mr. Date joined the CFPB in the fall of 2010 and led the agency following the departure of Elizabeth Warren in July 2011 until the appointment of Director Richard Cordray in January 2012. Mr. Date will depart after the CFPB finalizes a series of mortgage-related rules required by the Dodd-Frank Act to be adopted by January 21, 2013.

Federal Reserve Board Governor Calls for New Approach to Mortgage Regulation, Highlights Potential Impacts of Qualified Mortgage Rule. On November 9, in a [speech](#) to the Community Bankers Symposium, Federal Reserve Board Governor Elizabeth Duke reviewed in detail the role community banks play in the mortgage market and the post-Dodd-Frank Act mortgage lending challenges facing community banks. Ms. Duke explained that new rules to implement the Basel III capital accords, as well as those to put in place by Dodd-Frank Act requirements regarding escrow accounts for higher-priced mortgages, loan officer compensation, and appraisal requirements will burden community banks significantly. Ms. Duke highlighted the pending qualified mortgage and qualified residential mortgage rules, noting that they could have a "profound effect on the mortgage terms offered and the underwriting conditions for all banks." Specifically, she said that these rules could "constrain community bankers from using their experience with the cash flows from a small business customer or their knowledge of local real estate markets to customize a loan for an 'irregular' situation, such loans may not be made." Given the "cost of regulation that is prescriptive with respect to underwriting, loan structure, and operating procedures" and the "lack of evidence that balance sheet lending by community banks created significant problems," relating to the financial crisis, Ms. Duke concluded that policymakers should establish a separate, simpler regulatory structure applicable to community bank mortgage lending.

National Mortgage Settlement Monitor Seeks Servicemember Complaints. On November 12, National Mortgage Settlement Monitor Joseph Smith, Jr. [launched](#) a military-specific outreach program to encourage servicemembers to report mortgage servicing complaints using an online form. The Monitor released a separate form for complaints by attorneys, caseworkers, counselors or other professionals assisting servicemembers with their mortgages, as well as a servicemember-specific [fact sheet](#). The national settlement does not require that the Monitor collect or address

individual borrower complaints. The Monitor intends to use the complaint process to identify and investigate any trends in servicing complaints.

Fannie Mae and Freddie Mac Announce New Guidelines for Management of Law Firms. On November 9, Fannie Mae and Freddie Mac announced new, coordinated requirements with respect to the management of law firms for default servicing, bankruptcies, and related litigation. As described in Freddie Mac [Bulletin 2012-25](#), effective June 1, 2013, servicers (i) will be permitted to choose their own attorneys, create their own processes for managing foreclosure processing, and maintain direct relationships with their law firms, (ii) will be required to establish procedures to manage and monitor all aspects of the law firm's performance and compliance with applicable requirements, and (iii) upon request, will be required to perform a due diligence review and provide Freddie Mac with the results. Fannie Mae Servicing Guide [Announcement SVC-2012-22](#) similarly details new servicer requirements with regard to the use of outside law firms. Both Fannie Mae and Freddie Mac will accept and respond to servicer recommendations of law firms beginning March 1, 2013, and will begin conducting new firm training in April 2013. Law firms that are currently in the retained attorney network are not exempt from the new selection and retention processes.

Federal Reserve Board and OCC Renew Efforts to Market Independent Foreclosure Reviews. On November 13, the Federal Reserve Board and the OCC [announced](#) renewed efforts to remind eligible borrowers to participate in the [Independent Foreclosure Review Program](#) by December 31, 2012. Under the program, an eligible borrower can have his or her foreclosure reviewed for free by independent consultants to determine whether the borrower was financially injured due to errors, misrepresentations, or other deficiencies in the foreclosure process. An injured borrower may be eligible for compensation or other remedies. The program [originally was scheduled to close April 30, 2012](#), but has been extended numerous times over the past year. The renewed marketing effort includes targeted print, radio, and online advertising, as well as direct coordinated outreach by community, housing, and faith-based groups.

Federal Banking Regulators Issue Supplemental Statement Regarding Borrower and Institution Relief Following Hurricane Sandy. On November 14, the Federal Reserve Board, the OCC, the National Credit Union Administration, and the FDIC supplemented a [prior statement](#) on the impact of Hurricane Sandy on customers and the operations of financial institutions. The [supplemental guidance](#) identifies activities that could be considered "reasonable and prudent" steps to assist affected customers, including, for example (i) waiving certain fees and penalties, including ATM and overdraft fees, (ii) easing credit limits and terms for new loans, and (iii) offering payment accommodations. The regulators also provide post-storm guidance regarding loan modifications, the Community Reinvestment Act, and customer identification. The guidance largely mirrors guidance issued by the FDIC on November 9, 2012 in Financial Institution Letter [FIL-47-2012](#).

