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CFPB ISSUES FINAL RULE ON REGULATION P: ANNUAL PRIVACY NOTICES CAN BE DELIVERED BY POSTING ONLINE

The Consumer Financial Protection Bureau ("CFPB" or "Bureau") has issued a final rule amending Regulation P. *See*, 79 Fed. Reg. 64057 (October 28, 2014), or available at https://www.federalregister.gov/articles/2014/10/28/2014-25299/amendment-to-the-annual-privacy-notice-requirement-under-the-gramm-leach-bliley-act-regulation-p. Under Regulation P of the Gramm-Leach-Bliley Act ("GLBA"), financial institutions are required to provide their customers with initial and annual notices regarding the financial institution's privacy practices. Such notices must provide customers with information about how the financial institution shares its customers' personal information with third parties, if applicable, and a method whereby the customer can opt out of such sharing.

Earlier this year, in response to concerns about the cost of mailing out paper notices each year, as well as the potential for information overload, the CFPB proposed changing the requirement to allow financial institutions to post annual notices on their websites. The Bureau sought comment on its proposal to add an alternative delivery method for annual privacy notices and received approximately 130 comments from industry trade associations, consumer groups, public interest groups, individual financial institutions, and others. The Bureau made several revisions and modifications to the proposal in light of some of the comments.

The final rule, which is effective as of October 28, 2014, the day it was published in the Federal Register, requires the financial institution that wishes to utilize this alternative method of delivery to continuously post the annual privacy notice in a clear and conspicuous manner on a page of its website, without requiring a login or similar steps to access the notice. It allows financial institutions to use the alternative delivery method for annual privacy notices if:

- no opt-out rights are triggered by the financial institution's information sharing practices under GLBA or the Fair Credit Reporting Act ("FCRA") Section 603, and opt-out notices required by FCRA Section 624 have previously been provided, if applicable, or the annual privacy notice is not the only notice provided to satisfy those requirements;
- the information included in the privacy notice has not changed since the customer received the previous notice; and
- the financial institution uses the model form provided in Regulation P as its annual privacy notice.

Larger financial institutions submitted comments with respect to the first condition – that no opt-out rights are triggered. Many large financial institutions expressed concern that they would not be able to use the alternative method for delivery since they share information in such a way as to require opt-out notices either under GLBA or FCRA, or both. The CFPB did not alter the proposed revision to address these concerns.

The Bureau modified the proposed rule to clarify that if a financial institution has changed its privacy practices by eliminating categories or information that it discloses, or by eliminating categories of third parties to whom it discloses, the financial institution is still permitted to use the alternative

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'IT TAKES HUTZPAH!': D.C. FEDERAL JUDGE ISSUES STUNNING REBUKE OF HUD DISPARATE IMPACT RULE

On November 3, 2014, Judge Richard J. Leon of the U.S. District Court for the District of Columbia, issued a scathing opinion striking down a regulation promulgated by the U.S. Department of Housing and Urban Development ("HUD") on disparate impact discrimination in housing. The plaintiff in this case, American Insurance Association, Inc., challenged HUD's promulgation of the disparate impact rule, which provides for liability based on disparate impact under the Fair Housing Act ("FHA"). The plaintiff claimed that HUD violated the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 et seq., by exceeding its statutory authority when it expanded the scope of the FHA to recognize not only disparate treatment claims (i.e., intentional discrimination), but also disparate impact claims (i.e., facially neutral practices with discriminatory effects).

HUD's Action Under the Administrative Procedures Act

The court reviewed HUD's interpretation of the FHA through the lens of the well-settled *Chevron* analysis for deference to agency rulemaking. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the *Chevron* analysis, if the intent of Congress is clear as to a specific issue, then the court will not consider agency interpretation of the statute, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron* at 842-843. However, if the court determines that a statute is silent or ambiguous on the specific issue, then the court will consider whether the agency's interpretation is based on a permissible construction of the statute. *Chevron* at 843.

In determining whether the statute was plain on its face, and therefore without need for HUD's assistance, the court began with the language of the statute. HUD argued that Congress' intent to recognize claims based on disparate impact under the FHA could be found in the language of the statute. In response, the court undertook a pointed analysis of the words Congress used in the FHA, specifically, "refuse," "make," "deny," and "discriminate." The court noted: "The use of these particular verbs is telling, and indicates that the statute is meant to prohibit intentional discrimination only. When Congress intends to expand liability to claims of discrimination based on disparate impact, it uses language focused on the result or effect of particular conduct, rather than the conduct itself." The court found no such "effects-based language" present in the FHA.

HUD attempted to draw comparisons between the FHA and other federal statutes that the court noted do provide for claims based on disparate impact. The court flatly rejected this argument: "It takes hutzpah (bordering on desperation) for defendants to argue that [the FHA] more closely resembles the statutory language in the disparate-impact provisions of Title VII and the ADEA, both of which contain explicit effects-focused language that is conspicuously lacking in [the FHA]." In rejecting HUD's argument that the statute needs agency clarification, the court stressed: "The fact that this type of effects-based language appears nowhere in the text of the FHA is, to say the least, an insurmountable obstacle to the defendants' position regarding the plain meaning of the [FHA]."

