Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

June 7, 2013

TOPICS COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Updates TILA, ECOA Examination Procedures. On June 4, the CFPB released new TILA and ECOA examination procedures, which were updated to incorporate certain of the CFPB mortgage rules finalized in January 2013 that address appraisals, escrow accounts, and mortgage loan originator compensation and qualifications. Parts of the Regulation Z (TILA) amendments took effect June 1, 2013, while the majority of the changes to both Regulation Z and Regulation B (ECOA) take effect in January 2014. The CFPB explained that the procedures will help financial institutions and mortgage companies understand how they will be examined under the new requirements that, among other things: (i) set qualification and screening standards for loan originators, (ii) prohibit steering incentives, (iii) prohibit "dual compensation," (iv) extend the required duration of an escrow account on higher-priced mortgage loans, (v) prohibit mandatory arbitration, (vi) require lenders to provide appraisal reports and valuations, and (vii) prohibit single premium credit insurance.

HUD Announces REO Agreement with Bank, Fair Housing Organizations. On June 6, HUD announced an agreement to resolve an administrative complaint filed last year by the National Fair Housing Alliance (NFHA) and numerous individual fair housing organizations alleging that a national bank engaged in discriminatory practices with regard to real estate owned (REO) properties. The complaint was one of several that followed an investigation conducted by the fair housing groups, which allegedly revealed that REO properties in predominantly minority neighborhoods are more likely to have maintenance problems and are less likely to have a "For Sale" sign than properties in predominantly white neighborhoods. The report suggested that poor maintenance practices and other alleged neglect can result in properties being vacant for longer periods and can increase the likelihood that a property eventually will be purchased by an investor at a discounted price, as opposed to an owner-occupier. Under the conciliation agreement, the bank will invest $39 million in

45 communities to support homeownership, neighborhood stabilization, property rehabilitation, and housing development. The bank also will (i) use a revised Real Estate Broker Procedure Manual and property inspection checklist, (ii) implement an enhanced training program for real estate brokers and agents who list REO properties, and bank staff responsible for managing REO properties, and (iii) extend the amount of time that individual REO properties will be available exclusively for purchase by an owner-occupant or a non-profit organization.

CFPB Plans Credit Card Arbitration Survey. On June 6, the CFPB released a notice and request for comment on its plan to conduct a new survey related to its ongoing study of arbitration agreements. A supporting document submitted with the notice includes the initial survey questions proposed by the CFPB. The CFPB plans to contact 1,000 credit card holders to evaluate their awareness of card agreement dispute resolution provisions, and their "assessments of such provisions." The CFPB stated that the survey will seek information regarding card holders' perceptions and valuations of arbitration and litigation, but will not gather data regarding respondents' post-fact satisfaction with arbitration or litigation proceedings. Comments on the proposed survey are due by August 6, 2013.

FDIC Announces Enforcement Action Against Debit Card Issuer, Affiliated Service Provider. On May 31, the FDIC announced enforcement actions against a California bank and an affiliated service provider for alleged unfair and deceptive practices in the marketing and servicing of a prepaid reloadable MasterCard. According to the FDIC, the service provider's website contained a number of misrepresentations while omitting other information. Specifically, the FDIC claimed that the firm deceptively advertised free online bill pay, promoted features that were not available to cardholders, and charged fees that were not clearly disclosed. Additionally, the service provider's ACH error resolution procedures imposed additional, undisclosed requirements on card holders. Neither the bank nor the service provider admitted the allegations, but they agreed to establish a restitution fund of approximately $1.1 million for over 64,000 card holders, and pay civil money penalties of $600,000 and $110,000, respectively. The consent orders (i) direct both entities not to engage in further violations of law, (ii) establish specific corrective actions, and (iii) require enhanced compliance management systems and periodic reporting to the FDIC. The bank is further required to strengthen its oversight of third parties.

FTC Sues Payment Processor for Assisting Allegedly Fraudulent Credit Card Debt Relief Operation. On June 5, the FTC announced that it has added a payment processor as a defendant in an existing suit against a debt relief firm that the FTC alleges operated a credit card interest rate reduction scam. The FTC claims that the debt relief firm cold-called consumers and charged them up-front fees for promises of credit card interest rate reductions that the firm never obtained. The FTC charges that the payment processor knew, or consciously avoided knowing, the supposedly illegal nature of the operation and facilitated allegedly deceptive and abusive telemarketing acts or practices in violation of the Telemarketing Sales Rule. The FTC also alleges that the processor ignored the "alarmingly high" chargeback rates.

