Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

July 20, 2012

TOPICS - COVERED THIS WEEK (CLICK TO VIEW)

FEDERAL ISSUES

CFPB Announces First Public Enforcement Action; Issues Related Compliance Bulletin. On July 18, the CFPB announced its first public enforcement action - a Consent Order entered into by a major credit card issuer to resolve allegations that the issuer's vendors deceptively marketed ancillary products such as payment protection and credit monitoring. The OCC made a corresponding enforcement announcement and released a Cease and Desist Order and Civil Money Penalty to resolve related charges. Under the CFPB order, the issuer will refund approximately $140 million to roughly two million customers, and will pay a $25 million penalty. The OCC order requires restitution of approximately $150 million (of which $140 million overlaps with the CFPB order) and an additional $35 million civil money penalty. Under both agencies' actions, the issuer is prohibited from selling and marketing certain ancillary products until it obtains approval to do so from the regulators, and the issuer must take specific actions to enhance compliance with consumer financial laws.

Concurrently, the CFPB issued Bulletin 2012-06, which states that the CFPB expects supervised institutions and their vendors to offer ancillary products in compliance with federal consumer financial laws. The guidance cites "CFPB supervisory experience [that] indicates that some credit card issuers have employed deceptive promotional practices when marketing" such products, including (i) failing to adequately disclose terms and conditions, (ii) enrolling customers without their consent, and (iii) billing for services not performed. The Bulletin reviews applicable federal law and outlines the compliance program components that the CFPB expects supervised institutions to maintain.

CFPB Finalizes Rule to Supervise "Larger Participant" Consumer Reporting Agencies. On July 16, the CFPB finalized a rule that will allow it to begin supervising certain consumer reporting agencies (CRAs). Under the Dodd-Frank Act, the CFPB has authority to supervise, regardless of size, nonbanks offering (i) certain mortgage-related products and services, (ii) private education

loans, and (iii) payday loans. The CFPB also has the power to supervise "larger participants" in any other market for consumer financial products or services, provided that it first conducts a rulemaking to define "larger participants." Under this first "larger participant" rule, the CFPB will have supervisory authority over CRAs with more than $7 million in annual receipts from consumer reporting activities, effective September 30, 2012. The CFPB believes that the $7 million threshold will cover 30 companies that account for 94% of total industry receipts. The final rule is divided into two parts: (i) Subpart A sets the definitions and other terms applicable to the CFPB's supervision of "larger participants" in general, and (ii) Subpart B identifies the market, terms, and "larger participant" test for the CRA industry. This latter part will be expanded for each new market the CFPB opts to supervise under its "larger participant" authority. While the rule as proposed also included a threshold for use in identifying "larger participants" in the debt collection market, the CFPB has postponed issuance of the final debt collection "larger participant" rule until the fall. The CFPB described the final rule as "the first in a series of rules to define larger participants of other markets."

CFPB Releases Semiannual Regulatory Agenda. On July 16, the CFPB announced the release of its spring 2012 rulemaking agenda. The agenda lists the regulatory matters that the CFPB anticipates pursuing during the period June 1, 2012 through May 31, 2013. It also updates the CFPB's first-ever such agenda, published as part of the fall 2011 Unified Agenda. For example, the updated agenda indicates that the CFPB expects to issue by January 2013, an Advance Notice of Proposed Rulemaking regarding the registration of certain nonbank entities, whereas the fall 2011 agenda anticipated a Notice of Proposed Rulemaking on this topic by March 2012. Similarly, the new rulemaking agenda updates the date by which the CFPB expects to take further action on developing regulations concerning the expanded HMDA data collection required by the Dodd-Frank Act from October 2012 to April 2013.