After failing to persuade the court that the plain language of the statute demands application of the disparate impact test, and failing to successfully analogize the FHA to other federal statutes that do allow for disparate impact, HUD resorted to legislative intent. The court proceeded to note that the ADA and Title VII, which according to the court do provide for disparate impact claims, were enacted not long after Congress amended the FHA in 1988. According to the court: "These two statutes powerfully demonstrate that Congress knows how to craft statutory language providing for disparate-impact liability when it intends to do so." The court found that comparable language was absent from the FHA.

Judicial Treatment

HUD also argued that previous holdings of other Federal Circuit Courts that recognized disparate-impact liability under the FHA preclude the court in the current case from finding that the FHA unambiguously prohibits disparate treatment only. The court offered two bases for rejecting this contention. First, the court noted: "The Supreme Court itself has made clear that a statute is not ambiguous simply because there is a lack of judicial consensus as to its proper meaning, and judges cannot cause a clear test to become ambiguous by ignoring it." Second, the court noted that while the majority of the other circuit courts of appeal have held that the FHA does allow for the use of the disparate impact test, none of those circuits has recognized disparate impact subsequent to the Supreme Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), which made it clear that an inquiry into the availability of disparate impact liability turns on the presence, or absence, of effects-based language. The court was also careful to note that while a majority of the other federal appellate circuits have upheld the applicability of disparate impact test, the D.C. Circuit is not one of those circuits.

In closing, the court issued its most pointed commentary of the decision:

> This is, yet another example of an Administrative Agency trying desperately to write into law that which Congress never intended to sanction. While doing so might have been more understandable – and less troubling – prior to the Supreme Court's decision in *Smith*, in its aftermath it is nothing less than an artful misunderstanding of Congress's intent that is, frankly, too clever by half. Defendants, of course, were somehow hoping that a favorable *Chevron* analysis would muster the judicial deference necessary to salvage their much desired Rule. But alas, it did not. Fortunately for us all, however, the Supreme Court is now perfectly positioned in *Texas Department of Housing* to finally address this issue in the not-so-distant future.

"Perfectly Positioned"

Judge Leon's mention of *Texas Department of Housing* at the close of his opinion is a reference to *Inclusive Communities Project v. Texas Department of Housing*, 747 F.3d 275 (5th Cir. 2014), cert. granted (Oct. 2, 2014), where the Supreme Court agreed to consider whether disparate impact claims are cognizable under the FHA. This case represents the third opportunity since 2011 that the Supreme Court has had to definitively settle the question of whether the FHA contemplates disparate impact discrimination. The Supreme Court previously granted certiorari in two similar cases, one in the Eighth Circuit, *Magner v. Callagher*, 132 S.Ct. 548 (2011), and the other in the Third Circuit, *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S.Ct. 2824 (2013).

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GLASSINE WINDOW SPELLS TROUBLE FOR DEBT COLLECTOR

Based on an August 28, 2014 decision of the U.S. Court of Appeals for the Third Circuit, in *Douglass v. Convergent Outsourcing f/k/a ER Solutions, Inc.*, 765 F.3d 299 (3d Cir. 2014), debt collectors may need to be a lot more careful about the manner in which they send correspondence to debtors, particularly as to their use of envelopes with glassine (*i.e.*, "see-through") windows.

The facts in *Douglass* were that Courtney Douglass received a debt collection letter from Convergent Outsourcing ("Convergent") regarding a debt that she owed to T-Mobile USA. Printed near the top of the letter, above her name and address, was Douglass' account number with Convergent: "R-xxxx-5459-R241." The letter was mailed to her in an envelope with a glassine window. When mailed, the top portion of the letter, including Douglass' name and address, the account number, a U.S. Postal Service bar code and a quick response ("QR") Code, were visible through the window. The QR Code, if scanned by a device such as a smartphone, would reveal the same information that was visible through the glassine window plus a monetary amount that corresponded to Douglass' debt.

Douglass initiated a putative class action lawsuit against Convergent on behalf of herself and all other residents of Montgomery County, Pennsylvania who received similar letters from Convergent exposing their account numbers. She alleged that Convergent violated the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 1692f(8), which prohibits a debt collector from "using any language or symbol" other than the debt collector's name and address on an envelope, by disclosing her account number, both through the glassine window and embedded in the QR Code. (She later dropped her claim concerning the QR Code.)

District Court Decision

The district court granted summary judgment in favor of Convergent, reasoning that a strict interpretation of § 1692f(8) would contradict Congress' intent. That intent, the court said, was only to prohibit language or symbols on an envelope that would signal the letter's purpose as debt collection or that would "tend to humiliate, threaten, or manipulate the recipient of the letter." Other language or symbols, referred to as "benign language," the court held, was not prohibited.