SEC Chairman Names Chief Counsel. On June 3, the SEC Chairman Mary Jo White appointed Robert E. Rice as Chief Counsel. Mr. Rice previously served as a federal prosecutor in the Southern District of New York. Most recently he was head of governance, litigation, and regulation for the Americas, and the global co-head of the governance, litigation, and regulation operating committee for an international financial institution.

FHA Commissioner Issues Statement on Insurance Premiums and HPMLs. On June 3, FHA Commissioner Carol Galante issued a statement in response to lenders' concern that new monthly mortgage insurance premium requirements will increase the APR on FHA mortgages resulting in more mortgages exceeding Regulation Z's high priced mortgage loan (HPML) threshold. Mortgagee

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FFIEC Creates Cyber Security Working Group. On June 6, the Federal Financial Institutions Examination Council (FFIEC) announced the formation of a working group to further promote coordination across the federal and state banking regulatory agencies on critical infrastructure and cybersecurity issues.

Obama Administration Targets Iranian Currency. On June 3, the Obama Administration announced a new Executive Order authorizing sanctions that directly target trade in Iran's currency, the rial. The order authorizes the Treasury Secretary to take action against foreign financial institutions that knowingly conduct or facilitate significant transactions for the purchase or sale of the rial, or that maintain significant accounts outside of Iran denominated in the rial. Specifically, the Treasury Secretary can (i) prohibit opening, and prohibit or impose strict conditions on maintaining, in the United States, a correspondent account or a payable-through account by such foreign financial institution; or (ii) block all property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person (including any foreign branch) of such foreign financial institution, and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or

otherwise dealt in. The order also (i) subjects to new sanctions persons and financial institutions that knowingly engage in transactions for the supply of significant goods or services used in connection with the automotive sector of Iran, and (ii) expands sanctions against those who materially assist, sponsor, or provide financial, material, or technological support to persons designated by Treasury as the "Government of Iran."

STATE ISSUES

New York AG Signals Crackdown on Bank Foreclosure Practices. On June 4, New York Attorney General Eric Schneiderman (AG) announced a lawsuit against a major financial institution for allegedly violating state law by failing to timely file in foreclosure cases "requests for judicial intervention" (RJI), which would trigger court-supervised settlement conferences. The suit seeks to compel the financial institution to file the RJI immediately in all cases in which it has filed a proof of service, and to file an RJI simultaneously with proof of service in all future cases. The suit also seeks (i) to compel the firm to prepare an accounting of interest charges, penalties and fees that accrued beginning 60 days after the filing of proof of service on the homeowner; (ii) to toll and waive all accrued interest charges, fees and penalties that accrued, or will accrue, beginning 60 days after the filing of proof of service on the homeowner; (iii) restitution for interest charges, fees and penalties paid by the homeowner that accrued beginning 60 days after the filing of proof of service on the homeowner; and (iv) damages for homeowners injured by the alleged practices. The suit results from an AG investigation that sampled foreclosure filings in four New York counties, and the AG stated that he is committed to bringing similar actions against other lenders.

New York AG Obtains Health Care Credit Card Settlement. On June 3, AG Schneiderman announced an agreement with a credit card issuer to resolve an investigation into alleged consumer protection concerns arising from the offering of credit cards through medical care providers. The AG cited a Health Care Bureau investigation that found the health care provider application process is often rushed and occurs when treatment is set to begin, resulting in consumers feeling pressured into applying for the card and being charged the full amount for treatment in advance of receiving services. The AG claimed that, in many instances, providers failed to inform consumers of the terms of the card and represented that the account had "no interest," when it carried retroactive interest of 26.99% if not paid in full during a promotional period. Other consumers allegedly thought that they were signing up for an in-house, no-interest payment plan directly with their provider, or a line of credit with 0% interest. Under the agreement, the issuer will establish an appeals fund for certain card holders who disputed a claim and were denied, which could result in refunds or credits of up to $2 million to approximately 1,000 card holders. The issuer also must implement consumer protection and compliance measures, including, among others: (i) offering a three-day "cooling off" period, such that no transaction over $1,000 can be charged within three days of an initial application, (ii) adding a set of "Transparency Principles" to provider contracts to ensure that providers accurately describe card terms, and implementing other health care provider training and oversight measures, (iii) revising promotional interest rate and other disclosures, and (iv) standardizing complaint management procedures.