Senate Subcommittee Explores Money Laundering Vulnerabilities at Global Institutions. On July 17, the Senate Homeland Security and Government Affairs Committee, Permanent Subcommittee on Investigations, held a hearing to review money laundering and terrorist financing vulnerabilities that can emerge from certain international banking activities. In connection with the hearing, the Subcommittee released a report about its investigation into past money laundering and terrorist financing compliance failures at one multinational financial institution. The report notes that despite congressional efforts to strengthen anti-money laundering laws (AML), and financial institutions' diligence in bolstering AML controls, money laundering risks associated with correspondent banking persist. Using the investigation and its findings as a case study, the report reiterates that effective AML compliance programs at U.S. banks should include written standards, sufficient and knowledgeable staff, effective training, and a positive compliance culture. With regard to specific issues that U.S. banks might face with regard to correspondent banking, the report recommends that U.S. banks implement programs that effectively (i) screen high-risk affiliates, (ii) prevent circumvention of OFAC prohibitions, (iii) avoid providing U.S. correspondent services to banks with links to terrorism, (iv) ensure traveler check controls restrict acceptance of suspicious bulk travelers checks, and (v) eliminate bearer share accounts. The report also identifies regulatory gaps and recommends that the OCC (i) treat AML deficiencies as a safety and soundness matter, (ii) develop a policy to coordinate internal divisions conducting AML examinations, (iii) consider the use of formal or informal enforcement actions to address mounting AML failures, and (iv) strengthen AML examinations by citing violations and focusing on specific business units and a bank's AML program as a whole.

Federal Reserve Board Initiates Acquisition Guidance Program. On July 12, the Federal Reserve Board issued supervisory guidance outlining a new optionalprocess for a supervised institution to request feedback on a potential bank and nonbank acquisition or other transactional proposal prior to the submission of a formal application or notice. The supervision and regulation letter explains that under the new optional process, supervised institutions may submit "pre-filings" to

the appropriate Reserve Bank. Pre-filings can include inquiries seeking (i) advice about a specific aspect of a proposal, business plans or pro forma financial information related to a potential filing, or presentations outlining specific potential proposals, (ii) feedback on draft transactional and structural documents, and (iii) guidance regarding the type of filing required or the individuals or entities that would need to join a filing. In most cases, pre-filing and submitted information will be reviewed within 60 days. The guidance cautions that Federal Reserve staff review will focus on the specific request, and a review is not intended to identify or resolve all issues or concerns related to a possible future application or notice. The Federal Reserve also notes that it is not inviting negotiations on the structure of a potential proposal or for resolving significant issues of policy or law as part of this advance guidance program.

Congress Acts on Bills Regarding Protection of Information Submitted to CFPB and ATM Fee Disclosure Requirements. On July 12, Representatives Renacci (R-OH) and Perlmutter (D-CO) introduced H.R. 6125, a bill that would amend the Federal Deposit Insurance Act to grant protections to documents and information submitted by banks and nonbanks to the CFPB and state bank and financial regulators. H.R. 4014, a similar bill, previously passed the House with broad bipartisan support. The House also recently passed by a wide margin H.R. 4367, a bill to eliminate the EFTA requirement that ATM providers attach a fee disclosure placard to their machines. On July 17, Senate Banking Committee Chairman Johnson (D-SD) introduced with the support of Ranking Member Shelby (R-AL) S. 3394, which combines versions of H.R. 4014 and H.R. 4367 for Senate consideration.

Fannie Mae Announces Expanded Servicer Training Program. On July 16, Fannie Mae announced its "Know Your Options Customer Care" program, through which Fannie Mae provides training for servicers' call center employees in an effort to help prevent foreclosures. The program also offers servicers scripting for interactions with homeowners and assistance with quality control implementation. Fannie Mae has already implemented the program with 18 of its largest servicers and is now making the program available to all servicers through online webinars and related materials. Fannie Mae noted that those servicers that have participated in the free program have seen substantial increases in workouts.

