

November 2, 2012

**TOPICS COVERED THIS WEEK (CLICK TO VIEW)**[FEDERAL ISSUES](#)[STATE ISSUES](#)[COURTS](#)[MISCELLANY](#)[FIRM NEWS](#)[FIRM PUBLICATIONS](#)[MORTGAGES](#)[BANKING](#)[CONSUMER FINANCE](#)[CREDIT CARDS](#)[E-COMMERCE](#)[PRIVACY/DATA SECURITY](#)**[FEDERAL ISSUES](#)**

**CFPB Reports Examination Findings, Updates Examination Manual, and Issues Supervisory Appeals Policy.** On October 31, the CFPB released its first periodic Supervisory Highlights publication, along with an updated examination manual and a bulletin about the Bureau's supervisory appeals process. The [Supervisory Highlights](#) report describes the CFPB's supervisory activity from July 2011 through September 2012, and "signal[s] to all institutions the kinds of activities that should be carefully scrutinized for compliance." Following its first year of conducting examinations, the CFPB states that it has found compliance management system deficiencies and regulatory violations related to credit cards, credit reporting, and mortgage lending. The report also reviews public enforcement actions and nonpublic supervisory actions. [Bulletin 2012-07](#) explains the CFPB supervisory appeals process and addresses confidentiality and the role of the Bureau's Ombudsman Office. Finally, the CFPB's [updated Supervision and Examination Manual](#) incorporates the various procedures issued since the manual was first published in October 2011 (e.g., payday lending and consumer reporting examination procedures). The updated manual also includes new Code of Federal Regulations legal citations to reflect the recodification of federal consumer finance regulations under the CFPB's authority.

**CFPB and FHFA Partner to Develop National Mortgage Database.** On November 1, the CFPB and the FHFA announced an agreement to create a National Mortgage Database, the first comprehensive repository of mortgage loan information. The database primarily will be used to support the agencies' policymaking and research efforts and help regulators better understand emerging mortgage and housing market trends. The database is intended to (i) monitor the health of mortgage markets and consumers, (ii) provide insight on consumer decision making, (iii) monitor

new and emerging mortgage products, (iv) consolidate data on first and second lien mortgages for a given borrower, and (v) help policymakers understand consumer debt burden. The [press release](#) states that development of the dataset is currently underway and the agencies expect early versions of the full dataset to be complete in 2013. Once completed, the agencies plan to explore opportunities to share database information with other federal agencies, academics, and the public. The database will include information spanning the life of a mortgage loan from origination through servicing and include loan-level data about (i) the borrower's financial and credit profile, (ii) the mortgage product and terms, (iii) the property purchased or refinanced, and (iv) the ongoing payment history of the loan. The agencies will build the database by matching a nationwide sampling of credit bureau files on borrowers' mortgages and payment histories with informational files such as the HMDA database and property valuation models. The database will include historical data back to 1998 and will be updated on a monthly basis.

**CFPB Launches College Credit Card Agreement Database, Releases Annual Report on College Card Agreements.** On November 1, the CFPB [launched](#) a [database of college credit card agreements](#) in effect during 2011 and released an [annual report](#) to Congress on such agreements. The database provides copies of all 2011 agreements and presents other information submitted by card issuers for each agreement, including total payments, total open accounts, and new accounts opened in 2011. The report presents summary information about the data reflected in the database and identifies some trends from 2009-2011. For example, the report notes that (i) the total number of college card agreements declined from 2010 to 2011, (ii) issuers added 26 new agreements in 2011, and (iii) the majority of agreements were between issuers and an organization affiliated with an institution of higher education (such as an alumni association) or an institution of higher learning.

**Federal Banking Regulators Issue Guidance Regarding Supervision of Technology Service Providers.** On October 31, the Federal Financial Institutions Examination Council (FFIEC) [issued](#) a revised Supervision of Technology Service Providers Booklet (TSP Booklet). The revised TSP Booklet, which is part of the FFIEC [Information Technology Examination Handbook](#), provides guidance for examiners and financial institutions on the supervision of technology service providers by describing the federal banking regulators' statutory authority to supervise third-party service providers, outlining the regulators' risk-based supervision program, and providing the Uniform Rating System for examinations. The TSP Booklet clarifies that outsourced activities should be subject to the same risk management, security, privacy, and other internal controls and compliance policies as if such functions were performed internally, and that a financial institution's board of directors and management have the responsibility for ensuring that outsourced activities are conducted in a safe and sound manner and in compliance with applicable laws and regulations.

Concurrent with the release of the updated TSP Booklet, the Federal Reserve Board, the FDIC, and the OCC issued new [Administrative Guidelines](#) for the Implementation of Interagency Programs for the Supervision of Technology Service Providers. The Guidelines are separate from the FFIEC IT Examination Handbook and describe how the agencies implement their interagency supervisory programs. The Guidelines are primarily a resource for examiners and include the reporting templates used by examiners.

