

InfoBytes

October 28, 2011

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Federal Issues

Administration Revamps and Extends HARP. On October 24, the Federal Housing Finance Agency (FHFA), along with Fannie Mae and Freddie Mac, announced changes to the Home Affordable Refinance Program (HARP) in an effort to increase participation in the program. To bring additional borrowers into the program, FHFA has extended the program through December 31, 2013 for mortgage loans sold to Fannie Mae or Freddie Mac on or before May 31, 2009 and is removing the current 125 percent Loan-to-Value cap for those seeking to refinance into a fixed-rate mortgage under the program (there is a 105 percent LTV cap for refinancing into an adjustable-rate mortgage). FHFA is also seeking to lower the barrier to entry by decreasing fees where the borrower refinances into a shorter-term mortgage and removing the requirement that the lender obtain an appraisal if a reliable automated valuation model provides a reasonable estimate of the value of the property. Additional operating instructions will be provided to lenders by November 15 and FHFA hopes that some lenders will begin to operate under the new program by December 1. Fannie Mae provided informal guidance on a briefing call that the changes will be incorporated into Desktop Underwriter sometime late in the first quarter of 2012. [Click here for the FHFA announcement and initial set of frequently asked questions.](#)

Federal Reserve Board Announces Annual Indexing of Reserve Requirement Exemption Amount and Low Reserve Tranche. On October 26, the Federal Reserve Board amended Regulation D to reflect the annual indexing of the reserve requirement exemption amount and the low reserve tranche for 2012. The amendments set the amount of net transaction accounts (primarily checking accounts) of each depository institution that is subject to a zero percent reserve requirement, known as the reserve requirement exemption amount, at \$11.5 million for 2012 (increased from \$10.7 million in 2011). The amendments also set the low reserve tranche, which consists of the amount of net transaction accounts at each depository institution that is subject to a three percent reserve requirement, at \$71.0 million for 2012 (increased from \$58.8 million in 2011). Net transaction accounts in excess of \$71.0 million will be subject to a ten percent reserve requirement. The Federal Reserve Board also announced changes in two other amounts - the nonexempt deposit cutoff level and the reduced reporting limit - that are used to determine the frequency at which depository institutions

must submit deposit reports. The rule becomes effective 30 days after publication in the *Federal Register*. [Click here for a copy of the announcement.](#)

OCC Issues New Electronic Fund Transfer Act-Regulation E Booklet. On October 21, the Office of the Comptroller of the Currency (OCC) issued a Bulletin announcing its new booklet entitled "Electronic Fund Transfer Act-Regulation E" in the Comptroller's Handbook, replacing the sections of the "Depository Services" booklet that addressed Regulation E and the Electronic Fund Transfer Act. The new booklet contains updated examination procedures and incorporates recent changes made to Regulation E by the Board of Governors of the Federal Reserve regarding overdraft services and gift cards. The booklet also addresses recent changes that simplify and clarify e-communication requirements and the relationship of Regulation E to the ESIGN Act. It includes background information and detailed discussion on all of Regulation E, including the three new areas mentioned above. The updated examination procedures are presented in a slightly different format from the previous version. In addition, the updated procedures include newly added sections addressing requirements for: overdraft services, including opt-ins for payment of overdrafts on ATM and one-time debit transactions; payroll card accounts, including periodic statement requirements, disclosure requirements and error resolution procedures for those accounts; and gift certificates, store gift cards, and general use prepaid cards, including new requirements imposing certain restrictions on the ability to impose dormancy, inactivity, or service fees on, and a prohibition on expiration dates earlier than five years from issuance or last load of, the certificate or card. [Click here for a copy of the announcement and the new booklet including the updated examination procedures.](#)

