Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

August 27, 2010

Topics In This Issue

Federal Issues

SEC Changes Proxy Rules to Facilitate Director Nominations by Shareholders. On August 25, the Securities and Exchange Commission (SEC) adopted changes to federal proxy rules to better enable shareholders to nominate directors to a company's board. Companies must now include in their proxy materials the nominees of significant shareholders, which include those shareholders who have owned at least three percent of shares continuously for the prior three years, along with the nominees of management. The SEC's amendments follow the enactment of the Dodd-Frank Act, which authorized the SEC to make rules addressing shareholder access to company proxy materials. The amendments will be effective 60 days after publication in the*Federal Register*. Small public companies will be exempt from this rule for three years. For a copy of the press release, please see http://1.usa.gov/aswd78.

State Issues

Pennsylvania Issues Statement of Policy Regarding Mortgage Loan Modifications. Pennsylvania's Department of Banking added a statement of policy regarding mortgage loan modifications to the Pennsylvania Code, the Department of Banking Code and the state's Consumer Discount Company Act (CDCA). The statement of policy provides guidance to companies involved in negotiating mortgage loan modifications with consumers under the state's Mortgage Licensing Act and the CDCA; the Department noted that the intent behind the statement of policy was to protect consumers from potentially inexperienced or unscrupulous companies. Specifically, the statement of policy encourages companies to be approved as, or employed by, a government approved counselor. It also encourages companies to verify a borrower has received counseling services regarding mortgage loan modifications from government approved counselors. It requests companies inform borrowers of alternative options other than mortgage loan modifications. Finally, the statement of policy discourages companies from engaging in certain "improper activities" which include: (1) advising consumers to stop making regularly scheduled payments on an existing mortgage loans prior to a completed loan modification; (2) charging advance fees for a loan modification; or (3) negotiating a loan modification which the company knows or has reason to believe the borrower will not be able to afford. To see the statutory text, please click here.

New York Enacts Law Addressing Telemarketing Abuses and Regulates Robo-Calls. On August 13, New York Governor David Paterson signed into law A. 8839 which updates the state's telemarketing laws by, among other things, restricting the hours telemarketers can call state residents and by applying the federal Do Not Call Registry to robo-calls. Specifically, the bill: (1) restricts, absent expressed consent, unsolicited telemarketing calls to the hours of 8 a.m. to 9 p.m.; (2) requires telemarketers at the outset of a call to disclose their identity and the nature of good or services they are selling; (3) amends New York's existing Do Not Call registry law to include robo-calls and prohibits robo-calls to customers on the federal Do Not Call registry; and (4) gives the state's Consumer Protection Board subpoena power with regard to telemarketing violations. The new law takes effect on December 11, 2010. For a copy of A. 8839, please see http://assembly.state.ny.us/leg/?default_fld=&bn=A08839%09%09&Summary=Y&Text=Y.

California Legislature Again Passes Consumer Privacy Protection Bill Requiring Additional Notifications for Personal Information Security Breaches. The California legislature has again passed and sent to the governor's office for signature S.B. 1166 which would require any agency, person, or business to issue additional notifications to individuals in the event of a personal information security breach. Currently under California law, any agency, person or business conducting business in the state must notify individuals when that individual's personal information has been compromised. According to author of the bill, state senator Joe Simitian, current notifications of data breaches vary widely in the information they provide. Under the new bill, the law would be amended to require that breach notifications include, among other things, a general description of the incident, the type of information breached, the date and time of the breach and the toll-free telephone number of major credit reporting agencies for security breach notices in California. The law also requires public agencies, businesses and persons subject to the law to send an electronic copy of the breach notification to the state Attorney General if more than 500 Californians are affected by a single breach. California Governor Arnold Schwarzenegger vetoed an identical version of the same piece of legislation in 2009. Simitian indicated in a press release that "he reintroduced the measure after conversations with the Governor's office persuaded him that 'a signature by the Governor seems possible this year.'" For a copy of the enrolled bill, click here. For a copy of Simitian's press release, see http://bit.ly/nqAjHM.

Courts

Ninth Circuit Holds Debtor's Claim Under California Consumer Credit Reporting Act Preempted Under the Federal Fair Credit Reporting Act. On August 18, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment for defendants in an action concerning alleged violations of the California Consumer Credit Reporting Agencies Act (CCRAA). *Carvalho v. Equifax Information Services LLC*, 2010 WL 323947, No. 09-15030 (9th Cir. Aug. 18, 2010). In this matter, the Debtor had filed a class action complaint in California state court under the CCRAA alleging that the defendant consumer reporting agencies (CRAs) failed to properly "reinvestigate" a disputed credit report. The case was removed from state court to federal district court after the CRAs learned, during discovery, that the case met the $5 million amount in controversy requirement under the Class Action Fairness Act of 2005, 28 U.S.C. §13320(d). The CRAs moved for summary judgment, which the district court granted. On appeal, the debtor

challenged the court's decision and claimed that the notice of removal was untimely filed; that the federal Fair Credit Reporting Act (FCRA) did not pre-empt her state law causes of action; and that the CRAs violated the CCRAAs reinvestigation provision. The Ninth Circuit rejected the debtor's challenge. In upholding the district court's grant of summary judgment, the court held that: (1) removal was timely, because the debtor's complaint failed to indicate an amount in controversy necessary to trigger the 30 day period for removing a class action to federal court; (2) the debtor's claim under the CCRAA that the collection agency failed to assist in the reinvestigation of the dispute was preempted by the FCRA; and (3) the debtor's claim that the reported debt was misleading, rather than inaccurate, failed to establish a prima facie reinvestigation claim under the CCRAA. For a copy of the opinion, please click here.

Firm News

Melissa Klimkiewicz presented a webinar for West entitled, FHA Risk Management Initiatives: Reducing Mortgage Insurance Claims and Loss on Wednesday, August 25.

James Parkinson will be speaking at the Institute of Continuing Legal Education in Georgia's FCPA seminar "International Business and Crime: An Overview" in Atlanta on September 2, 2010. Mr. Parkinson's session is titled "FCPA Compliance Tools and Techniques" and will focus on detection and compliance.

David Krakoff will be speaking at the ALI-ABA Environmental Crimes Conference on Sept. 23, 2010.

Andrew Sandler will be co-chairing the PLI program Financial Crisis Fallout 2010: Emerging Enforcement Trends in New York City on November 4. David Krakoff and Sam Buffone will also be presenting at the seminar.

Andrew Sandler will be speaking at the American Conference Institute's 10th Annual Advanced Forum on Consumer Finance Class Actions & Litigation on January 27, 2011 at 11am. The conference is taking place at The Helmsley Park Lane Hotel, 36 Central Park South, NYC. The topic will be Emerging Federal and State Regulatory and Enforcement Initiatives: FTC, DOJ, SEC, FRB, and State AGs Perspectives. Also on the panel with Mr. Sandler will be Attorney General William Sorrell, AG, State of Vermont and Attorney General Greg Zoeller, AG, State of Indiana.

Clinton Rockwell and Jeff Naimon were quoted in *American Banker* in an article entitled " Stripped of Preemption, Banks Expected to Roll Up Mortgage Units" on August 23.

Mortgages

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Consumer Finance

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Litigation

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Privacy/Data Security

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