Oregon Expands Foreclosure Mediation Program. On June 4, Oregon enacted SB 558, which creates a foreclosure mediation program for judicial foreclosures. In 2012, Oregon enacted a law that required for nonjudicial foreclosures that a beneficiary (i) enter into mediation with a grantor for the purpose of negotiating a foreclosure avoidance measure, and (ii) notify a grantor if they are not eligible for any foreclosure avoidance measure or if the grantor has not complied with the terms of a foreclosure avoidance measure. The new law expands that program to cover judicial foreclosures and makes changes to the structure of the overall mediation program.

Hawaii Expands Authority to Investigate Mortgage Servicers, Increases Servicer Licensing Fees. On June 3, Hawaii enacted SB 1070, a bill related to the supervision and licensing of mortgage servicers. The bill grants the Commissioner of Financial Institutions additional authority to conduct investigations and examinations of mortgage servicers. The bill allows the Commissioner to (i) subpoena or otherwise obtain access to servicer accounts, records, documents and other information; (ii) hire investigations staff and retain outside consultants, and (iii) charge examination or investigation fees and expenses. The bill also increases initial servicer application fees from $500 to $675 and renewal fees from $250 to $425. The bill took effect immediately.

Texas Reorganizes Mortgage Licensing Laws. On May 24, Texas enacted SB 1004, which reorganizes and simplifies the state's mortgage licensing regime. Under current law, mortgage loan originators who are employed by mortgage bankers are licensed under separate sections of the code, which together contain six individual types of licenses. Each of these licenses require the same set of qualifications, however, an originator licensed under one chapter must get a separate license to be qualified under the other chapter, and vice versa. SB 1004 creates a single license type for mortgage origination, which will enable a qualified individual to originate for a mortgage company or a mortgage banker, so long as the individual meets the statutory licensure requirements. The bill makes numerous other revisions relating to the regulation of residential mortgage loan originators, residential mortgage loan companies, mortgage bankers, and residential mortgage loan servicers and raises the fee cap for license applications and renewals. The changes become effective on September 1, 2013.

COURTS

Oregon Supreme Court Rulings Allow Nonjudicial Foreclosures to Proceed. On June 6, the Oregon Supreme Court issued a pair of rulings resolving issues around the role of MERS in the non-judicial foreclosure process and allowing such foreclosures to move forward. In *Brandrup v. ReconTrust Company, N. A.*S060281, slip op. (Oregon Jun. 6, 2013) and *Niday v. GMAC Mortgage LLC*, SC S060655, 2013 WL 2446524 (Oregon Jun. 6, 2013), the court answered a series of certified questions related to the role of an electronic mortgage registry as the beneficiary listed on trust deeds and applied those answers to the appeal of a state foreclosure action. The court held that, under the Oregon Trust Deed Act: (i) a mortgage registry that is neither a lender nor successor to a lender may not be a beneficiary of a trust deed; (ii) a mortgage registry is not eligible to serve as beneficiary where the trust deed provides that the registry holds only the legal title to the interests granted by the borrower, but, if necessary to comply with law or custom, the registry has the right to exercise any or all of those interests; (iii) assignments of a trust deed that result from the transfer of the secured obligation are not required to be recorded; and (iv) a mortgage registry cannot hold and transfer legal title to a trust deed as nominee for the lender, after the note secured by the trust deed is transferred from the lender to a successor or series of successors. The court also explained that, "even if MERS lacks authority to act as the trust deed's beneficiary, it may have authority to act on behalf of the beneficiary if it can demonstrate that it has an agency relationship with the beneficiary and that the agency agreement is sufficiently expansive." The court added that this would apply equally to the issue of the registry's authority to foreclose the trust deed. Effectively allowing nonjudicial foreclosures involving MERS as the beneficiary on trust deeds to proceed, the Court stated that "[i]n either case, MERS' authority to act as the beneficiary's agent depends on who succeeded to the lender's rights, whether those persons manifested consent that MERS act on their behalf and subject to their control, and whether MERS has agreed to so act."

Federal District Court Holds Phone Number Provided in Online Account Information Is Consent to Receive Text Messages. On May 30, the U.S. District Court for the Northern District of California held that a user of an online service consented to receiving text messages from that

service by including his mobile number in his online account information. *Roberts v. PayPal, Inc.*, No. 12-622, 2013 WL 2384242 (N.D. Cal. May 30, 2013). In this case, a PayPal user filed a putative class action claiming that the company sent unsolicited advertisements via text messages to users' mobile phones in violation of the Telephone Consumer Protection Act, which generally prohibits unsolicited calls and messages using automatic dialing or prerecorded voices absent express written consent. The court granted summary judgment to PayPal, holding that, by providing his mobile phone number to PayPal when he added the number to his online account, the user provided express consent for PayPal to send text messages. The court did not resolve PayPal's alternative argument that the user consented to receiving messages by accepting the terms of PayPal's user agreement, which included an express consent to receive autodialed calls. That provision was not included in the agreement at the time the user created his PayPal account and accepted the user agreement, but was added several years later without notice to the user. The court expressed skepticism concerning the binding nature of an agreement amendment that is merely posted to a website without other notice to the customer, even if the customer has previously agreed to the terms and that procedure.