STATE ISSUES

Hawaii Enacts Multiple Mortgage-Related Bills and Legislation to Protect Personal Information. Recently, Hawaii enacted a set of bills related to mortgage origination and servicing. With regard to mortgage origination, S.B. 2763 amends the state SAFE Act to reflect changes to the federal law and to adjust originator registration fees. With regard to mortgage servicers, H.B. 2502 allows the Commissioner of Financial Institutions to require registration with the NMLS and makes it unlawful for a servicer to provide loan modifications without first complying with certain licensing requirements. Another bill, H.B. 1875 makes numerous changes to the state's foreclosure laws, largely implementing recommendations from the Mortgage Foreclosure Task Forcecreated by the state legislature in 2010. Finally, with regard to mortgages, H.B. 2375 establishes criminal penalties for certain violations of the state's Mortgage Rescue Fraud Prevention Act. Hawaii also recently enacted S.B. 2419, which prohibits businesses from scanning a customer's identification card or driver's license with an electronic device capable of obtaining information electronically encoded on that identification card, except for specific purposes.

California Expands Servicemember Protections. On July 13, California enacted AB 2476, which expands the period of time during which servicemembers are protected from high interest rates. Under current law, a creditor cannot charge, during a servicemember's period of military service, an interest rate in excess of 6% on any obligation or liability incurred by a servicemember before that person's entry into service. The bill expands the interest rate protections to prevent an increase in

any such rate on a mortgage, trust deed, or other security in the nature of a mortgage for one year after the period of military service.

California AG Announces Privacy Enforcement Unit. On July 19, California Attorney General Kamala Harris announced the creation of the Privacy Enforcement and Protection Unit. The unit will combine the various existing privacy functions of the California Department of Justice to centrally enforce and protect consumer privacy. The unit will pursue civil prosecution of state and federal privacy laws regulating the collection, retention, disclosure, and destruction of private or sensitive information by individuals, organizations, and the government. These include laws relating to cyber privacy, financial privacy, identity theft, and data breaches, among others. The new unit will reside within the eCrime Unit, which was created in December 2011 to identify and prosecute identity theft crimes, cyber-crimes and other crimes involving the use of technology.

Delaware AG Settles Case Against Electronic Mortgage Registry. On July 13, Delaware Attorney General Beau Biden announced a settlement of the state's lawsuit against a national electronic mortgage registry. The state alleged that the registry system created inaccurate and unreliable records that undermined chain of title in that state. Under the agreement, the registry has agreed to (i) maintain a database that allows homeowners to clearly see who owns the mortgage and who services the loan, (ii) record assignments of mortgages with the county Recorder of Deeds Office before a foreclosure can proceed, (iii) not foreclose in its name for the next five years, (iv) audit its records for accuracy and report results to the Attorney General, and (v) increase oversight and training, including annual examinations of documents signed by employees of its 25 largest members to check the identity and authority of the person who signed the documents. These steps are consistent with those already taken by the registry nationally, and the agreement does not include any monetary payment.

COURTS

Ninth Circuit Reverses Dismissal of Pricing Discrimination Suit Against Auto Dealers. On July 13, the U.S. Court of Appeals for the Ninth Circuit reversed a district court's dismissal of a Department of Justice suit alleging that two automobile dealers violated the Equal Credit Opportunity Act by charging non-Asian customers higher "overages" or "dealer mark-ups" than similarly-situated Asian customers. *United States v. Union Auto Sales, Inc.* No. 9-7124, 2012 WL 2870333 (9th Cir. Jul. 13, 2012).A bank within whose network the automobile dealers operated, settled related charges concurrent with the filing of the case. The automobile dealers chose to litigate, eventually succeeding on a motion to dismiss. On appeal, the court reversed the district court's holding that the complaint lacked sufficient supporting detail to give the defendants fair notice of the claim. Instead, the divided appeals court held that the government need not demonstrate discrimination at the pleading stage, but merely allege facts sufficient to make a discrimination claims plausible, a threshold met by the government's complaint. One judge dissented from the majority opinion and argued that the government's conclusory allegations do not meet the plausibility threshold established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and a subsequent Ninth Circuit decision. The majority also held that the district court erred in dismissing the complaint for failing to articulate intent, noting that under both disparate impact and disparate treatment theories, intent is irrelevant. Further, the court held that the link between names and racial categorization for the purposes of discriminatory conduct is well-established. The case was remanded for further proceedings.

