Buckley Sandler LLP

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FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

September 28, 2012
(Updated)

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FEDERAL ISSUES

CFPB Announces Enforcement Action Against Credit Card Issuer. On September 24, the CFPB announced that it resolved an investigation initiated by the FDIC and subsequently joined by the CFPB into telephone sales of certain ancillary or "add on" products marketed and sold by a major credit card issuer. The products related to (i) payment protection, (ii) credit monitoring, (iii) identity theft protection, and (iv) protection in the event of wallet loss. Pursuant to the Joint Consent Order released by the CFPB, the bank will pay a $14 million penalty and provide approximately $200 million in restitution to eligible consumers who purchased one or more ancillary products over a period of approximately four years. The order also calls for certain changes to the bank's marketing and sales practices in connection with the products. During a press call to announce the consent order, CFPB Director Richard Cordray explained that the CFPB "expect[s] that more such actions will follow." The CFPB is publishing the orders from its various actions on its administrative adjudication docket. Mr. Cordray also stated that "[i]n the meantime, [the CFPB is] signaling as clearly as [it] can that other financial institutions should review their marketing practices to ensure that they are not deceiving or misleading consumers into purchasing financial products or services." In July, the CFPB issued Bulletin 2012-06, which outlines the CFPB's expectations for the institutions it supervises, and their vendors, with regard to offering ancillary products in compliance with federal consumer financial laws.

STATE ISSUES

CSBS Proposes Uniform Reporting of Authorized Delegates for Money Service Businesses. On September 28, the Conference of State Bank Supervisors (CSBS) proposed a system for state-licensed money service businesses (MSBs) to report information concerning authorized delegates through NMLS. Licensed MSBs are permitted to contract with third-parties-authorized delegates-to perform the function of receiving and dispensing funds on behalf of the MSB. Most state regulators require that MSBs report information regarding their authorized delegates. NMLS currently is expanding to allow state agencies to manage filings by non-mortgage companies, including MSBs. To date, nine states have started to manage or have announced their intent to manage MSB licenses through NMLS. An NMLS working group has determined that the reporting of authorized delegate information is not supported by NMLS' existing platform. The instant proposal (i) identifies

new NMLS functionality to facilitate reporting of authorized delegate information, (ii) outlines policies to implement such reporting, and (iii) describes the process by which an MSB would report such information through NMLS. The CSBS has requested comment from licensees and regulatory agencies by November 1, 2012.

California Enacts Remaining Parts of Homeowner Bill of Rights. On September 25, California Governor Jerry Brown signed the three outstanding bills proposed as part of the state's Homeowner Bill of Rights. First, under Assembly Bill 2610, purchasers of foreclosed properties must provide ninety days' written notice to quit before removing the tenant or subtenant from the property. Except in limited circumstances, tenants or subtenants holding possession of a rental housing unit under a fixed-term residential lease entered into before the purchase at foreclosure is permitted would have the right to possession until the end of the lease term. Second, Senate Bill 1474 allows the state attorney general to use a statewide grand jury to investigate and indict the perpetrators of financial crimes involving victims in multiple counties. Finally, Assembly Bill 1950 extends the statute of limitations for prosecuting mortgage related crimes from one year to three years.

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COURTS

Sixth Circuit Allows Private FCRA Action To Proceed Against Bank. On September 27, the U.S. Court of Appeals for the Sixth Circuit revived an individual's private action under FCRA against a bank, alleging that the bank failed to adequately investigate and respond to notices it received from several consumer reporting agencies regarding disputed car loan. *Boggio v. USAA Fed. Savings Bank,* No 11-4040, slip op. (6th Cir. Sep. 27, 2012). After experiencing credit problems caused by his ex-wife's failure to make payments on a car she purchased during their marriage by signing both of their names to a check, the plaintiff wrote to several consumer reporting agencies to dispute his responsibility for the loan in light of the forgery, as well as the parties' separation and divorce agreements that stated the ex-wife would be responsible for the car payments. The plaintiff alleges that the reporting agencies notified the bank of the dispute, which the bank refused to investigate without a police report or fraud affidavit from the plaintiff, as required by the bank's fraud

policy. The district court granted summary judgment in favor of the bank, holding that the bank reasonably investigated the notices it received from credit reporting agencies, and that the plaintiff had ratified the debt. On appeal, the circuit court reversed and remanded the district court's decision, holding that there is a genuine dispute of material fact with regard to the sufficiency of the bank's investigation. The court added that the plaintiff's failure to comply with the bank's fraud policy does not alter its finding of a genuine dispute of material fact, holding that FCRA does not permit the bank to require independent confirmation of the reporting agencies' notices before conducting an investigation. The court also held that the dispute over ratification requires resolution by a trier of fact given the ambiguity of the separation agreement, among other issues.