Eighth Circuit Reinstates Portions of Minnesota Quiet Title Action, Upholds Dismissal of "Show-Me-The-Note" Claims. On November 8, the U.S. Court of Appeals for the Eighth Circuit [revived](#) two claims brought by a group of borrowers alleging that the nominal mortgagee on their mortgage loans, and the servicer to whom the mortgagee assigned each mortgage, were not entitled to foreclose on their properties. *Murphy v. Aurora Loan Servs. LLC*, No. 12-1398, 2012 WL 5439284 (8th Cir. Nov. 8, 2012). The Eighth Circuit, following the Minnesota Supreme Court's interpretation of state law, [has previously held](#) that the servicer has an undeniable right to initiate foreclosure as the legal holder of title. Here, the district court earlier dismissed claims that the servicer and mortgagee lacked authority to foreclose as repackaged "show-me-the-note" claims. The appeals court determined that two of the borrowers' theories do not rely on the failure of the foreclosing party to produce the note, and therefore should be reinstated. The court reinstated theories that the assignments from the mortgagee to the servicer either were unrecorded or executed by individuals who lacked authority to do so, resulting in a defective chain of title that

would undermine the servicer's authority to foreclose. Because the parties did not specifically brief these theories the court remanded to allow the district court to address the two claims at issue. Specifically, the court directed that additional briefing should address whether the borrowers still have any interest in the properties and whether the borrowers' interest is adverse to the interests of the mortgagee or servicer.

BANKING

Federal Banking Regulators Launch Next Round of Stress Testing. On November 15, the [Federal Reserve Board](#), the [OCC](#), and the [FDIC](#) released the macroeconomic and financial market scenarios to be used in annual stress tests conducted by covered institutions pursuant to rules the regulators [finalized last month](#). The economic scenarios are the same for each regulator and their covered institutions and include baseline, adverse, and severely adverse scenarios with variables that reflect, among other things, economic activity, unemployment, exchange rates, prices, incomes, and interest rates. The baseline scenario represents expectations of private-sector forecasters, while the adverse and severely adverse scenarios present hypothetical conditions designed to assess the strength and resilience of financial institutions, as well as their ability to continue to meet the credit needs of households and businesses in stressful economic and financial environments. The Federal Reserve Board also published a [proposed policy statement](#) and the OCC [issued](#) interim guidance to describe how those agencies will develop and distribute stress test scenarios in future years. Comments are due on the Federal Reserve Board policy statement by February 15, 2013, and on the OCC interim guidance within 60 days after publication in the Federal Register. Finally, last week, the Federal Reserve Board [issued](#) instructions and guidelines for covered institutions, including timelines for submissions. In a shift from prior years, the Federal Reserve Board will provide covered firms an opportunity to adjust planned capital distributions based on the stress test results before the Federal Reserve Board makes a final decision on their capital adequacy.

Senate Banking Committee Holds Hearing on Proposed Basel III Rules. On November 14, the Senate Banking Committee held a [hearing](#) regarding rules proposed by federal banking regulators to implement the Basel III international regulatory capital accords. The hearing featured testimony from representatives of the Federal Reserve Board, the FDIC, and the OCC, the federal regulators responsible for the proposed rules. Committee Chairman Tim Johnson (D-SD) and Ranking Member Richard Shelby (R-AL) asked regulators to explain the Basel III process generally, and the potential impact of implementation on community banks specifically. The committee also explored (i) the impact of proposed risk weights, particularly with regard to small banks' willingness to offer mortgages, (ii) the treatment of accumulated other comprehensive income, (iii) the treatment of insurance businesses, (iv) sovereign debt ratings, and (v) the rulemaking process. The witnesses did not provide a timeline for the final rule or discuss any specific changes to the proposed rules to accommodate small banks' concerns, but did promise a long implementation timeframe. The witnesses generally acknowledged those concerns and assured that they are considering them as regulators prepare the final rules.