Bank Officers Charged With Concealing Nonperforming Assets. On July 11, four former bank officers and two of their former customers were indicted in the U.S. District Court for the Eastern District of Virginia on eighteen counts of fraud. Indictment, *United States v. Woodard,* No. 12-105 (E.D. Va.). The indictment alleges that in the run-up to the financial crisis, the bank more than

doubled its assets primarily through brokered deposits, while the directors administered a lending program that violated industry standards and the bank's internal controls. In connection with the financial crisis, the indictment states, the bank's loan portfolio deteriorated and the directors conspired to conceal the institution's financial condition. Ultimately, the bank failed, leaving the federal government insurance fund to cover approximately $260 million in deposits, the indictment claims. In addition to the criminal charges, the U.S. Attorney is seeking forfeiture of the defendants' assets. Other bank officers, employees, and customers already have pled guilty to related charges.

Federal Court Allows Shareholder Suit Alleging Concealment of Mortgage-Related Risks to Proceed. On July 11, the U.S. District Court for the Southern District of New York declined to dismiss the majority of the claims brought by a putative class alleging that a national bank, certain of its current and former officers and directors, multiple underwriters, and the bank's third-party accounting auditor, deliberately concealed the bank's reliance on an electronic registry system and its exposure to MBS loan repurchase claims. *Pa. Pub. Sch. Employee's Ret. Sys. v. Bank of Am. Corp.* No. 11-733, 2012 WL 2847732 (S.D.N.Y. Jul. 11, 2012). In this case, a state retirement system alleges on behalf of similarly situated shareholders that the bank misrepresented that it had "good title" to loans even though multiple courts had blocked the bank's attempts to foreclosure based on the bank's use of an electronic registry system. The court, in declining to dismiss these claims, held that the use of the registry system "clouded" the bank's ownership of many loans, thereby causing the bank to publish misleading shareholder information. The court also declined to dismiss allegations that the defendants misstated or omitted the bank's exposure to repurchase claims. Further, claims that the bank misled investors about its internal controls also survived. Several other claims, including certain claims against the directors and officers were dismissed without prejudice, while other certain other claims against the defendants were dismissed with prejudice.

Major Settlement Reached in Consolidated Interchange Fee Litigation. On July 13, the parties to the long-running consolidated class action litigation against the two major payment network providers and 17 banks filed a proposed settlement to resolve allegations that the defendants unlawfully conspired to fix the fees that merchants are charged each time a customer uses a card for a purchase, so-called "swipe" or "interchange" fees. Class Settlement Agreement, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, No. 05-MD-1720 (E.D.N.Y. Jul. 13, 2012). In total, the settlement is valued at $7.25 billion. Of that total amount, roughly $6 billion would be paid to a class of millions of merchants and certain individual merchants. Another $1.2 billion of the total amount would be used to provide merchants with a temporary reduction in interchange fees. Further, the agreement allows merchants, for the first time, to apply a surcharge to customer transactions processed over the payment networks.

FIRM NEWS

Please Join Us for a Complimentary Webinar - The Consumer Financial Protection Bureau: How to Prepare for an Examination

As the first anniversary of the CFPB approaches, many banks and non-banks are experiencing their first examination by the CFPB. In this webinar, Jeffrey Naimon, Jonice Gray Tucker, and Lori Sommerfield will provide guidance on what to expect from the CFPB, how to prepare for and manage the exam, and how best to interact with the Bureau concerning examination findings and ratings. During this webinar, we will also highlight key developments, including recent changes to CFPB leadership, the status of critical rulemakings, and enforcement activity.