FIRM NEWS

BuckleySandler will host a Power Breakfast session at the American Bankers Association's Regulatory Compliance Conference in Chicago, IL, taking place from June 9 - 12, 2013. During the June 12 Power Breakfast BuckleySandler Partners Andrew Sandler, Jeffrey Naimon, Kirk Jensen, and Andrea Mitchell will be joined by BuckleySandler Counsel and former Deputy Assistant Director for the Office of Regulations at the CFPB Ben Olson, to provide practical guidance for institutions facing compliance examinations.

Also at the same conference, Andrea Mitchell will speak at a pre-conference Fair Lending Workshop on June 8. The Fair Lending Workshop will review current fair lending hot topics and how institutions can manage or mitigate fair lending obstacles and demonstrate compliance with fair lending laws and regulations. Kirk Jensen will participate on June 10 in panel that will review the latest enforcement actions involving SCRA and the most common SCRA compliance errors in mortgage and consumer lending, and will discuss how institutions have successfully implemented SCRA compliance programs. Jeffrey Naimon will participate on a panel that will take a close look at various mortgage servicing topics on June 11. Andrew Sandler will speak on June 11 on a panel titled "Fair and Responsible Banking: Beyond Mortgages," which will review recent non-mortgage fair lending examinations, especially direct and indirect auto lending.

Jonathan Cannon will speak at the National Settlement Services Summit in Cleveland, OH on June 12, 2013. Mr. Cannon's session is entitled "RESPA defined in 2013: What's new, what's the same and where do compliance issues lurk?"

John Redding will participate on a panel at the 15th AFSA State Government Affairs and Legal Issues Forum on June 13, 2013 in San Antonio, TX. Mr. Redding's panel, which will cover auto finance lending products and CFPB concerns on fair lending and dealer participation, also will include Rebecca Gelfond, Deputy Fair Lending Director, CFPB; Will Lund, Superintendent, Maine Bureau of Consumer Credit Protection; and Deborah Robertson, Managing Counsel, Toyota Financial Services.

Donna Wilson will speak at ACI's 12th National Forum on Residential Mortgage Litigation and Regulatory Enforcement, on September 26, 2013 in Dallas, TX. Ms. Wilson's panel is titled, "Responding to Stepped Up Litigation and Enforcement Being Brought at the State Level, With an Emphasis on California, Florida, New York, Illinois, Texas, and Nevada."

FIRM PUBLICATIONS

Benjamin Saul, Valerie Hletko, Liana Prieto, and Shara Chang published the Fair Lending Litigation chapter in *Litigation Services Handbook: The Role of the Financial Expert,* 2013 Cumulative Supplement (5th Edition).

Jeremiah Buckley authored "Help the Fed Get Out of the Mortgage Business" for American Banker on May 7, 2013.

Benjamin Saul published "Private Student Lenders and Servicers Face CFPB Scrutiny," on May 20, 2013, in the Westlaw Journal of Bank & Lender Liability.

Benjamin Klubes, Michelle Rogers, and Katherine Halliday published "HAMP Risk on the Rise: A Complicated Regulatory Scheme Under the Spotlight," on June 5, 2013 in Bloomberg Law.

About BuckleySandler LLP (www.buckleysandler.com)

With nearly 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).

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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.

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CREDIT CARDS

CFPB Plans Credit Card Arbitration Survey. On June 6, the CFPB released a notice and request for comment on its plan to conduct a new survey related to its ongoing study of arbitration agreements. A supporting document submitted with the notice includes the initial survey questions proposed by the CFPB. The CFPB plans to contact 1,000 credit card holders to evaluate their awareness of card agreement dispute resolution provisions, and their "assessments of such provisions." The CFPB stated that the survey will seek information regarding card holders' perceptions and valuations of arbitration and litigation, but will not gather data regarding respondents' post-fact satisfaction with arbitration or litigation proceedings. Comments on the proposed survey are due by August 6, 2013.