First Circuit Reinstates Two Force-Placed Insurance Class Actions. On September 21, the U.S. Court of Appeals for the First Circuit vacated a district court's dismissal of two putative class actions brought by borrowers alleging that their mortgage lender improperly required borrowers to buy and maintain higher flood insurance coverage. *Lass v. Bank of America, N.A.*, No. 11-2037, 2012 WL 4240504 (1st Cir. Sep. 21, 2012); *Kolbe v. BAC Home Loans Servicing, LP*, No. 11-2030, 2012 WL 4240298 (1st Cir. Sep. 21, 2012). Both named borrowers claim on their own behalf and that of similarly situated borrowers that the bank breached its contracts by requiring borrowers to purchase more flood insurance than contractually required. They also claim that the bank proceeded in bad faith by requiring that such insurance be purchased through backdated policies placed with the bank's affiliates, which earned a kickback on the purchase. In *Kolbe*, while the court favored the borrower's interpretation that the contract prohibits the lender from exercising discretion with regard to flood insurance, it held that the mortgage contract was ambiguous and susceptible to multiple interpretations. In *Lass*, the court held that while the borrower's mortgage contract explicitly grants the lender discretion to set the amount of flood insurance required for the property, a "flood insurance notification" document provided to the borrower at closing may be read to state that the amount of insurance required at closing would not change during the term of the mortgage. The notification was part of the mortgage agreement and essentially completed that contract, the court held. Taken together, the court explained, the mortgage contract and flood insurance notification are ambiguous with regard to the lender's authority to alter the flood insurance coverage requirement. Further, in both cases, the court held that the borrowers alleged sufficient facts to support their bad faith claims of the bank's backdating and self-dealing. The court vacated the district court's decisions on the lender's motions to dismiss and remanded both cases for further proceedings. Notably, in *Kolbe*, the circuit court did not overturn the lower court's dismissal of the plaintiff's claims for breach of contract and breach of the implied covenant of god faith and fair dealing against the insurance carrier, noting that the complaint was devoid of allegations showing a contractual relationship between the plaintiff and the insurance carrier.

Eleventh Circuit Holds Monetary Damages Caused by Identity Theft Present a Cognizable Injury. Recently, the U.S. Court of Appeals for the Eleventh Circuit, in a case of first impression, held that the named plaintiffs in a putative class action could pursue their claims for monetary loss from a health care company that allegedly failed to protect their personal information. *Resnick v. AvMed Inc.*, No. 11-13694, 2012 WL 3833035 (11th Cir. Sep. 25, 2012). The plaintiffs allege that they became subject to identity theft several months after laptops containing their sensitive personal information were stolen from the company's offices. The plaintiffs sued the health care company, alleging negligence, negligence *per se* under Florida law, breach of contract, unjust enrichment, breach of implied covenant of good faith and fair dealing, and breach of fiduciary duty. The district court dismissed all claims, holding that the complaint failed to state a cognizable injury. On appeal, the court of appeals reversed the district court on the majority of the claims. It held that because the complaint alleges financial injury, and because monetary loss is cognizable under Florida law, the plaintiffs have alleged a cognizable injury. The court found that the plaintiffs "have shown a sufficient nexus between the data breach and the identity theft beyond allegations of time and sequence" because the plaintiffs plead that they were careful in protecting their identities and had never been

victims of identity theft. Finding that causation was sufficiently plead, the court of appeals reversed the district court with regard to the counts of negligence, breach of contract, and breach of fiduciary duty. The court affirmed dismissal of the claims of negligence *per se* and breach of implied covenant of good faith and fair dealing because failure to comply with the relevant state statute cannot serve as a basis for negligence *per se*, and because the health care company's actions were not shown to be conscious and deliberate as necessary to support a claim of breach of implied covenant. Finally, the court held that the plaintiffs alleged sufficient facts to sustain a claim for unjust enrichment because they claim to have paid monthly premiums to the company, while alleging that the company failed to implement sufficient data management and security measures. The case was remanded for further proceedings.