Based on this reasoning, the district court concluded that the account number qualified as "benign language" because "it neither indicated the purpose of the letter nor threatened, harassed, or manipulated Douglass." Douglass appealed.

Decision on Appeal

The Third Circuit reversed the district court's decision, and remanded the case for further proceedings. Its reasons for doing so are set forth below.

First, although neither party apparently argued the point, the court noted that § 1692f(8) regulates language "*on* any envelope," and construed those words to mean "language appearing on the face of an envelope." Hence, the fact that the account number was printed on **the letter** and only **visible** through the window made no difference in the court's view.

Second, the court observed that § 1692f(8) is, by its terms, unequivocal. In this regard, the court noted that the plain language of § 1692f(8) prohibits the use by a debt collector of "any language or symbol, other than the debt collector's address [and name, provided it does not indicate that the collector is in the debt collection business], on any envelope when communicating with a consumer by use of the mails or by telegram…," and thus "does not permit Convergent's envelope to display an account number."

Nevertheless, the court declined to determine whether or not the statute allows for a "benign language" exception. It did so based on the fact that, as Convergent pointed out, if § 1692f(8) is read literally, it would prohibit a debt collector from **ever** sending a letter through the mail, since displaying the recipient's name and address or affixing a stamp on the envelope would not be permitted – clearly, an absurd result.

Rather than deciding whether a benign language exception is appropriate, the court decided instead that any such exception could not be "stretched to cover" conduct implicating a "core concern of the FDCPA," which the court found would be the case if the debtor's account number were to be included in the exception. One of these "core concerns" is the "invasion of privacy." (The FDCPA, 15 U.S.C. § 1692(a), explains that Congress enacted the law in response to "abundant evidence" of abusive debt collection practices that cause manifest harm to individuals, and among such harm, is "invasions of privacy.")

The court contrasted account numbers with other markings on envelopes that have been found by other courts and by the Federal Trade Commission in its FDCPA commentary to be benign, including "priority letter," "PERSONAL AND CONFIDENTIAL," "IMMEDIATE REPLY REQUESTED," "Revenue Department" and "Forwarding and Address Correction Requested." These markings, in the court's view, "do not raise the privacy concerns present in this case."

The court viewed Douglass' account number, contrary to Convergent's characterization of it as a meaningless string of numbers and letters that could not possibly harm Douglass, as "a piece of information capable of identifying Douglass as a debtor." Hence, its disclosure on the envelope sent by Convergent was deemed by the court to violate the FDCPA, 15 U.S.C. § § 1692f(8), regardless whether or not that section should be interpreted to include a "benign language exception."

The lesson here for debt collectors is to be very careful as to how debt collection letters are sent. If envelopes with glassine windows are used, they should ensure that the only information visible through the window is the debtor's name and address.

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SEVENTH CIRCUIT PERMITS INQUIRIES RELATING TO DISABILITY BENEFITS

In October 2014, in *Wigginton v. Bank of America Corp.*, 2014 U.S. App. Lexis 19850 (7th Cir. October 16, 2014), the Seventh Circuit Court of Appeals rejected the plaintiffs' assertion that Bank of America's request for income-related information on the continuation of disability benefits was discriminatory under the Fair Housing Act, 42 U.S.C. § 3605(a) ("FHA"), the Rehabilitation Act, 29 U.S.C.§ 794, and Title III of the Americans with Disabilities Act, 29 U.S.C. 12182(a) ("ADA"). The Seventh Circuit cited to the Equal Credit Opportunity Act ("ECOA") for the proposition that it is not discriminatory for a bank to collect information about "whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness." 2014 U.S. App. Lexis 19850 *2, citing 15 U.S.C. §1691(b)(2).

Although the Seventh Circuit agreed that the FHA, the ADA, and the Rehabilitation Act prohibit discrimination, it noted that "[n]one of these statutes forbids asking applicants for information that will be used to apply the same standards that govern non-disabled persons." 2014 U.S. App. Lexis 19850 *3. The appellate court noted that a creditor is permitted to determine income levels as part of its underwriting process, and that disability benefits are not locked-in for life and may change. Accordingly, a creditor may request information necessary to determine the continuation of such income as part of the application process.

The take-away from this ruling is that although federal fair lending law – under ECOA, the FHA and the ADA – prohibits discrimination in obtaining applications for lending, it does not prohibit a lender from requesting income information necessary to make a reasoned underwriting decision.

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ASSIGNEE'S CLAIM FOR KENTUCKY STATUTORY INTEREST ON CHARGED-OFF DEBT HELD ACTIONABLE UNDER FDCPA

On October 24, 2014, the Sixth Circuit Court of Appeals issued its decision in *Stratton v. Portfolio Recovery Assocs. LLC*, --- F.3d ---, 2014 WL 5394517 (6th Cir. Oct. 24, 2014). In that decision, the court held that (i) because the original creditor had charged off the debt owed by the plaintiff and waived its right to collect contractual interest thereon before selling the debt to the defendant-assignee, the defendant had no right under Kentucky law to collect statutory interest on the debt, and (ii) the defendant's attempt to collect statutory interest provided the plaintiff with a cause of action under the Fair Debt Collection Practices Act ("FDCPA").