AML Regulatory Initiatives Highlighted at ABA/ABA Money Laundering Enforcement Conference. This week, Treasury Under Secretary for Terrorism and Financial Intelligence, David Cohen, and new FinCEN Director Jennifer Shasky Calvey addressed the American Bankers Association/American Bar Association Money Laundering Enforcement Conference. Ms. Calvey and Mr. Cohen [announced](#) the formation of an interagency anti-money laundering (AML) task force comprised of Treasury officials, federal banking regulators, and enforcement agencies charged with conducting a comprehensive review of the AML regulatory and enforcement structure to address any gaps, redundancies or inefficiencies in the framework. Ms. Calvey further [explained](#) that the

Bank Secrecy Act Advisory Group is exploring ways to reduce the variance between compliance risk and illicit financing risk. Ms. Calvery also stressed the importance of electronic filings, and urged financial institutions to adopt the new FinCEN reports before the April 1, 2013 deadline. Mr. Cohen discussed a [proposed](#) customer due diligence regulation, which would extend customer due diligence obligations by requiring institutions to collect information on an account's beneficial owner. In connection with that rulemaking, FinCEN this week [announced](#) the last in a series of roundtable discussions to gather information from stakeholders and discuss key issues relating to the proposed rule. This final roundtable will be held on December 3, 2012, at the Miami Branch of the Federal Reserve Bank of Atlanta.

CONSUMER FINANCE

CFPB Deputy Director Expected to Depart in January 2013. On November 12, major news outlets [reported](#) that CFPB Deputy Director Raj Date will leave the Bureau at the end of January 2013. Mr. Date joined the CFPB in the fall of 2010 and led the agency following the departure of Elizabeth Warren in July 2011 until the appointment of Director Richard Cordray in January 2012. Mr. Date will depart after the CFPB finalizes a series of mortgage-related rules required by the Dodd-Frank Act to be adopted by January 21, 2013.

CFPB Launches Financial Product Innovation Initiative. On November 14, the CFPB [announced](#) an initiative designed to encourage "consumer-friendly innovation and entrepreneurship" in financial product markets. The CFPB stated that the "Project Catalyst" initiative will allow the Bureau to (i) establish firm communication with innovators that will allow the Bureau to better understand the current situations in the market, (ii) understand new and emerging products in the market and the sufficiency of the existing regulatory environment for such products, and (iii) engage with innovators to help the Bureau better understand what works and does not work for consumers. The first phase of the project involves three companies that will share anonymized data about consumer behaviors and trends with the CFPB, which the CFPB intends to use to inform policy decisions. The initial phase participants will provide (i) consumer credit and debit card billing dispute data, (ii) data regarding the value consumers place on easily depositing and obtaining immediate access to their funds, and (iii) a product that helps consumers gain insight into their spending habits. Through the [Project Catalyst website](#), interested parties can identify financial regulations that hamper consumer-friendly innovation or seek to collaborate with the CFPB on new financial products or services.

SECURITIES

SEC Reports Results of 2012 Enforcement and Whistleblower Programs. On November 14, the SEC [reported](#) the results of its enforcement program for the fiscal year ending September 30, 2012. During the year, the SEC filed 734 enforcement actions, which included an increasing number of actions focused on highly complex products, transactions, and practices. The SEC obtained orders requiring more than \$3 billion in penalties and disgorgement, an 11% increase over the amount required in 2011. The SEC believes these metrics indicate "sustained high-level performance," which it attributes to various reforms and innovations put in place over the past two years. The announcement highlights certain cases related to (i) the financial crisis, (ii) insider trading, (iii) investment advisers, (iv) broker-dealers, (v) FCPA, and (vi) municipal securities. On November 15, the SEC [released](#) its Annual Report on the Dodd-Frank Whistleblower Program. The [annual report](#) provides an overview of the program and notes that the SEC received 3,001 whistleblower tips from all 50 states and from 49 countries, including a tip that resulted in the [first ever award](#) under the program. There were 143 enforcement judgments and orders issued with potential for a whistleblower award. The most common complaints related to corporate disclosures

and financials (18.2%), offering fraud (15.5%), and manipulation (15.2%).

E-COMMERCE

Federal District Court Finds Valid Agreement under ESIGN Based on Upload of Images in Accordance with Website Terms of Use. On November 13, the United States District Court for the District of Maryland [held](#) that uploaded pictures to a website disclosing in its Terms of Use (TOU) that uploading images creates valid assignments of the rights to use those images were electronic signatures creating valid assignments. *Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, No. 12-cv-00954 (D. Md. Nov. 13, 2012). The plaintiff had obtained a preliminary injunction against the defendant's use of images that appeared on the plaintiff's website, and the defendant appealed the injunction, arguing, *inter alia*, that no valid assignment of the images had occurred under Section 204(a) of the Copyright Act, which requires assignments to be in writing and signed by the assignor. Citing Section 101(a) of the Electronic Signature in Global and National Commerce Act (ESIGN Act), the court found that users' acts of uploading images constituted electronic signatures sufficient to satisfy the requirements of the Copyright Act. The court thus denied the defendant's motion to suspend the preliminary injunction.