MISCELLANY

Joint Forum Finalizes Guidelines on Supervision of Financial Conglomerates. On September 24, the Joint Forum, which brings togetherthe Basel Committee on Banking Supervision, the International Organization of Securities Commissions, and the International Association of Insurance Supervisors to coordinate regulation of financial conglomerates, published final principles for the supervision of financial conglomerates. The principles are meant to provide an overarching policy framework to support consistent and effective supervision of financial conglomerates across borders, while closing regulatory gaps. The final guidelines, which update a framework originally adopted in 1999, are organized in five categories-(i) supervisory powers and authority, (ii) supervisory responsibility, (iii) corporate governance, (iv) capital adequacy and liquidity, and (v) risk management-and provide implementation criteria and comments explaining each principle.

Canada Proposes Adding Mobile Payments to Card Industry Voluntary Code of Conduct. Recently, Canada's Department of Finance published a consultation paper that proposes an addendum to the Code of Conduct for the Credit and Debit Card Industry in Canada to apply the Code to mobile payments. The Code, which took effect in August 2010, is a voluntary measure applicable to credit and debit card networks and covers point-of-sale, Internet, and phone payment methods. The addendum would extend the Code to apply explicitly to payments initiated by consumers that access a deposit or credit account through a payment network accessed by mobile device at the point-of-sale. The addendum also would clarify the way in which five of the ten elements of the code would apply to mobile payments. For example, the addendum would prohibit credit and debit card functions from co-residing in the same mobile payment application. Canada's Department of Finance has invited stakeholder comments on all aspects of the proposal.

FIRM NEWS

Andrew Sandler and Jeff Naimon will speak at the Mortgage Bankers Association's Regulatory Compliance Conference on October 1-2, 2012. On October 1, Mr. Sandler's panel will address "Mortgage Litigation and Enforcement Concerns for Compliance Professionals" and Mr. Naimon will facilitate the "Roundtable Discussion on Servicing." On October 2, Mr. Naimon will speak on a panel entitled "Government Program and Secondary Market Changes and Challenges."

Melissa Klimkiewicz and Jon Langlois will speak on a live teleconference sponsored by the National Business Institute on October 4, 2012. The presentation is titled "HAMP, HARP, HAFA and FHA Update: Evolving Program Requirements and Expectations." To register call (800) 931-3140 or visit the website, www.nbi-sems.com.

James Parkinson will speak at the American Bar Association's International White Collar Crime Conference in London on October 8, 2012. Mr. Parkinson's panel is entitled "What Every General

Counsel Needs to Know Regarding Compliance and Internal Investigations."
Jonice Gray Tucker, Valerie Hletko, and Amanda Raines will present a webinar sponsored by the California Mortgage Bankers Association on October 9, 2012. Their remarks will focus on fair lending enforcement trends and related risk assessments.

Jeff Naimon will be an instructor at the American Bar Association Consumer Financial Services Committee's Third Annual National Institute on Consumer Financial Services Basics on October 9, 2012. Mr. Naimon will be co-presenting on the topic of fair lending with Patrice Ficklin, CFPB Assistant Director, Office of Fair Lending and Equal Enforcement.

John Stoner will speak on a panel addressing "The Uniform Commercial Code and the Mortgage Crisis" at the State Bar of California Annual Meeting on October 12, 2012. Mr. Stoner recently was appointed to the Commercial Transactions Committee of the State Bar of California.
David Krakoff will participate on a panel at The American Bar Association's Fifth Annual National Institute on the Foreign Corrupt Practices Act, being held October 17 - 19, 2012 at The Westin Georgetown. Mr. Krakoff's session on October 18, 2012 is titled "The Trial of an FCPA Case: Pitfalls and Pratfalls."

Thomas Sporkin will speak at the Securities Enforcement Forum 2012 on October 18, 2012, in Washington, DC. The Securities Enforcement Forum 2012 brings together securities enforcement and white-collar attorneys, current and former senior SEC and DOJ officials, in-house counsel and compliance executives, and other top professionals in the field.