Financial Stability Oversight Council Provides Information on Supervision of Nonbank Financial Companies. Recently, the Financial Stability Oversight Council (Council) issued a second notice of proposed rulemaking (NPR) and proposed guidance on the process the Council will follow in determining whether a nonbank financial company should be subject to supervision by the Board of Governors of the Federal Reserve System. This second NPR and proposed guidance follows and responds to comments received on an initial NPR issued by the Council in January. In the NPR, the Council clarifies and adds additional details to its proposal to use a six-category framework for evaluating whether a nonbank financial company meets the standards allowing for supervision set forth in Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Nonbank financial companies meriting further review will be contacted by the Council, which will vote on whether to subject a company to a proposed determination. Nonbank financial companies will receive written notice of any proposed determination and be given a chance to contest the determination. [Click here for a copy of the press release announcing this NPR.](#) [Click here for a copy of the NPR.](#)

State Issues

Workgroup Recommends Changes to Florida's Foreclosure Mediation Program. On October 21, a workgroup tasked by the Supreme Court of Florida with assessing Florida's foreclosure mediation program submitted a report recommending that the program not be mandatory in all cases. When the court created the program, all residential foreclosure cases in Florida were required to be referred to mediation. Based on program data, public comments, and circuit court chief judge input, the Assessment Workgroup for the Managed Mediation Program for Residential Mortgage Foreclosure Cases voted to (i) eliminate the mandate for a statewide managed mediation program, and (ii) allow circuits to opt in to a new, revised uniform model administrative order. Other recommendations include improving the integrity of borrowers' financial information, creating sanctions for noncompliance, reducing fees, and shortening the mediation timeline. Interestingly, a survey showed that 100% of the surveyed borrower attorneys believed the program should continue, but a majority of borrowers said it should be eliminated. However, the workgroup seemed to attribute this to alleged

misunderstandings by the borrowers that the program was court sponsored. The workgroup did indicate that "Florida's economy will continue to be depressed as long as there are massive numbers of mortgages in default that have not been resolved by foreclosure." [Click here for a copy of the report.](#)

Courts

First Circuit Rules that Stores Should Pay Shoppers' Mitigation Costs for Losing Payment Card Numbers. On October 20, the U.S. Court of Appeals for the First Circuit kept alive a case by holding that, in Maine, customers may bring negligence and implied contract claims against merchants that lose or fail to protect their payment card data and that those customers may recover their reasonably-incurred costs to mitigate the impact of the data loss. *Anderson v. Hannaford Bros. Co.*, No. 10-2384, (1st Cir. Oct. 20, 2011). In *Anderson*, a class of consumer-plaintiffs sued the defendant-grocery store chain after the defendant admitted that hackers broke into its computer system and stole millions of its customers' credit and debit card numbers. The district court initially granted the defendant's motion to dismiss the case. The appeals court reversed the dismissal in part - disagreeing principally with one aspect of the district court's reasoning. Both courts agreed that a jury may reasonably find that the defendant impliedly agreed to protect consumers' payment card data and that the defendants may therefore be liable for negligence and for breach of an implied contract if they failed to do so. Nevertheless, the district court found that the plaintiffs' damages - costs to avoid liability for unauthorized charges - were unforeseeable and therefore not recoverable. The appeals court disagreed and held that, under Maine law, incidental costs expended in good faith to mitigate the harm caused by the data loss are recoverable, including costs to replace the cards and purchase fraud insurance. [Click here for a copy of the opinion.](#)

Eleventh Circuit Refuses Equitable Tolling for TILA Violation. Recently, the U.S. Court of Appeals for the Eleventh Circuit upheld the dismissal of a complaint alleging a Truth in Lending Act (TILA) violation on the ground that it was untimely. *Sampson v. Washington Mutual Bank*, No 10-cv-00627 (11th Cir. Oct. 5, 2011). Plaintiff homeowner defaulted on his loan and, following foreclosure sale, sued defendant lender alleging TILA violations and various state law claims. It was undisputed that the subject TILA violation occurred at the closing of the original home loan, some five years before the filing of the complaint and well outside the one-year statute of limitations generally applicable to TILA claims. Accordingly, the trial court dismissed the TILA claim as time-barred. On appeal, plaintiff argued that the court should equitably toll the statute of limitation on a continuing violation theory because the requisite disclosures were never provided at any point. The Eleventh Circuit responded that mere nondisclosure does not give rise to a continuing violation and, therefore, affirmed the dismissal. [Click here for a copy of the opinion.](#)