CRIMINAL ENFORCEMENT

DOJ and SEC Publish Long-Awaited FCPA Resource Guide. On November 14, the DOJ and the SEC [released](#) A Resource Guide to the Foreign Corrupt Practices Act. The [long-awaited release](#) comes almost a year to the day after Assistant Attorney General Lanny Breuer [announced](#) that the agencies would prepare an FCPA guidance document. Overall, the [Resource Guide](#) is a compilation of previously-issued guidance and litigation positions set forth by the DOJ and the SEC with regard to (i) who and what is covered by the FCPA's anti-bribery and accounting provisions, (ii) the definition of a "foreign official", (iii) what constitute proper and improper gifts, travel and entertainment expenses, (iv) facilitating payments, (v) how successor liability applies in the mergers and acquisitions context, and (vi) the different types of civil and criminal resolutions available in the FCPA context. The Guide also provides what the DOJ refers to as "the hallmarks of an effective corporate compliance program," which may serve as a useful starting point for constructing, testing or revising an FCPA compliance program. At an industry conference this week, Assistant Attorney General Breuer [explained](#) that the Guide represents "the most comprehensive effort ever undertaken by either the Justice Department or the SEC to explain our approach to enforcing a particular statute." [BuckleySandler's FCPA Practice](#) plans to prepare an analysis and perspectives on the Resource Guide, drawing from recent trial and international compliance counseling experience.

AML Regulatory Initiatives Highlighted at ABA/ABA Money Laundering Enforcement Conference. This week, Treasury Under Secretary for Terrorism and Financial Intelligence, David Cohen, and new FinCEN Director Jennifer Shasky Calvery addressed the American Bankers Association/American Bar Association Money Laundering Enforcement Conference. Ms. Calvery and Mr. Cohen [announced](#) the formation of an interagency anti-money laundering (AML) task force comprised of Treasury officials, federal banking regulators, and enforcement agencies charged with conducting a comprehensive review of the AML regulatory and enforcement structure to address any gaps, redundancies or inefficiencies in the framework. Ms. Calvery further [explained](#) that the Bank Secrecy Act Advisory Group is exploring ways to reduce the variance between compliance risk and illicit financing risk. Ms. Calvery also stressed the importance of electronic filings, and urged financial institutions to adopt the new FinCEN reports before the April 1, 2013 deadline. Mr. Cohen discussed a [proposed](#) customer due diligence regulation, which would extend customer due diligence obligations by requiring institutions to collect information on an account's beneficial owner.

In connection with that rulemaking, FinCEN this week [announced](#) the last in a series of roundtable discussions to gather information from stakeholders and discuss key issues relating to the proposed rule. This final roundtable will be held on December 3, 2012, at the Miami Branch of the Federal Reserve Bank of Atlanta.

DOJ Obtains \$100 Million Money Laundering Settlement from Money Services Business. On November 9, the DOJ [announced](#) that a money services business (MSB) agreed to enter into a deferred prosecution agreement (DPA) and pay \$100 million for failing to maintain an effective anti-money laundering program and for aiding and abetting wire fraud. The DOJ alleged that from 2004 through 2009, the MSB profited on thousands of transactions processed on behalf of agents it knew to be involved in an international fraud scheme. According to the DOJ, the MSB's senior management deferred to sales department executives and ignored recommendations from the MSB's fraud department that certain agents known to be engaged in fraud be terminated. The DOJ also accused the MSB of systematic and willful failure to meet AML obligations under the Bank Secrecy Act. Pursuant to the DPA, the MSB must (i) create an independent compliance and ethics committee of the board of directors with direct oversight of the chief compliance officer and the compliance program, (ii) adopt a global anti-fraud and anti-money laundering standard to ensure that agents throughout the world will, at a minimum, be required to adhere to U.S. anti-fraud and anti-money laundering standards, (iii) adopt a bonus system that rates all executives on success in meeting compliance obligations, with failure making the executive ineligible for any bonus for that year, and (iv) adopt enhanced due diligence for agents deemed to be high-risk or operating in a high-risk area. The MSB also agreed to retain an independent monitor that will oversee implementation and maintenance of these enhanced compliance obligations, evaluate the overall effectiveness of its anti-fraud and anti-money laundering programs, and report regularly to the DOJ.

© BuckleySandler LLP. INFOBYTES is not intended as legal advice to any person or firm. It is provided as a client service and information contained herein is drawn from various public sources, including other publications.

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>