The facts were that the plaintiff, Dede Stratton, defaulted on her credit card issued by GE Money Bank ("GE"). After determining that the debt was uncollectible, GE charged off the debt and stopped charging interest on it. (The contractual rate of interest was 21.99%.) Subsequently, GE assigned the debt to Portfolio Recovery Associates, LLC ("PRA"). PRA then filed suit against Stratton in Kentucky state court, alleging that Stratton owed PRA the principal amount, "with interest thereon at the rate of 8% per annum" from the date of charge-off until the date of judgment. The 8% interest rate is the default rate set by Section 360.010 of the Kentucky Revised Statutes ("Section 360.010").

Stratton then filed a putative class action against PRA in the Eastern District of Kentucky, alleging that PRA's attempt to collect 8% interest for the period between the date GE charged off her debt and the date it sold that debt to PRA violated the FDCPA. After the district court dismissed Stratton's case, she appealed.

For the purposes of the appeal, PRA conceded that GE waived its right to collect interest at the contractually agreed upon rate. The questions to be decided on appeal were (1) whether GE's waiver of its right to contractual interest precluded GE (or PRA) from collecting statutory interest and, if so, (2) whether PRA's attempt to collect statutory interest constituted a violation of the FDCPA.

Right to Collect Statutory Interest. In deciding the first question, the court focused on the plain text of Section 360.010. Section 360.010 states in pertinent part:

> The legal rate of interest is eight percent (8%) per annum, but any party or parties may agree, in writing, for the payment of interest in excess of that rate[;] ... and any such party or parties, and any party or parties who may assume or guarantee any such contract or obligation, shall be bound for such rate of interest as is expressed in any such contract, …, and no law of this state prescribing or limiting interest rates shall apply to any such agreement or to any charges which pertain thereto or in connection therewith....

The court interpreted this provision as setting a default rate of interest which applies in the absence of a contract setting a higher rate. This meant that once GE established the 21.99% interest rate by contract, it gave up the right to collect the 8% statutory interest permitted by Section 360.010. The court further determined that "GE cannot recover the right it bargained away [to charge 8% statutory interest] simply because it later chose to waive the right for which it bargained [to charge 21.99% contractual interest]."

In this regard, the court stated:

> The question is whether GE's waiver of its right to contractual interest could somehow give it or PRA, GE's assignee, the right to collect statutory interest. In other words, can someone collect interest if they agree not to collect interest? The answer must be no.

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Assignee's Claim for Kentucky Statutory Interest on Charged-Off Debt Held Actionable Under FDCPA—continued from page 4

One wonders whether the court might have reached a different conclusion had PRA not conceded that the creditor "waived" its right to collect contractual interest. Does the fact that GE stopped collecting interest necessarily mean that it waived its right to do so? Did the credit card agreement include a provision indicating that GE's failure to exercise a contractual right does not constitute a waiver of that right? Was there an "agreement" between GE and Ms. Stratton that interest would no longer be charged? None of these questions appears to have been addressed by the court.

FDCPA Violation. With regard to the second question, the court held that, because PRA did not have the right to collect interest on Ms. Stratton's debt, PRA's assertion to the contrary was a "false representation" of the "character" and "amount" of Stratton's debt. The court thus characterized PRA's state court collection action as both (i) an "attempt" to collect an "amount"—principal plus 8% interest—that was neither "expressly authorized" by any agreement in the record nor "permitted by law," and (ii) from the perspective of the least sophisticated consumer, a "threat" by PRA "to take action that cannot legally be taken"—namely, to recover 8% interest.

In so holding, the Sixth Circuit rejected the position espoused by the district court below, in which that court distinguished "claims made in court from the type of abusive tactics most often invoked under the FDCPA" and saw "no need to invoke the protections" of the act "when a claim is made to the court," (quoting *Argentieri v. Fisher Landscapes, Inc.*, 15 F.Supp.2d 55, 62 (D.Mass.1998)." The Sixth Circuit stated:

> "Litigating ... seems simply one way of collecting a debt," [citation omitted] that could be used, especially against an unsophisticated consumer, in an unfair or deceptive manner. Indeed, the original FDCPA expressly exempted attorneys but—as the Supreme Court has explained—in 1986 "Congress repealed this exemption in its entirety ... without creating a narrower, litigation-related exemption to fill the void."

Based on these holdings, the Sixth Circuit reversed and remanded the case back to the district court for further proceedings.

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FDCPA: RECENT INSIGHTS FROM THE CFPB'S SUPERVISORY HIGHLIGHTS

In October 2014, the Consumer Financial Protection Bureau ("CFPB") released its Fall 2014 Supervisory Highlights report. In this report, the CFPB shares its recent supervisory observations in the various areas within its mandate, including a number of specific observations regarding unfair practices of debt collectors and violations of the Fair Debt Collection Practices Act ("FDCPA") that its examinations uncovered.