Margo Tank will speak at the ACORD Implementation Forum in Ft. Lauderdale, FL on October 24, 2012. Ms. Tank's panel is titled "Guidelines for e-Signatures and e-Delivery in the Insurance - Cutting through the Legalese."

David Krakoff, James Parkinson, Andrew Schilling, and Thomas Sporkin will speak at the Commerce and Industry Group's seminar, "Anti-Bribery: The Changing Anti-Corruption Environment in Key Jurisdictions" on October 24, 2012, in London. The panel will examine recent developments in anti-corruption enforcement in the UK, US, and Continental Europe; it will also consider best practices to identify and mitigate exposure to corruption risk.

Margo Tank will speak at The Electronic Signature and Records Associationâ€™s Annual Conference, November 14-15, 2012, in Washington, DC. Ms. Tank's panel will discuss electronic signatures and mobile technology.

David Krakoff will speak at ACI's Inaugural Summit on White Collar Litigation being held January 23-24, 2013, in New York, NY. Mr. Krakoff will participate in the session entitled "FCPA Case Review: A Hands-On Look at the Year in the FCPA and What Litigators Need to Take Away."

FIRM PUBLICATIONS

David Krakoff and Lauren Randall contributed "FCPA: Were the Sting Trials Doomed from the Start?" for the September 2012 Business Crimes Bulletin.

Matthew Previn, Andrew Pennacchia, and Jonathan Cannon published "Rising Tide of Operational Risk Demands Due Diligence in Vendor Selection" on September 20, 2012 in National Mortgage News.

About BuckleySandler LLP (www.buckleysandler.com)

With over 150 lawyers in Washington, Los Angeles, New York, and Orange County, BuckleySandler

provides best-in-class legal counsel to meet the challenges of its financial services industry and other corproate 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 institution. "The best at what they do in the country." (Chambers USA).

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New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400
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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MORTGAGES

FHFA IG Clears Freddie Mac's Use of Inverse Floating-Rate Bonds. On September 26, the FHFA Inspector General (IG) reported that neither Freddie Mac nor the FHFA purposefully limited refinancing opportunities to influence the yields of Freddie Mac inverse floating-rate bonds (inverse floaters). Inverse floaters are a by-product of other variable rate bonds carved out of Freddie Mac's securitized mortgages to capitalize on increasing investor demand. Because the value of inverse floaters decreases when the underlying mortgages are refinanced, U.S. lawmakers and others argued that inverse floaters created a conflict of interest for Freddie Mac's investment and refinancing policies because Freddie Mac could intentionally limit refinances to protect the value of its retained inverse floaters. The FHFA IG reviewed the practice and Freddie Mac's portfolio and determined that (i) inverse floaters represent a small portion of Freddie Mac's capital markets portfolio, (ii) inverse floaters pose no greater conflict than do any other mortgages held by Freddie Mac, and (iii) Freddie Mac employs an "information wall" to prevent the use of nonpublic information-including information about refinancing activity-from being used in investment decisions.

FHFA Proposes State-Level Guarantee Fee Pricing. On September 25, the FHFA published a notice and request for comment on its proposal to set risk-based guarantee fees by state. The proposal identifies five states-Connecticut, Florida, Illinois, New Jersey, and New York-that have substantially higher default-related costs than the national average. The proposed methodology for state-level guarantee fees considers three factors (i) the number of days it takes Fannie Mae or Freddie Mac to obtain marketable title, (ii) the average per-day carrying cost incurred by Fannie Mae or Freddie Mac, and (iii) the national average default rate on single-family mortgages. The FHFA is proposing to charge lenders an upfront fee of between fifteen and thirty basis points on each new mortgage originated in the five higher-cost states, beginning in 2013. The actual increase in the upfront fee would vary for each state, depending on default data in the state and the state's deviation from the mean of the state-level estimates of expected total default-related carrying costs.

The proposed approach is based on the expected costs of defaults on mortgages acquired by Fannie Mae and Freddie Mac in the future given current underwriting standards, rather than actual default losses realized over the past decade. The FHFA also states that its methodology for determining increased state-level fees could change in the future to consider other factors, including the impact of recently-enacted laws and ordinances or a wider range of state actions. The FHFA has asked for comments on the proposal by November 26, 2012.