New York AG Obtains Health Care Credit Card Settlement. On June 3, AG Schneiderman announced an agreement with a credit card issuer to resolve an investigation into alleged consumer protection concerns arising from the offering of credit cards through medical care providers. The AG cited a Health Care Bureau investigation that found the health care provider application process is often rushed and occurs when treatment is set to begin, resulting in consumers feeling pressured into applying for the card and being charged the full amount for treatment in advance of receiving services. The AG claimed that, in many instances, providers failed to inform consumers of the terms of the card and represented that the account had "no interest," when it carried retroactive interest of 26.99% if not paid in full during a promotional period. Other consumers allegedly thought that they were signing up for an in-house, no-interest payment plan directly with their provider, or a line of credit with 0% interest. Under the agreement, the issuer will establish an appeals fund for certain card holders who disputed a claim and were denied, which could result in refunds or credits of up to $2 million to approximately 1,000 card holders. The issuer also must implement consumer protection and compliance measures, including, among others: (i) offering a three-day "cooling off" period, such that no transaction over $1,000 can be charged within three days of an initial application, (ii) adding a set of "Transparency Principles" to provider contracts to ensure that providers accurately describe card terms, and implementing other health care provider training and oversight measures, (iii) revising promotional interest rate and other disclosures, and (iv) standardizing complaint management procedures.

PRIVACY/DATA SECURITY

FFIEC Creates Cyber Security Working Group. On June 6, the Federal Financial Institutions Examination Council (FFIEC) announced the formation of a working group to further promote coordination across the federal and state banking regulatory agencies on critical infrastructure and cybersecurity issues.

Federal District Court Holds Phone Number Provided in Online Account Information Is Consent to Receive Text Messages. On May 30, the U.S. District Court for the Northern District of California held that a user of an online service consented to receiving text messages from that service by including his mobile number in his online account information. *Roberts v. PayPal, Inc.*, No. 12-622, 2013 WL 2384242 (N.D. Cal. May 30, 2013). In this case, a PayPal user filed a putative class action claiming that the company sent unsolicited advertisements via text messages to users' mobile phones in violation of the Telephone Consumer Protection Act, which generally prohibits unsolicited calls and messages using automatic dialing or prerecorded voices absent express written consent. The court granted summary judgment to PayPal, holding that, by providing his mobile phone number to PayPal when he added the number to his online account, the user provided express consent for PayPal to send text messages. The court did not resolve PayPal's alternative argument that the user consented to receiving messages by accepting the terms of PayPal's user agreement, which included an express consent to receive autodialed calls. That provision was not included in the agreement at the time the user created his PayPal account and accepted the user agreement, but was added several years later without notice to the user. The court expressed skepticism concerning the binding nature of an agreement amendment that is merely posted to a website without other notice to the customer, even if the customer has previously agreed to the terms and that procedure.

PAYMENTS

FDIC Announces Enforcement Action Against Debit Card Issuer, Affiliated Service Provider. On May 31, the FDIC announced enforcement actions against a California bank and an affiliated service provider for alleged unfair and deceptive practices in the marketing and servicing of a prepaid reloadable MasterCard. According to the FDIC, the service provider's website contained a number of misrepresentations while omitting other information. Specifically, the FDIC claimed that the firm deceptively advertised free online bill pay, promoted features that were not available to cardholders, and charged fees that were not clearly disclosed. Additionally, the service provider's ACH error resolution procedures imposed additional, undisclosed requirements on card holders. Neither the bank nor the service provider admitted the allegations, but they agreed to establish a restitution fund of approximately $1.1 million for over 64,000 card holders, and pay civil money penalties of $600,000 and $110,000, respectively. The consent orders (i) direct both entities not to engage in further violations of law, (ii) establish specific corrective actions, and (iii) require enhanced compliance management systems and periodic reporting to the FDIC. The bank is further required to strengthen its oversight of third parties.

FTC Sues Payment Processor for Assisting Allegedly Fraudulent Credit Card Debt Relief Operation. On June 5, the FTC announced that it has added a payment processor as a defendant in an existing suit against a debt relief firm that the FTC alleges operated a credit card interest rate reduction scam. The FTC claims that the debt relief firm cold-called consumers and charged them up-front fees for promises of credit card interest rate reductions that the firm never obtained. The FTC charges that the payment processor knew, or consciously avoided knowing, the supposedly illegal nature of the operation and facilitated allegedly deceptive and abusive telemarketing acts or practices in violation of the Telemarketing Sales Rule. The FTC also alleges that the processor ignored the "alarmingly high" chargeback rates.

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