Miscellany

Court Grants FTC Request for TRO Against Debt Collection Operation. On October 26, the Federal Trade Commission (FTC) announced that the U.S. District Court for the Central District of California granted its request for a temporary restraining order against a debt collection operation that allegedly deceived and abused consumers. The FTC filed the complaint and request for a TRO on October 11, 2011 against two individuals and seven companies in a Corona, California-based debt-collection operation doing business as Rincon Debt Management. The FTC charged that the defendants made false and misleading claims that they were process servers or attorneys who had filed - or were about to file - a lawsuit against a consumer, and that these claims violated the FTC Act. Additionally, the FTC alleged that the defendants violated the Fair Debt Collection Practices Act by: (i) improperly contacting third parties about consumers' debts; (ii) failing to disclose the name of the company they represented, or the fact that they were attempting to collect on a debt,

during telephone calls to consumers; (iii) misrepresenting the existence of a debt, the amount, and other facts about the debt; and (iv) failing to notify consumers of their right to dispute and obtain verification of their debts. In response, the court granted an order to stop the illegal conduct, freeze the operation's assets and appoint a temporary receiver to take over the defendants' business while the FTC moves forward with the case. [Click here for a copy of the press release.](#) [Click here for a copy of the court filings.](#)

Firm News

Please Join Us for a Complimentary Webinar: Mortgage Servicing Update: Understanding and Complying with the New and Evolving Rules and Regulations in Light of Recent OCC and CFPB Activity

This year, we have seen tremendous changes in the mortgage servicing landscape. Please join BuckleySandler for a webinar that will discuss where we are now, how we got here and where we are going. In particular, we will focus on:

The new CFPB Servicing Supervision and Examination Manual published in October 2011

OCC Bulletin 2011-29 and other bank regulator guidance on servicing

Compliance with the "rules" and expectations that stem from new examination procedures, recent regulatory guidance, and enforcement actions related to mortgage servicing

Date: Wednesday, November 9, 2011
Time: 2:00 - 3:15 PM ET

Sign up now to attend this important webinar hosted by BuckleySandler LLP.

Click here to register: <https://www1.gotomeeting.com/register/257198081>. After registering, you will receive a confirmation email containing instructions for joining the webinar.

Presenters:

- [Jeff Naimon](#), Partner, BuckleySandler LLP
- [Jonice Gray Tucker](#), Partner BuckleySandler LLP
- [Joe Reilly](#), Counsel, BuckleySandler LLP

[Jonice Gray Tucker](#) will be speaking at the Fall Meeting of the ABA Banking Law Committee in Washington, D.C. on November 4. Ms. Tucker will be discussing enforcement trends related to mortgage servicing.

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

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

[Donna Wilson](#) will be speaking in the Strafford Privacy Data Breach Class Action Webinar on Wednesday, December 7, from 1:00 to 2:30 PM EST/10:00 to 11:30 AM PST. Ms. Wilson's session is entitled: "Class Actions on Data Breach and Privacy on the Rise; Litigating Class Claims, Alleging and Challenging Damages, and Evaluating Insurance."

[David Krakoff](#) will be participating in a panel at the International Association of Defense Counsel program on worldwide anti-corruption laws in Palm Springs in February 2012.

Firm Publications

Podcast: Saul and Naimon Weigh In on the Impact of *Wal-Mart v. Dukes*: In a podcast moderated by [Elizabeth McGinn](#), [Ben Saul](#) and [Jeff Naimon](#) discuss litigation and enforcement developments that have followed in the wake of the Supreme Court's *Wal-Mart v. Dukes* decision, including how *Dukes* is influencing the defense of class actions and fair lending lawsuits. Click here to listen: <http://bit.ly/pQSUOS>

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

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