Legislators Accuse Assistant AG of Inappropriate Interference in Disparate Impact Case. On September 24, Representatives Lamar Smith (R-TX), Patrick McHenry (R-NC), and Darrell Issa (R-CA), along with Senator Charles Grassley (R-IA), sent a letter to U.S. Attorney General Eric Holder alleging that Assistant Attorney General Tom Perez struck an inappropriate deal with the City of St. Paul to entice the City to withdrawal its appeal in *Magner v. Gallagher*, a case that could have yielded a decision on whether disparate impact claims are cognizable under the Fair Housing Act, and if they are, the applicable legal standards for such claims. Based on a DOJ staff briefing and documents obtained from the DOJ, the lawmakers claim that the DOJ agreed not to intervene in a False Claims Act case pending against the City of St. Paul in exchange for the City abandoning its appeal, and that such an arrangement went beyond a standard settlement between the parties. The letters seeks additional documents and interviews of top DOJ officials by September 28, 2012.

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BANKING

FinCEN Repeals Special Requirements Regarding Two Burmese Banks. On September 26, the U.S. Department of Treasury announced that FinCEN is repealing a 2004 rule that required certain U.S. financial institutions to terminate correspondent or payable-through accounts for, or on behalf of, two Burmese banks, and to apply due diligence to guard against the banks' indirect use of correspondent or payable-through accounts. The repeal takes effect upon publication in the Federal Register.

FDIC Announces New Violations Classification System. On September 25, the FDIC issued Financial Institution Letter FIL-41-2012, which revises the classification system used to cite violations of consumer financial laws identified during compliance examinations. The new system features three levels of severity and will replace the current two-level system on October 1, 2012. The FDIC letter states that the change is intended to provide greater clarity regarding the severity of a violation by focusing on the most significant issues identified during an examination. For example, the new "Level 3/High Severity" classification will cover violations that result in significant harm to consumers or members of a community. These violations typically result in restitution in excess of $10,000 (in aggregate), and include any pattern or practice violations of anti-discrimination provisions.

FDIC Names New York Regional Director. On September 26, the FDIC named John Vogel as New York Regional Director. The New York Region covers twelve northeastern states, as well as Washington, DC, Puerto Rico, and the U.S. Virgin Islands. Mr. Vogel has been with the FDIC since 1990 and previously served as New York Deputy Regional Director for Risk Management.

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CFPB Releases Five Year Strategic Plan. On September 25, the CFPB released a draft strategic plan for 2013-2018. The draft plan outlines the CFPB's four strategic goals and desired outcomes, as well as its broad strategies for achieving those objectives. The CFPB states that it will strive to (i)

"prevent financial harm to consumers while promoting good practices that benefit them," (ii) "empower consumers to live better financial lives," (iii) inform the public and policymaking with "data-driven analysis," and (iv) advance the CFPB's performance "by maximizing resource productivity and enhancing impact." For each goal, the plan identifies metrics the CFPB will use to measure its performance. For example, to assess its progress in preventing financial harm to consumers and promoting good practices, the CFPB will consider, among other indicators, the number of fair lending supervision activities opened during the fiscal year and the percentage of fair lending cases filed that were "successfully resolved" through litigation, settlement, or default judgment. The CFPB has asked for comments by October 25, 2012.

CFPB Reports on Consumer Credit Scores. On September 25, the CFPB published a report on credit scores and consumer reporting agencies. As required by the Dodd-Frank Act, the CFPB compared credit scores sold to consumers to those sold to creditors to determine the impact of the different scoring models used by consumer reporting agencies. Using 200,000 credit files obtained from each of the major consumer reporting agencies, the CFPB found that for a substantial minority of consumers, the different scoring models yielded meaningfully different results, *i.e.,* the consumer and creditor purchased different credit scores from the same reporting agency. In comparing different models across various demographic subgroups, the CFPB found that different credit scores did not appear to treat different groups of consumers systematically differently than other scoring models. The CFPB cautioned consumers against exclusively relying on credit scores they purchase as a guide to how creditors will view their credit quality. Additionally, the CFPB urged consumer reporting agencies to advise consumers that the scores they purchase could vary, sometimes substantially, from the scores used by creditors.