Initially, the CFPB noted that a number of debt collectors are imposing "convenience fees" (*i.e.*, fees charged to consumers who make debt payments using a credit card or debit card) in violation of the laws of various states. It is thus important for debt collectors to determine if the law of the state in which the debtor resides makes such convenience fees illegal before they are charged, and to ensure that any convenience fee is not automatically charged without such a determination. It is also important to ensure that the instrument creating the debt permits such convenience fees.

The CFPB also observed that a number of debt collectors are violating the FDCPA by threatening consumers with lawsuits that the debt collector does not intend to file. See 15 U.S.C. § 1692e(5). Supervision identified one collector in particular that routinely threatened to file, but only rarely actually filed, suit. In light of the amorphousness of what constitutes an impermissible number of threats in proportion to suits filed, it is important to avoid statements regarding intended litigation unless it is fairly certain that suit will be filed.

Additionally, the CFPB encountered debt collectors who violated the FDCPA by providing their name and the name of their employer to third parties without being requested to do so. See 15 U.S.C. § 1692c(b). The CFPB concluded that this was the result of faulty training manuals. It is thus important to ensure that all materials being used to train representatives who speak to debtors are accurate and up-to-date.

Finally, the CFPB determined that several financial institutions engaged in unfair practices connected to their sale of charged-off credit card debt to debt buyers. It found several institutions that overstated the annual percentage rates "APRs" in the account documents provided to each debt buyer, or reported APRs that exceeded the rate for which the consumer was liable pursuant to the credit agreement, making it appear that the debtor was liable for more than he or she owed. The CFPB further observed at least one other institution that failed to timely forward to the debt buyer payments that it received post-sale, with delays ranging from two months to two years. Sellers of debt should ensure that they (i) maintain practices to accurately and timely communicate to the debt buyer all necessary information about the debt, and (ii) promptly forward to the debt buyer any post-sale payments that they receive.

Again, these violations may be institution-specific but they provide a useful reminder of the obligations imposed by the FDCPA. Further, they identify potential issues for debtors' attorneys to consider when defending against collection actions or thinking about filing FDCPA claims.

A copy of the Supervisory Highlights report can be accessed at http://www.consumerfinance.gov/reports/supervisory-highlights-fall-2014/.

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FCC CONFIRMS THAT EVEN SOLICITED FAX ADS MUST CONTAIN OPT-OUT LANGUAGE

On October 30, 2014, the FCC issued a much-anticipated ruling (the "FCC Order") on several petitions seeking clarification on the applicability and scope of the requirement under the Telephone Consumer Protection Act, § 227 of the Communications Act ("TCPA") to include opt-out notices on all fax advertisements, unsolicited or not. The FCC ruled that all fax advertisements, even those sent **with** the recipient's prior express permission or invitation, in other words, "solicited" fax advertisements, must include notice of the recipient's right to opt-out of receiving future such fax ads and a mechanism for exercising such opt-out. In light of the confusion about the applicability of the opt-out notice requirement, though, the Commission granted 24 individual petitioners limited retroactive waivers, giving them six months to come into compliance with the rule. Importantly, the FCC will allow similarly-situated entities to seek their own retroactive waivers.

The TCPA prohibits the sending of unsolicited fax advertisements. The TCPA was amended in 2005 by the Junk Fax Prevention Act, which codified an established business relationship exemption to the prohibition on sending unsolicited fax ads and required the sender of an unsolicited fax advertisement to provide specific notice and contact information on the fax that allows recipients to 'opt out' of future fax transmissions from the sender. In 2006, the Commission issued additional regulations (the "Junk Fax Order"), including the following: "A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section." 47 C.F.R. § 64.1200(a)(4)(iv) (the "Challenged Regulation").

In 2010, Anda, Inc. filed a request for declaratory ruling on the applicability of the Challenged Regulation. Anda argued that the Commission did not have the authority to promulgate the Challenged Regulation because the TCPA applies only to unsolicited fax advertisements. Alternatively, Anda argued that § 227 of the TCPA was not the statutory basis of the Challenged Regulation, and thus, there is no private right of action to enforce the Challenged Regulation.

The Consumer and Governmental Affairs Bureau ("Bureau") dismissed Anda's petition in 2012 on procedural grounds. First, a condition precedent for the Commission to issue a declaratory ruling is that there must be a "controversy to terminate" or "uncertainty to remove." The Bureau ruled that Anda had identified neither because the Junk Fax Order identified § 227 as the statutory basis for the Challenged Regulation. In addition, the Bureau determined that any challenge to the Commission's authority to adopt the rule itself was a collateral challenge that should have been raised within 30 days of the date of public notice of such action, which was in May 2006. Because Anda waited until 2010 to challenge the regulation, it was untimely. Anda sought review of this ruling by filing an Application for Review of the Bureau Order on May 14, 2012.