**Fannie Mae and Freddie Mac Announce Short Sale Agreements with Mortgage Insurers; Freddie Mac Announces Other Servicing Updates.** On October 31, Fannie Mae [announced](#) that it reached agreements with nine major mortgage insurance companies that will allow servicers to complete short sales and deeds-in-lieu of foreclosure without first obtaining approval from the mortgage insurer. The new standard delegation agreement executed with each of the mortgage insurers replaces various individual delegation agreements and is intended to create a more consistent and efficient process for borrowers and servicers.

On the same day, Freddie Mac issued Single-Family Seller/Servicer Guide [Bulletin 2012-23](#), which also announced new delegation agreements with its mortgage insurers that will streamline short sales and deeds-in-lieu of foreclosure. Freddie Mac revised other requirements for servicers' loss mitigation activities and updated its mortgage insurance claim documentation policy to require delivery of documentation no later than sixty days following the foreclosure sale, short sale, or acceptance of deed-in-lieu of foreclosure. The Bulletin also (i) requires approval by Freddie Mac of foreclosures in certain circumstances, (ii) revises imminent default documentation requirements, (iii) authorizes use of ACH for expense reimbursements and incentive payments, (iv) clarifies the policy for reimbursement of interest, and (v) updates charge-off recommendation requirements.

**Fannie Mae and Freddie Mac Issue Disaster Assistance Reminders for Servicers, Announce Disaster Policy Changes for Sellers.** On October 31, Fannie Mae issued a [servicing notice](#) to remind servicers that they may temporarily suspend or reduce mortgage payments for up to ninety days for borrowers whose income is affected by a disaster or for borrowers within federally declared disaster areas. The notice also lists the steps a servicer providing relief measures must take once it becomes aware that a property has incurred damage as a result of a disaster. On November 1, Fannie Mae issued Selling Guide [Announcement SEL-2012-12](#), which establishes a permanent selling policy for mortgages impacted by a disaster. This policy replaces Fannie Mae's traditional approach of issuing Lender Letters for each disaster. Under the new policy, for mortgage loans other than DU Refi Plus and Refi Plus, lenders must take prudent and reasonable actions to determine whether the condition of the property may have materially changed since the effective date of the appraisal report, and whether an additional inspection or appraisal is necessary. The Announcement identifies specific criteria lenders should use when determining if a mortgage can be delivered without additional action. Fannie Mae will not require a property secured by a DU Refi Plus or Refi Plus mortgage to undergo an additional inspection and/or new appraisal following a disaster, and will not require that a property damaged as a result of a disaster be repaired prior to delivery as long as the loan meets the property insurance requirements described in the Selling Guide.

On October 30, Freddie Mac [announced](#) that its full menu of relief policies for borrowers affected by disaster is being extended to homeowners whose homes were damaged or destroyed by Hurricane Sandy and are located in jurisdictions that the President has declared to be Major Disaster Areas and where he has made federal Individual Assistance programs available to affected individuals and households. Freddie Mac encouraged servicers to help affected borrowers with Freddie Mac loans by (i) suspending foreclosure and eviction proceedings for up to 12 months, (ii) waiving assessments of penalties or late fees against borrowers with disaster-damaged homes, and (iii) not reporting forbearance or delinquencies caused by the disaster to the nation's credit bureaus. On November 2, Freddie Mac issued Single-Family Seller/Servicer Guide [Bulletin 2012-24](#) to revise selling requirements for properties damaged as a result of a disaster. The Bulletin explains that, on a temporary basis for mortgages secured by properties located in eligible Disaster Areas impacted by Hurricane Sandy, required property valuation and underwriting documentation must be dated no more than 180 days before the note date. For Relief Refinance Mortgages, sellers are not required to determine if an additional property inspection or a new appraisal is necessary after an initial property valuation has been relied upon, provided that the mortgage meets property insurance requirements.

**Independent Financial Regulators Express Opposition to Senate Regulatory Analysis Bill.** On October 26, the leaders of the Federal Reserve Board, the OCC, the FDIC, the CFPB, the NCUA, and the SEC sent a [letter](#) to Senators Lieberman (I-CT) and Collins (R-ME) opposing [S. 3468](#), which would authorize the President to require that regulations promulgated by the independent regulatory agencies be subject to regulatory review in the same manner as other federal agencies, including central review of certain rules by the Office of Information and Regulatory Affairs. The

regulators note that the bill, which was introduced by Senator Portman (R-OH) with the support of Senator Warner (D-VA) in August 2012, may be considered soon for markup by the Committee on Homeland Security and Governmental Affairs led by Mr. Lieberman and Ms. Collins. The letter argues that by giving the President unprecedented authority to influence policy and rulemaking functions of independent regulatory agencies through review of regulations, the bill would undermine congressional intent to create certain agencies that could exercise policymaking functions independent of any Administration.