Three State AGs Join Challenge to Dodd-Frank Act and CFPB Appointment. On September 20, the Attorneys General (AGs) of Michigan, Oklahoma, and South Carolina joined an earlier-filed lawsuit in the U.S. District Court for the District of Columbia that challenges aspects of the Dodd-Frank Act, including the CFPB and its director. The AGs joined an amended complaint that seeks to challenge as unconstitutional the "formation and operation" of the CFPB, and that argues the President side-stepped constitutional checks and balances by refusing to submit his nominee for CFPB Director to the Senate. The AGs also charge that the "orderly liquidation authority" (OLA) for financial institutions provided to the Treasury Secretary by the Dodd-Frank Act violates the separation of powers doctrine, as well as the Fifth Amendment's bar against the taking of property without due process. The AGs cite their state pension funds-each of which is invested in "a variety of institutions" subject to the OLA-as their basis for standing, claiming that the OLA exposes the states and their funds to "the risk that their credit holdings could be arbitrarily and discriminatorily extinguished." Finally, the private plaintiffs that originally filed the suit also contest based on a separation of powers argument the "unconstitutional creation" of the Financial Stability Oversight Council.

Sixth Circuit Allows Private FCRA Action To Proceed Against Bank. On September 27, the U.S. Court of Appeals for the Sixth Circuit revived an individual's private action under FCRA against a bank, alleging that the bank failed to adequately investigate and respond to notices it received from several consumer reporting agencies regarding disputed car loan. *Boggio v. USAA Fed. Savings Bank,* No 11-4040, slip op. (6th Cir. Sep. 27, 2012). After experiencing credit problems caused by his ex-wife's failure to make payments on a car she purchased during their marriage by signing both of their names to a check, the plaintiff wrote to several consumer reporting agencies to dispute his responsibility for the loan in light of the forgery, as well as the parties' separation and divorce agreements that stated the ex-wife would be responsible for the car payments. The plaintiff alleges that the reporting agencies notified the bank of the dispute, which the bank refused to investigate without a police report or fraud affidavit from the plaintiff, as required by the bank's fraud policy. The district court granted summary judgment in favor of the bank, holding that the bank

reasonably investigated the notices it received from credit reporting agencies, and that the plaintiff had ratified the debt. On appeal, the circuit court reversed and remanded the district court's decision, holding that there is a genuine dispute of material fact with regard to the sufficiency of the bank's investigation. The court added that the plaintiff's failure to comply with the bank's fraud policy does not alter its finding of a genuine dispute of material fact, holding that FCRA does not permit the bank to require independent confirmation of the reporting agencies' notices before conducting an investigation. The court also held that the dispute over ratification requires resolution by a trier of fact given the ambiguity of the separation agreement, among other issues.

SECURITIES

FHFA IG Clears Freddie Mac's Use of Inverse Floating-Rate Bonds. On September 26, the FHFA Inspector General (IG) reported that neither Freddie Mac nor the FHFA purposefully limited refinancing opportunities to influence the yields of Freddie Mac inverse floating-rate bonds (inverse floaters). Inverse floaters are a by-product of other variable rate bonds carved out of Freddie Mac's securitized mortgages to capitalize on increasing investor demand. Because the value of inverse floaters decreases when the underlying mortgages are refinanced, U.S. lawmakers and others argued that inverse floaters created a conflict of interest for Freddie Mac's investment and refinancing policies because Freddie Mac could intentionally limit refinances to protect the value of its retained inverse floaters. The FHFA IG reviewed the practice and Freddie Mac's portfolio and determined that (i) inverse floaters represent a small portion of Freddie Mac's capital markets portfolio, (ii) inverse floaters pose no greater conflict than do any other mortgages held by Freddie Mac, and (iii) Freddie Mac employs an "information wall" to prevent the use of nonpublic information-including information about refinancing activity-from being used in investment decisions.