Dozens of petitions have been filed since Anda filed its Application for Review. These petitions parallel the arguments Anda raised in its original petition and its request for review. In addition, several of these petitions sought from the FCC a ruling that opt-out notices that "substantially complied" with the Challenged Regulation's requirements, but did not track the language from the regulation exactly, were sufficient under the law. Some petitioners challenged the constitutionality of the regulation, arguing that the regulation was an unconstitutional limitation on free speech.

The FCC Order denies much of the relief requested by Anda and the other petitioners. Specifically, the FCC Order:

- Affirms the Bureau's holding that the Anda petition was an improper and untimely collateral challenge to the Challenged Regulation;
- Affirms that the Commission relied on § 227 of the Communications Act to promulgate the opt-out requirement for solicited fax ads;
- Affirms that the Commission had authority to adopt the Challenged Regulation;
- Denies a petitioner's request to repeal the Challenged Regulation on First Amendment grounds; and
- Denies petitioners' requests to allow for "substantial compliance" with the opt-out notice requirements, instead requiring full compliance with the notice requirements.

Commissioners Ajit Pai and Michael O'Rielly concurred in part and dissented in part to the order. Their statements offer a roadmap of sorts to petitioners who want to appeal this FCC ruling to the federal court of appeals, which has jurisdiction to review FCC orders. Commissioner Pai stated that "to the extent our rules require solicited fax advertisements to contain a detailed opt-out notice, our regulations are unlawful. And to the extent that they purport to expose businesses to billions of dollars in liability for failing to provide detailed opt-out notices on messages that their customers have specifically asked to receive they depart from common sense." Commissioner O'Rielly concurred with the relief granted, but dissented, like Commissioner Pai, from the ruling that the Commission has statutory authority to require opt-out notices on solicited faxes. He said that though the agency has the right to fill gaps in a statute, "it is not entitled to invent gaps in order to fill them with the agency's own policy goals, no matter how well intentioned."

The FCC Order acknowledges that petitioners and other entities may not have complied with the opt-out notice requirements for solicited faxes as the result of "reasonable confusion or misplaced confidence" that the opt-out notice did not apply to those fax ads. This confusion could have been the result of two things: (1) a contradictory footnote in the Junk Fax Order that stated that "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements;" and (2) the lack of explicit notice, at the time the Challenged Regulation was adopted, that the Commission was contemplating an opt-out requirement on solicited fax ads. The FCC thus concluded that this reasonable confusion and misplaced confidence provided good cause for it to grant individual retroactive waivers to the petitioners and to open that opportunity up to other similarly-situated businesses.

On a practical level, this means that a business that sent fax ads with the recipient's permission that did not include an opt-out notice, or included an opt-out notice that was not in full compliance with the language in the regulation, should lose no time seeking a waiver from the FCC. There is a rebuttable presumption that a business will receive a waiver, which simply retroactively waives the business' requirement to include opt-out language

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MOBILE BANKING AND PAYMENTS – FCA INDUSTRY REVIEW

A Fast Developing Market

There have been dramatic developments in the mobile banking and payments sphere in recent years. Customers of the UK's largest retail banks made more than 18 million mobile transactions per week in 2013 – twice as many as in the previous year. We expect these numbers to continue to increase.

Although innovations in this field have the potential to provide great benefits to consumers, the Financial Conduct Authority (FCA) is keen to ensure that consumers' interests are protected. It has therefore conducted a thematic review of the industry to determine whether market participants are achieving good outcomes for consumers when delivering mobile payment and banking products. The FCA published the findings of its review (document TR 14/15) in September 2014 (the ***Review***).

Key Findings Of The Review

It is encouraging that the FCA did not find any evidence of consumer harm in the mobile banking and payments arena. The Review also does not prioritise issues in relation to fraud prevention and anti money laundering measures. Although these are important considerations, and they were raised in the the FCA's interim report in August 2013 on which the Review builds, the FCA was satisfied that firms were addressing these areas, although it encouraged firms to continue to do so as products and services develop in popularity and complexity.

The FCA identified five areas that were important in influencing consumer outcomes for firms developing mobile banking products and services.

Consumers' Understanding Of Their Rights And Obligations

Consumers must understand that they have the same protection when using mobile banking technology as they do when using traditional payment mechanisms. Firms have an important role to play in helping their customers know when and how to report unauthorised transactions.

Key Decision-Makers Having The Most Up-To-Date Understanding

Considering the speed with which mobile banking has taken off in recent years, with consumers increasingly using mobile technology to perform simple banking transactions, it is vital that senior managers in firms have the depth of knowledge to understand how their products and services can best be delivered to consumers.

The FCA has suggested that examples of firms achieving good outcomes include the conducting of thorough research into how consumers interact with their mobile devices, and more specifically their behaviour when using mobile banking services.

Security

Technology and security must be sufficiently robust to keep consumers' data protected. All firms sampled in the thematic review safeguarded consumers' data by encrypting it.