**NCUA Names New Consumer Protection Director.** On October 26, NCUA [announced](#) the selection of Gail Laster as Director of the Office of Consumer Protection. Ms. Laster most recently served as Deputy Chief Counsel for the House Financial Services Committee where she participated in drafting the Dodd-Frank Act. Prior to her work in the House, Ms. Laster served as General Counsel to HUD, as Director of Government Relations for the Legal Services Corporation, and as Counsel to two Senate committees. Ms. Laster succeeds Ken Buckham, who will retire at year-end 2012.

## STATE ISSUES

**California AG Notifies Mobile Application Developers of Non-Compliance.** On October 30, California Attorney General (AG) Kamala Harris [announced](#) that her office's [Privacy Enforcement and Protection Unit](#) sent letters to numerous mobile application developers advising those entities of their noncompliance with state privacy law. Specifically, the AG alleges that the targeted mobile application developers failed to post a privacy policy that is reasonably accessible to the consumer, as required by the California Online Privacy Protection Act. Under the state unfair competition law, violation of the Act may result in penalties of up to \$2,500 per violation. A violation in this instance is each download of a mobile application that does not properly include a privacy policy. The letters provide thirty-day notice of noncompliance as required by the Act, within which each developer must provide specific plans and a timeline for compliance, or an explanation of why the application is not covered by the Act.

**NMLS Issues Annual Renewal Reminder.** On November 1, the NMLS [issued a reminder](#) that the renewal period for state-licensed entities and individuals runs from November 1, 2012 through December 31, 2012. The NMLS also provided a Renewal Handbook to guide users in the renewal process, as well as state-specific renewal FAQs, and deadline and fees charts.

## COURTS

**Ohio Supreme Court Holds Standing to Foreclose Cannot Be Established by Assignment of Note After Filing.** On October 31, the Ohio Supreme Court [held](#) unanimously that a party's standing to foreclose on a delinquent borrower is determined as of the filing of the complaint, and the party's receipt of an assignment of a promissory note and mortgage after such filing does not cure initial lack of standing to bring the action. *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, No. 2012-Ohio-5017, slip op. (Ohio Oct. 31, 2012). The borrowers in the case appealed a trial court holding that allowed Federal Home Loan Mortgage Corporation (Freddie Mac) to foreclose, notwithstanding the fact that Freddie Mac commenced the action prior to obtaining an assignment of the promissory note and mortgage securing the borrowers' loan. According to the borrowers, because Freddie Mac did not hold the assignment and mortgage at the time of filing, it had no standing to sue. The Ohio Second District Court of Appeals held that Freddie Mac had cured the lack of standing by obtaining an assignment from the real party in interest after it filed for foreclosure. The Ohio Supreme Court reversed the Second District and agreed with the borrowers.

Freddie Mac did not hold both the assignment and mortgage as required under Ohio law as a predicate to foreclosure and admitted that it had not suffered any injury at the time it commenced the foreclosure action. The state supreme court held that because standing to sue is required to invoke the jurisdiction of the trial court, standing must be determined at the beginning of the suit. Further, the court found that Freddie Mac could not avail itself of civil procedures that allow for substitution of the real party in interest because such rules were not intended to cure a lack of standing. The court agreed with the borrowers that Freddie Mac lacked standing and dismissed the foreclosure without prejudice and without adjudicating the underlying indebtedness.

**Arizona Appellate Court Requires Further Proceedings on Whether Certain Emails Constitute Electronic Signatures Under State Law.** Recently, the Arizona Court of Appeals [ruled](#) that a state trial court erred in dismissing a claim that an emailed thank-you note acknowledging the receipt of a signed agreement constituted an electronic signature. *Young v. Rose*, 286 P.3d 518 (Az. Ct. App. 2012). In this case, a real estate agent sued two former clients for breaching an exclusive representation contract. The clients had manually signed the contract and returned it as a PDF copy. The agent never manually signed the agreement, but claimed that her electronic business card attached to an email thanking her clients for the PDF copy constituted an electronic signature under the Arizona Electronic Transactions Act, which includes a broad definition of electronic signature. The trial court disagreed and dismissed the case, noting that the agent's business card was included on all of her outgoing emails and therefore could not constitute an electronic signature in some cases but not others. The Arizona Court of Appeals vacated the trial court order on procedural grounds and held that further proceedings are necessary to determine whether the email at issue qualifies as an electronic signature. The court explained that in addition to proving the existence of an electronic signature, the agent must also establish that the parties intended to conduct the transaction by electronic means.