CREDIT CARDS

CFPB Announces Enforcement Action Against Credit Card Issuer. On September 24, the CFPB announced that it resolved an investigation initiated by the FDIC and subsequently joined by the CFPB into telephone sales of certain ancillary or "add on" products marketed and sold by a major credit card issuer. The products related to (i) payment protection, (ii) credit monitoring, (iii) identity theft protection, and (iv) protection in the event of wallet loss. Pursuant to the Joint Consent Order released by the CFPB, the bank will pay a $14 million penalty and provide approximately $200 million in restitution to eligible consumers who purchased one or more ancillary products over a period of approximately four years. The order also calls for certain changes to the bank's marketing and sales practices in connection with the products. During a press call to announce the consent order, CFPB Director Richard Cordray explained that the CFPB "expect[s] that more such actions will follow." The CFPB is publishing the orders from its various actions on its administrative adjudication docket. Mr. Cordray also stated that "[i]n the meantime, [the CFPB is] signaling as clearly as [it] can that other financial institutions should review their marketing practices to ensure that they are not deceiving or misleading consumers into purchasing financial products or services." In July, the CFPB issued Bulletin 2012-06, which outlines the CFPB's expectations for the institutions it supervises, and their vendors, with regard to offering ancillary products in compliance with federal consumer financial laws. BuckleySandler represented the bank in this joint CFPB-FDIC investigation and enforcement action.

E-COMMERCE

Canada Proposes Adding Mobile Payments to Card Industry Voluntary Code of Conduct. Recently, Canada's Department of Finance published a consultation paper that proposes an addendum to the Code of Conduct for the Credit and Debit Card Industry in Canada to apply the Code to mobile payments. The Code, which took effect in August 2010, is a voluntary measure

applicable to credit and debit card networks and covers point-of-sale, Internet, and phone payment methods. The addendum would extend the Code to apply explicitly to payments initiated by consumers that access a deposit or credit account through a payment network accessed by mobile device at the point-of-sale. The addendum also would clarify the way in which five of the ten elements of the code would apply to mobile payments. For example, the addendum would prohibit credit and debit card functions from co-residing in the same mobile payment application. Canada's Department of Finance has invited stakeholder comments on all aspects of the proposal.

PRIVACY/DATA SECURITY

Eleventh Circuit Holds Monetary Damages Caused by Identity Theft Present a Cognizable Injury. Recently, the U.S. Court of Appeals for the Eleventh Circuit, in a case of first impression, held that the named plaintiffs in a putative class action could pursue their claims for monetary loss from a health care company that allegedly failed to protect their personal information. *Resnick v. AvMed Inc.*, No. 11-13694, 2012 WL 3833035 (11th Cir. Sep. 25, 2012). The plaintiffs allege that they became subject to identity theft several months after laptops containing their sensitive personal information were stolen from the company's offices. The plaintiffs sued the health care company, alleging negligence, negligence *per se* under Florida law, breach of contract, unjust enrichment, breach of implied covenant of good faith and fair dealing, and breach of fiduciary duty. The district court dismissed all claims, holding that the complaint failed to state a cognizable injury. On appeal, the court of appeals reversed the district court on the majority of the claims. It held that because the complaint alleges financial injury, and because monetary loss is cognizable under Florida law, the plaintiffs have alleged a cognizable injury. The court found that the plaintiffs "have shown a sufficient nexus between the data breach and the identity theft beyond allegations of time and sequence" because the plaintiffs plead that they were careful in protecting their identities and had never been victims of identity theft. Finding that causation was sufficiently plead, the court of appeals reversed the district court with regard to the counts of negligence, breach of contract, and breach of fiduciary duty. The court affirmed dismissal of the claims of negligence *per se* and breach of implied covenant of good faith and fair dealing because failure to comply with the relevant state statute cannot serve as a basis for negligence *per se*, and because the health care company's actions were not shown to be conscious and deliberate as necessary to support a claim of breach of implied covenant. Finally, the court held that the plaintiffs alleged sufficient facts to sustain a claim for unjust enrichment because they claim to have paid monthly premiums to the company, while alleging that the company failed to implement sufficient data management and security measures. The case was remanded for further proceedings.

GAO Recommends Better Implementation of Mobile Device Security. On September 18, the U.S. Government Accountability Office recommended that the FCC take steps to encourage private sector implementation of baseline mobile security standards. The GAO examined (i) common security threats and vulnerabilities affecting mobile devices, (ii) the security features and practices used to mitigate risks, and (iii) the extent to which government and private entities have addressed mobile device security vulnerabilities. The resulting report identifies common vulnerabilities, including for example, the failure to enable password protection and the failure to keep operating systems updated with security patches. While mobile device manufacturers and wireless carriers can implement technical solutions to address vulnerabilities, the GAO concludes that the FCC should facilitate public-private coordination to develop industry-wide minimum mobile security standards, and that the Department of Homeland Security and NIST should develop performance measures to assess mobile device security public awareness efforts.

PAYMENTS

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