However, as technology develops to allow customers to interact with their bank, more and more, firms' systems are likely to come under increasing pressure. Security measures will therefore need to evolve based on market developments.

Third party oversight

Mobile banking relies on a number of different service providers, including mobile network operators, mobile phone manufacturers and operating system manufacturers.

The regulated firm with overall responsibility for providing the mobile banking service therefore must perform thorough due diligence before contracting with third parties, and actively monitor them to ensure appropriate standards of delivery are being observed.

New Payment Firms

The FCA desires to strike a balance between promoting competition by encouraging new entrants into the market, and the need to protect the consumer. However, the FCA has made clear that new entrants to the market will be expected to consider consumer rights and protections when bringing new products to the market, including the rules around immediate refunds for fraudulent transactions.

The European Dimension

The FCA notes in the Review that it is fully engaged at European level in discussions regarding a number of initiatives that will impact the mobile banking and payments industry. A new payment services directive is expected to come into force by 2016 or 2017. In addition, the European Banking Authority is carrying out work on the risks posed by the use of new payment methods and the European Central Bank has formulated proposals for tighter security.

Who Should Take Account Of The FCA's Findings?

The FCA recognises that, while many market participants are authorised firms, there are a large number of products and firms which fall outside its regulatory scope but nevertheless have a significant impact on the market. So while the findings are aimed primarily at FCA authorised firms, all firms active in the mobile banking and payments market should, in the FCA's view, consider how the industry can work better for the benefit of consumers.

The FCA makes clear in the Review that firms operating in the market should satisfy themselves that, as new innovations unfold, they have appropriate controls in place to prevent consumer harm and damage to the market. What is required from each firm will differ depending on the precise nature of its business and the services offered. Given the level of regulatory scrutiny the mobile payments industry has attracted, market participants should consider whether their product offerings comply with the FCA's findings in the Review. They should also evaluate this on a continuing basis as and when their business develops or offers new products or services..

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BUILDING BANKING RING-FENCES: TOO HIGH A COST?

Recently, Douglas Flint, the chairman of HSBC, told the House of Lords' European economic and financial affairs sub-committee that the changes required by the new ring-fencing rules would be "very expensive", and estimated that the cost to HSBC of implementing them would be between £1 billion and £2 billion.

Mr Flint's comments follow the October publication of the Prudential Regulation Authority's Consultation Paper on the implementation of ringfencing (PRA CP 19/14) (the CP).

What Are The Latest Ring-Fencing Proposals?

The CP sets out the PRA's proposed ring-fencing policy, including rules and supervisory statements, in three areas:

- The legal structure of banking groups
- Governance
- Continuity of services and facilities

(i) Legal structure

Under the latest proposals, the PRA's expectation is that a Ring-fenced bank (RFB) should not have an ownership interest in any entity which undertakes excluded or prohibited "investment banking" activities. Instead, RFBs and entities that can conduct excluded or prohibited activities are expected to be structured as separate clusters of subsidiaries beneath a UK holding company. This is known as a "sibling structure". By creating legally and operationally separate units to house their retail and commercial banking businesses away from their investment banking divisions, the PRA expects that risks to an RFB's provision of core services will be reduced by preventing losses related to "riskier" activities from being passed to an RFB from a subsidiary. The PRA also expects that the rules will prevent an RFB becoming financially dependent on the income or profits of such activities.

(ii) Governance

The Financial Services and Markets Act 2000, as amended by the Financial Services (Banking Reform) Act 2013, requires the PRA to make rules on board membership for group ring-fencing purposes. In the CP, the PRA proposes the following rules on the membership of the RFB's board:

- At least half of an RFB's board, excluding the chair, must be independent non-executive directors (NEDs)
- The chair of an RFB must be independent during his or her tenure as chair
- The chair of an RFB must not hold another chair position in another group entity board
- No more than one third of an RFB's board members may be current employees or directors of another entity in the group
- An RFB executive director on the board of an RFB must not hold other executive director positions on the board of another entity in the group that carries out excluded or prohibited activities
- An RFB must have its own risk, nomination, audit and remuneration non-executive board committees

(iii) Continuity of services and facilities

Although the CP states that the existing regulatory framework fulfils, to a certain extent, the PRA's objective of ensuring that RFBs have appropriate arrangements in place in this area, the PRA proposes imposing additional restrictions in relation to:

- Any intragroup service arrangements an RFB may have
- Service arrangements an RFB may have with non-group entities where those arrangements may be affected by the financial position of a group entity

The PRA states that these proposals should be read in conjunction with the PRA Discussion Paper DP1/14 (DP) which sets out the PRA's current proposals for the principles that all deposit-takers (excluding credit unions) and PRA-designated investment firms should follow to demonstrate operational continuity in resolution and facilitate recovery and post-resolution restructuring.

Consultation on other areas of the ring-fencing rules will follow in 2015. The current proposals are due to come into effect from 1 January 2019.

What is the likely impact of these rules for banks?