## MISCELLANY

**ACLU Fair Lending Case Against Mortgage Securitizer Highlights New Fair Lending Litigation Risk; Fair Lending Litigation Against Lenders Continues.** On October 15, the ACLU filed a putative class action suit on behalf of a group of private citizens against a financial institution alleged to have financed and purchased subprime mortgage loans to be included in mortgage backed securities. The [complaint](#) alleges that the institution implemented policies and procedures that supported the market for subprime loans in the Detroit area so that it could purchase, pool, and securitize those loans. The plaintiffs claim those policies violated the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA) because they disproportionately impacted minority borrowers who were more likely to receive subprime loans, putting those borrowers at higher risk of default and foreclosure. The suit seeks injunctive relief, including a court appointed monitor to ensure compliance with any court order or decree, as well as unspecified monetary damages. The National Consumer Law Center, which developed the case with the ACLU, [reportedly](#) is investigating similar activity by other mortgage securitizers, suggesting additional suits could be filed. The ACLU also released a [report](#) on the fair lending aspects of mortgage securitization and called for, among other things, DOJ and HUD to expand their Fair Housing Testing Program, and for Congress to increase penalties for FHA and ECOA violations and provide additional funding for DOJ/HUD fair lending enforcement.

On October 18, three Georgia counties [filed suit](#) on behalf of their communities and certain residents against a financial institution the counties allege targets FHA-protected minority borrowers with "predatory high cost, subprime, ALT-A and conforming mortgages without considering the borrowers' ability to repay such loans." The complaint claims that the lender's practices caused and continue to cause minority borrowers to be more at risk of default and foreclosure than similarly situated white borrowers, and, as such, constitute a pattern or practice of discriminatory lending and

reverse redlining in violation of the FHA. The counties are seeking injunctive relief and unspecified compensatory and punitive damages.

BuckleySandler's [Fair and Responsible Financial Services Team](#) has extensive experience litigating fair lending cases and assisting financial institutions seeking to manage fair lending risk. For a review of fair lending red flags for banks and strategies for addressing them, see our [recent article](#).

## **FIRM NEWS**

[BuckleySandler recently represented First Virginia Community Bank](#) (FVCbank) in its acquisition of 1stCommonwealth Bank of Virginia, marking FVCbank's expansion into Arlington County. The all-stock transaction represents the first acquisition for the five-year-old bank, which is based in Fairfax, Virginia. Earlier this year, [BuckleySandler represented CommerceFirst Bancorp, Inc.](#) in its acquisition by Sandy Spring Bancorp, Inc. As a result of the merger, Sandy Spring expanded its presence in Anne Arundel, Howard and Prince George's counties in central Maryland.

[Andrew Sandler](#) will speak at the [Seventh Annual Judicial Symposium on Civil Justice Issues](#), which will be held at The Mason Inn Conference Center and Hotel on the George Mason University Campus, Fairfax, Virginia, on November 12, 2012. Mr. Sandler's panel is entitled "Using Disparate Impact Analysis to Establish Discrimination in Lending."

[James Parkinson](#) will moderate a panel at the [ACI's 28th National Conference on Foreign Corrupt Practices Act](#) in Washington, D.C. Mr. Parkinson's panel, entitled "Data and Document Management Strategies for FCPA Investigations: Practical Tools for Effectively Accessing, Obtaining and Controlling Data and Documents during an FCPA Investigation," will be held November 14, 2012.

[Margo Tank](#) will speak at [The Electronic Signature and Records Association's Annual Conference](#), November 14-15, 2012, in Washington, DC. Ms. Tank's panel will discuss electronic signatures and mobile technology.

[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 be moderating 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](#).

## **About BuckleySandler LLP ([www.buckleysandler.com](http://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, (424) 203-1000

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](mailto: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 Reports Examination Findings, Updates Examination Manual, and Issues Supervisory Appeals Policy.** On October 31, the CFPB released its first periodic Supervisory Highlights publication, along with an updated examination manual and a bulletin about the Bureau's supervisory appeals process. The [Supervisory Highlights](#) report describes the CFPB's supervisory activity from July 2011 through September 2012, and "signal[s] to all institutions the kinds of activities that should be carefully scrutinized for compliance." Following its first year of conducting examinations, the CFPB states that it has found compliance management system deficiencies and regulatory violations related to credit cards, credit reporting, and mortgage lending. The report also reviews public enforcement actions and nonpublic supervisory actions. [Bulletin 2012-07](#) explains the CFPB supervisory appeals process and addresses confidentiality and the role of the Bureau's Ombudsman Office. Finally, the CFPB's [updated Supervision and Examination Manual](#) incorporates the various procedures issued since the manual was first published in October 2011 (e.g., payday lending and consumer reporting examination procedures). The updated manual also includes new Code of Federal Regulations legal citations to reflect the recodification of federal consumer finance regulations under the CFPB's authority.