The legal and compliance costs for implementing the new ring fence are likely to be very high, as the rules are likely to require new legal, operational and compliance structures to be put in place.

However, the ring-fencing rules will impact banks in the UK differently. UK banks with smaller investment banking divisions may find that the costs of complying with the rules eat into profit margins enough to outweigh the benefits of operating a separate investment bank, which may result in them selling their investment banking divisions if they can't get a relaxation in the rules. Those UK banks with larger investment banking divisions are likely to swallow the compliance costs and keep their investment banking units, although they will not do so quietly.

A link to the CP is available here:

http://www.bankofengland.co.uk/pra/Pages/publications/cp/2014/cp1914.aspx

A link to the DP is available here:

http://www.bankofengland.co.uk/pra/Pages/publications/cp/2014/dp114.aspx

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CFPB Issues Final Rule on Regulation P: Annual Privacy Notices Can Be Delivered By Posting Online—continued from page 1

delivery method. The Bureau retained the requirement that the financial institution use the model form, and believes that some financial institutions may begin to use that form in order to take advantage of the alternative delivery method.

A financial institution that wishes to use the alternative method for delivery must alert customers to the fact that the financial institution's privacy notice is available on its website. This statement of availability can be included on an account statement, coupon book, or a notice or disclosure the institution issues under any provision of law. In addition to stating that the annual privacy notice, which has not changed, is available on the financial institution's website, the statement of availability must also inform the customer that he or she can request a paper notice be mailed.

To assist customers with limited or no access to the Internet, the institution must mail annual notices to customers who request them by telephone, within ten days of the request. The telephone number by which customers can make this request does not have to be a toll-free number, but the Bureau encourages financial institutions to utilize such toll-free methods where available.

The Bureau estimates that this change will save financial institutions $17 million annually, which is 58% of the total $30 million annual cost of providing the notices required under Regulation P.

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'It Takes Hutzpah!': D.C. Federal Judge Issues Stunning Rebuke of HUD Disparate Impact Rule—continued from page 2

Judge Leon describes the issue as being "perfectly positioned" for a definitive Supreme Court decision because, unlike the prior two cases pending before the Court – which were settled before the Court could resolve the issue – the governmental litigant in *Inclusive Communities v. Texas Department of Housing* is unlikely to succumb to the same sort of pressures that were applied in the prior two cases. Unlike the other two cases, which involved two decidedly "blue states," and involved municipalities that could be influenced by pressure from the Justice Department, *Inclusive Communities v. Texas Department of Housing* involves the state of Texas, a litigant that will be considerably more difficult to influence in avoiding a Supreme Court ruling. The fact that on November 4, 2014, Texans elected Republicans to the offices of governor and attorney general only confirms this reality.

In view of the recent mid-term election results, where the Republicans have gained control of both houses of Congress, the timing for proponents of the disparate impact test under the FHA could not be worse. Had the issue been addressed legislatively in the early years of the Obama administration, where the Democrats controlled the White House and Congress, the FHA could have been amended to explicitly address disparate impact, thereby avoiding the Supreme Court showdown that is now almost certain to take place.

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FCC Confirms that Even Solicited Fax Ads Must Contain Opt-Out Language—continued from page 6

on its solicited fax advertisements. Whether the business had the recipient's prior express invitation or permission to send the fax is not something the FCC will answer. The waiver will not apply to conduct that occurs after April 30, 2015, which is six months from the release date of this order. Any business that wishes to seek a waiver must file its petition by April 30, 2015.

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RECENT PUBLICATIONS

- "Pennsylvania Amends Mortgage Licensing Act," Conference on Consumer Financial Law, Quarterly Report, Vol. 68, No. 1 – Lauren A. Abbott.
- "RESPA Back in the News," Banking & Financial Services Policy Report, Vol. 33, No. 8 (August 2014) – Robert M. Jaworski.
- "RESPA Back in the News II," Banking & Financial Services Policy Report, (October, 2014) – Robert M. Jaworski.

SPEECHES

- Speech on Mobile Banking, ABA Business Law Section Annual Meeting, Chicago, Illinois (Sept. 11, 2014) – Roberta G. Torian.
- "Alphabet Soup of Federal Laws, Truth in Lending/Regulation Z," presented at the Mortgage Bankers Association of America's 2014 Regulatory Compliance Conference, Washington, D.C. (Sept. 28, 2014) – Robert M. Jaworski.
- Mortgage Bankers Association of America Regulatory Conference – Presentation on Vender Management Rule, Washington, DC (September 29) – Leonard A. Bernstein.
- NJ Bankers Association Residential Mortgage Committee – Presentation on TILA/RESPA Integration Rule, Cranford, NJ (October 15th) – Leonard A. Bernstein.
- "CFPB Update: Enforcement Actions, Bulletins, Amicus Initiatives," New Jersey Bankers Association/Mortgage Bankers Association of New Jersey's Joint Mortgage Lending Conference (Nov. 19, 2014) – Robert M. Jaworski.

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