**CFPB and FHFA Partner to Develop National Mortgage Database.** On November 1, the CFPB and the FHFA announced an agreement to create a National Mortgage Database, the first comprehensive repository of mortgage loan information. The database primarily will be used to support the agencies' policymaking and research efforts and help regulators better understand emerging mortgage and housing market trends. The database is intended to (i) monitor the health of mortgage markets and consumers, (ii) provide insight on consumer decision making, (iii) monitor new and emerging mortgage products, (iv) consolidate data on first and second lien mortgages for a given borrower, and (v) help policymakers understand consumer debt burden. The [press release](#) states that development of the dataset is currently underway and the agencies expect early versions of the full dataset to be complete in 2013. Once completed, the agencies plan to explore opportunities to share database information with other federal agencies, academics, and the public. The database will include information spanning the life of a mortgage loan from origination through servicing and include loan-level data about (i) the borrower's financial and credit profile, (ii) the mortgage product and terms, (iii) the property purchased or refinanced, and (iv) the ongoing payment history of the loan. The agencies will build the database by matching a nationwide sampling of credit bureau files on borrowers' mortgages and payment histories with informational files such as the HMDA database and property valuation models. The database will include historical data back to 1998 and will be updated on a monthly basis.

**Fannie Mae and Freddie Mac Announce Short Sale Agreements with Mortgage Insurers; Freddie Mac Announces Other Servicing Updates.** On October 31, Fannie Mae [announced](#) that

it reached agreements with nine major mortgage insurance companies that will allow servicers to complete short sales and deeds-in-lieu of foreclosure without first obtaining approval from the mortgage insurer. The new standard delegation agreement executed with each of the mortgage insurers replaces various individual delegation agreements and is intended to create a more consistent and efficient process for borrowers and servicers.

On the same day, Freddie Mac issued Single-Family Seller/Servicer Guide [Bulletin 2012-23](#), which also announced new delegation agreements with its mortgage insurers that will streamline short sales and deeds-in-lieu of foreclosure. Freddie Mac revised other requirements for servicers' loss mitigation activities and updated its mortgage insurance claim documentation policy to require delivery of documentation no later than sixty days following the foreclosure sale, short sale, or acceptance of deed-in-lieu of foreclosure. The Bulletin also (i) requires approval by Freddie Mac of foreclosures in certain circumstances, (ii) revises imminent default documentation requirements, (iii) authorizes use of ACH for expense reimbursements and incentive payments, (iv) clarifies the policy for reimbursement of interest, and (v) updates charge-off recommendation requirements.

**Fannie Mae and Freddie Mac Issue Disaster Assistance Reminders for Servicers, Announce Disaster Policy Changes for Sellers.** On October 31, Fannie Mae issued a [servicing notice](#) to remind servicers that they may temporarily suspend or reduce mortgage payments for up to ninety days for borrowers whose income is affected by a disaster or for borrowers within federally declared disaster areas. The notice also lists the steps a servicer providing relief measures must take once it becomes aware that a property has incurred damage as a result of a disaster. On November 1, Fannie Mae issued Selling Guide [Announcement SEL-2012-12](#), which establishes a permanent selling policy for mortgages impacted by a disaster. This policy replaces Fannie Mae's traditional approach of issuing Lender Letters for each disaster. Under the new policy, for mortgage loans other than DU Refi Plus and Refi Plus, lenders must take prudent and reasonable actions to determine whether the condition of the property may have materially changed since the effective date of the appraisal report, and whether an additional inspection or appraisal is necessary. The Announcement identifies specific criteria lenders should use when determining if a mortgage can be delivered without additional action. Fannie Mae will not require a property secured by a DU Refi Plus or Refi Plus mortgage to undergo an additional inspection and/or new appraisal following a disaster, and will not require that a property damaged as a result of a disaster be repaired prior to delivery as long as the loan meets the property insurance requirements described in the Selling Guide.

On October 30, Freddie Mac [announced](#) that its full menu of relief policies for borrowers affected by disaster is being extended to homeowners whose homes were damaged or destroyed by Hurricane Sandy and are located in jurisdictions that the President has declared to be Major Disaster Areas and where he has made federal Individual Assistance programs available to affected individuals and households. Freddie Mac encouraged servicers to help affected borrowers with Freddie Mac loans by (i) suspending foreclosure and eviction proceedings for up to 12 months, (ii) waiving assessments of penalties or late fees against borrowers with disaster-damaged homes, and (iii) not reporting forbearance or delinquencies caused by the disaster to the nation's credit bureaus. On November 2, Freddie Mac issued Single-Family Seller/Servicer Guide [Bulletin 2012-24](#) to revise selling requirements for properties damaged as a result of a disaster. The Bulletin explains that, on a temporary basis for mortgages secured by properties located in eligible Disaster Areas impacted by Hurricane Sandy, required property valuation and underwriting documentation must be dated no more than 180 days before the note date. For Relief Refinance Mortgages, sellers are not required to determine if an additional property inspection or a new appraisal is necessary after an initial property valuation has been relied upon, provided that the mortgage meets property insurance requirements.

**ACLU Fair Lending Case Against Mortgage Securitizer Highlights New Fair Lending Litigation Risk; Fair Lending Litigation Against Lenders Continues.** On October 15, the ACLU filed a putative class action suit on behalf of a group of private citizens against a financial institution alleged to have financed and purchased subprime mortgage loans to be included in mortgage backed securities. The [complaint](#) alleges that the institution implemented policies and procedures that supported the market for subprime loans in the Detroit area so that it could purchase, pool, and securitize those loans. The plaintiffs claim those policies violated the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA) because they disproportionately impacted minority borrowers who were more likely to receive subprime loans, putting those borrowers at higher risk of default and foreclosure. The suit seeks injunctive relief, including a court appointed monitor to ensure compliance with any court order or decree, as well as unspecified monetary damages. The National Consumer Law Center, which developed the case with the ACLU, [reportedly](#) is investigating similar activity by other mortgage securitizers, suggesting additional suits could be filed. The ACLU also released a [report](#) on the fair lending aspects of mortgage securitization and called for, among other things, DOJ and HUD to expand their Fair Housing Testing Program, and for Congress to increase penalties for FHA and ECOA violations and provide additional funding for DOJ/HUD fair lending enforcement.

On October 18, three Georgia counties [filed suit](#) on behalf of their communities and certain residents against a financial institution the counties allege targets FHA-protected minority borrowers with "predatory high cost, subprime, ALT-A and conforming mortgages without considering the borrowers' ability to repay such loans." The complaint claims that the lender's practices caused and continue to cause minority borrowers to be more at risk of default and foreclosure than similarly situated white borrowers, and, as such, constitute a pattern or practice of discriminatory lending and reverse redlining in violation of the FHA. The counties are seeking injunctive relief and unspecified compensatory and punitive damages.

BuckleySandler's [Fair and Responsible Financial Services Team](#) has extensive experience litigating fair lending cases and assisting financial institutions seeking to manage fair lending risk. For a review of fair lending red flags for banks and strategies for addressing them, see our [recent article](#).

**Ohio Supreme Court Holds Standing to Foreclose Cannot Be Established by Assignment of Note After Filing.** On October 31, the Ohio Supreme Court [held](#) unanimously that a party's standing to foreclose on a delinquent borrower is determined as of the filing of the complaint, and the party's receipt of an assignment of a promissory note and mortgage after such filing does not cure initial lack of standing to bring the action. *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, No. 2012-Ohio-5017, slip op. (Ohio Oct. 31, 2012). The borrowers in the case appealed a trial court holding that allowed Federal Home Loan Mortgage Corporation (Freddie Mac) to foreclose, notwithstanding the fact that Freddie Mac commenced the action prior to obtaining an assignment of the promissory note and mortgage securing the borrowers' loan. According to the borrowers, because Freddie Mac did not hold the assignment and mortgage at the time of filing, it had no standing to sue. The Ohio Second District Court of Appeals held that Freddie Mac had cured the lack of standing by obtaining an assignment from the real party in interest after it filed for foreclosure. The Ohio Supreme Court reversed the Second District and agreed with the borrowers. Freddie Mac did not hold both the assignment and mortgage as required under Ohio law as a predicate to foreclosure and admitted that it had not suffered any injury at the time it commenced the foreclosure action. The state supreme court held that because standing to sue is required to invoke the jurisdiction of the trial court, standing must be determined at the beginning of the suit. Further, the court found that Freddie Mac could not avail itself of civil procedures that allow for substitution of the real party in interest because such rules were not intended to cure a lack of standing. The court agreed with the borrowers that Freddie Mac lacked standing and dismissed the foreclosure without prejudice and without adjudicating the underlying indebtedness.

**NMLS Issues Annual Renewal Reminder.** On November 1, the NMLS [issued a reminder](#) that the renewal period for state-licensed entities and individuals runs from November 1, 2012 through December 31, 2012. The NMLS also provided a Renewal Handbook to guide users in the renewal process, as well as state-specific renewal FAQs, and deadline and fees charts.

## **BANKING**

**Federal Banking Regulators Issue Guidance Regarding Supervision of Technology Service Providers.** On October 31, the Federal Financial Institutions Examination Council (FFIEC) [issued](#) a revised Supervision of Technology Service Providers Booklet (TSP Booklet). The revised TSP Booklet, which is part of the FFIEC [Information Technology Examination Handbook](#), provides guidance for examiners and financial institutions on the supervision of technology service providers by describing the federal banking regulators' statutory authority to supervise third-party service providers, outlining the regulators' risk-based supervision program, and providing the Uniform Rating System for examinations. The TSP Booklet clarifies that outsourced activities should be subject to the same risk management, security, privacy, and other internal controls and compliance policies as if such functions were performed internally, and that a financial institution's board of directors and management have the responsibility for ensuring that outsourced activities are conducted in a safe and sound manner and in compliance with applicable laws and regulations.

Concurrent with the release of the updated TSP Booklet, the Federal Reserve Board, the FDIC, and the OCC issued new [Administrative Guidelines](#) for the Implementation of Interagency Programs for the Supervision of Technology Service Providers. The Guidelines are separate from the FFIEC IT Examination Handbook and describe how the agencies implement their interagency supervisory programs. The Guidelines are primarily a resource for examiners and include the reporting templates used by examiners.

**Independent Financial Regulators Express Opposition to Senate Regulatory Analysis Bill.** On October 26, the leaders of the Federal Reserve Board, the OCC, the FDIC, the CFPB, the NCUA, and the SEC sent a [letter](#) to Senators Lieberman (I-CT) and Collins (R-ME) opposing [S. 3468](#), which would authorize the President to require that regulations promulgated by the independent regulatory agencies be subject to regulatory review in the same manner as other federal agencies, including central review of certain rules by the Office of Information and Regulatory Affairs. The regulators note that the bill, which was introduced by Senator Portman (R-OH) with the support of Senator Warner (D-VA) in August 2012, may be considered soon for markup by the Committee on Homeland Security and Governmental Affairs led by Mr. Lieberman and Ms. Collins. The letter argues that by giving the President unprecedented authority to influence policy and rulemaking functions of independent regulatory agencies through review of regulations, the bill would undermine congressional intent to create certain agencies that could exercise policymaking functions independent of any Administration.

**NCUA Names New Consumer Protection Director.** On October 26, NCUA [announced](#) the selection of Gail Laster as Director of the Office of Consumer Protection. Ms. Laster most recently served as Deputy Chief Counsel for the House Financial Services Committee where she participated in drafting the Dodd-Frank Act. Prior to her work in the House, Ms. Laster served as General Counsel to HUD, as Director of Government Relations for the Legal Services Corporation, and as Counsel to two Senate committees. Ms. Laster succeeds Ken Buckham, who will retire at year-end 2012.

## CONSUMER FINANCE

**CFPB Reports Examination Findings, Updates Examination Manual, and Issues Supervisory Appeals Policy.** On October 31, the CFPB released its first periodic Supervisory Highlights publication, along with an updated examination manual and a bulletin about the Bureau's supervisory appeals process. The [Supervisory Highlights](#) report describes the CFPB's supervisory activity from July 2011 through September 2012, and "signal[s] to all institutions the kinds of activities that should be carefully scrutinized for compliance." Following its first year of conducting examinations, the CFPB states that it has found compliance management system deficiencies and regulatory violations related to credit cards, credit reporting, and mortgage lending. The report also reviews public enforcement actions and nonpublic supervisory actions. [Bulletin 2012-07](#) explains the CFPB supervisory appeals process and addresses confidentiality and the role of the Bureau's Ombudsman Office. Finally, the CFPB's [updated Supervision and Examination Manual](#) incorporates the various procedures issued since the manual was first published in October 2011 (e.g., payday lending and consumer reporting examination procedures). The updated manual also includes new Code of Federal Regulations legal citations to reflect the recodification of federal consumer finance regulations under the CFPB's authority.

**Independent Financial Regulators Express Opposition to Senate Regulatory Analysis Bill.** On October 26, the leaders of the Federal Reserve Board, the OCC, the FDIC, the CFPB, the NCUA, and the SEC sent a [letter](#) to Senators Lieberman (I-CT) and Collins (R-ME) opposing [S. 3468](#), which would authorize the President to require that regulations promulgated by the independent regulatory agencies be subject to regulatory review in the same manner as other federal agencies, including central review of certain rules by the Office of Information and Regulatory Affairs. The regulators note that the bill, which was introduced by Senator Portman (R-OH) with the support of Senator Warner (D-VA) in August 2012, may be considered soon for markup by the Committee on Homeland Security and Governmental Affairs led by Mr. Lieberman and Ms. Collins. The letter argues that by giving the President unprecedented authority to influence policy and rulemaking functions of independent regulatory agencies through review of regulations, the bill would undermine congressional intent to create certain agencies that could exercise policymaking functions independent of any Administration.

**NMLS Issues Annual Renewal Reminder.** On November 1, the NMLS [issued a reminder](#) that the renewal period for state-licensed entities and individuals runs from November 1, 2012 through December 31, 2012. The NMLS also provided a Renewal Handbook to guide users in the renewal process, as well as state-specific renewal FAQs, and deadline and fees charts.

## CREDIT CARDS

**CFPB Reports Examination Findings, Updates Examination Manual, and Issues Supervisory Appeals Policy.** On October 31, the CFPB released its first periodic Supervisory Highlights publication, along with an updated examination manual and a bulletin about the Bureau's supervisory appeals process. The [Supervisory Highlights](#) report describes the CFPB's supervisory activity from July 2011 through September 2012, and "signal[s] to all institutions the kinds of activities that should be carefully scrutinized for compliance." Following its first year of conducting examinations, the CFPB states that it has found compliance management system deficiencies and regulatory violations related to credit cards, credit reporting, and mortgage lending. The report also reviews public enforcement actions and nonpublic supervisory actions. [Bulletin 2012-07](#) explains the CFPB supervisory appeals process and addresses confidentiality and the role of the Bureau's Ombudsman Office. Finally, the CFPB's [updated Supervision and Examination Manual](#) incorporates the various procedures issued since the manual was first published in October 2011 (e.g., payday

lending and consumer reporting examination procedures). The updated manual also includes new Code of Federal Regulations legal citations to reflect the recodification of federal consumer finance regulations under the CFPB's authority.

**CFPB Launches College Credit Card Agreement Database, Releases Annual Report on College Card Agreements.** On November 1, the CFPB [launched](#) a [database of college credit card agreements](#) in effect during 2011 and released an [annual report](#) to Congress on such agreements. The database provides copies of all 2011 agreements and presents other information submitted by card issuers for each agreement, including total payments, total open accounts, and new accounts opened in 2011. The report presents summary information about the data reflected in the database and identifies some trends from 2009-2011. For example, the report notes that (i) the total number of college card agreements declined from 2010 to 2011, (ii) issuers added 26 new agreements in 2011, and (iii) the majority of agreements were between issuers and an organization affiliated with an institution of higher education (such as an alumni association) or an institution of higher learning.

## E-COMMERCE

**California AG Notifies Mobile Application Developers of Non-Compliance.** On October 30, California Attorney General (AG) Kamala Harris [announced](#) that her office's [Privacy Enforcement and Protection Unit](#) sent letters to numerous mobile application developers advising those entities of their noncompliance with state privacy law. Specifically, the AG alleges that the targeted mobile application developers failed to post a privacy policy that is reasonably accessible to the consumer, as required by the California Online Privacy Protection Act. Under the state unfair competition law, violation of the Act may result in penalties of up to \$2,500 per violation. A violation in this instance is each download of a mobile application that does not properly include a privacy policy. The letters provide thirty-day notice of noncompliance as required by the Act, within which each developer must provide specific plans and a timeline for compliance, or an explanation of why the application is not covered by the Act.

**Arizona Appellate Court Requires Further Proceedings on Whether Certain Emails Constitute Electronic Signatures Under State Law.** Recently, the Arizona Court of Appeals [ruled](#) that a state trial court erred in dismissing a claim that an emailed thank-you note acknowledging the receipt of a signed agreement constituted an electronic signature. *Young v. Rose*, 286 P.3d 518 (Az. Ct. App. 2012). In this case, a real estate agent sued two former clients for breaching an exclusive representation contract. The clients had manually signed the contract and returned it as a PDF copy. The agent never manually signed the agreement, but claimed that her electronic business card attached to an email thanking her clients for the PDF copy constituted an electronic signature under the Arizona Electronic Transactions Act, which includes a broad definition of electronic signature. The trial court disagreed and dismissed the case, noting that the agent's business card was included on all of her outgoing emails and therefore could not constitute an electronic signature in some cases but not others. The Arizona Court of Appeals vacated the trial court order on procedural grounds and held that further proceedings are necessary to determine whether the email at issue qualifies as an electronic signature. The court explained that in addition to proving the existence of an electronic signature, the agent must also establish that the parties intended to conduct the transaction by electronic means.

## PRIVACY/DATA SECURITY

**California AG Notifies Mobile Application Developers of Non-Compliance.** On October 30, California Attorney General (AG) Kamala Harris [announced](#) that her office's [Privacy Enforcement](#)

[and Protection Unit](#) sent letters to numerous mobile application developers advising those entities of their noncompliance with state privacy law. Specifically, the AG alleges that the targeted mobile application developers failed to post a privacy policy that is reasonably accessible to the consumer, as required by the California Online Privacy Protection Act. Under the state unfair competition law, violation of the Act may result in penalties of up to \$2,500 per violation. A violation in this instance is each download of a mobile application that does not properly include a privacy policy. The letters provide thirty-day notice of noncompliance as required by the Act, within which each developer must provide specific plans and a timeline for compliance, or an explanation of why the application is not covered by the Act.

© 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](mailto:infobytes@buckleysandler.com)

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