Date & Time: Thursday, July 26, 2012, 2:00 - 3:15 PM ET

Click here to register: https://www1.gotomeeting.com/register/543845256

Registration required. This webinar is open to all financial services companies and others subject to CFPB oversight. Please no outside law firms, government agency personnel, consulting firms, or media. After registering and being approved, you will receive a confirmation email containing instructions for joining the webinar.

Matthew Previn and Andrew Schilling will present a one-hour PLI telephone briefing entitled "From False Claims Act to FIRREA: The Government's Expanding Enforcement Arsenal Against Financial Institutions" on July 26, 2012 at 1:00 pm. Mr. Previn and Mr. Schilling will be joined by Pierre G. Armand, Deputy Chief of the Civil Frauds Unit at the U.S. Attorney's Office for the Southern District of New York, to discuss the government's recent approach to civil enforcement actions against mortgage lenders and other financial institutions.

Jonice Gray Tucker and Jay Laifman will participate in the California Mortgage Bankers Association's Western States Loan Servicing Conference on July 30, 2012 in Las Vegas, Nevada. Ms. Tucker will moderate a panel of current and former state and federal officials regarding the implementation and enforcement of new mortgage servicing standards. Mr. Laifman will speak on a panel that will explore best practices for compliance with the new servicing standards. For further information or registration, you may click the following link: http://www.cmba.com/new/brochures/WSLC12Reg.pdf.

Andrew Sandler will speak at the National Mortgage News 2nd Annual Mortgage Regulatory Forum taking place September 13-14, 2012, in Arlington, VA. The Mortgage Regulatory Forum is created to provide the most up-to-date information on newly implemented regulation, and regulation in the pipeline, for both those on the origination side of the business, as well as mortgage servicing.

James Parkinson will be speaking at the ABA'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."

About BuckleySandler LLP (www.BuckleySandler.com)

With over 150 lawyers in Washington, DC, Los Angeles, and New York, BuckleySandler provides best-in-class legal counsel to meet the challenges of its financial services industry and other corporate and individual clients across the full range of government enforcement actions, complex and class action litigation, and transactional, regulatory, and public policy issues. The Firm represents many of the nation's leading financial services institutions. "The best at what they do in the country." (Chambers USA).

Please visit us at the following locations:

- **Washington: 1250 24th St NW, Suite 700, Washington D.C. 20037, (202) 349-8000**
- **Los Angeles: 100 Wilshire Boulevard, Suite 1000, Santa Monica, CA 90401, (424) 203-1000**
- **New York: 1133 Avenue of the Americas, Suite 3100, New York, NY 10036, (212) 600-2400**

We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes. E-mail infobytes@buckleysandler.com.

In addition, please feel free to email our attorneys. A list of attorneys can be found at: http://www.buckleysandler.com/professionals/professionals.

For back issues of InfoBytes, please see http://www.buckleysandler.com/infobytes/infobytes.

InfoBytes is not intended as legal advice to any person or firm. It is provided as a client service and information contained herein is drawn from various public sources, including other publications.

© 2012 BuckleySandler LLP. All Rights Reserved.

MORTGAGES

Fannie Mae Announces Expanded Servicer Training Program. On July 16, Fannie Mae announced its "Know Your Options Customer Care" program, through which Fannie Mae provides training for servicers' call center employees in an effort to help prevent foreclosures. The program also offers servicers scripting for interactions with homeowners and assistance with quality control implementation. Fannie Mae has already implemented the program with 18 of its largest servicers and is now making the program available to all servicers through online webinars and related materials. Fannie Mae noted that those servicers that have participated in the free program have seen substantial increases in workouts.

Hawaii Enacts Multiple Mortgage-Related Bills and Legislation to Protect Personal Information. Recently, Hawaii enacted a set of bills related to mortgage origination and servicing. With regard to mortgage origination, S.B. 2763 amends the state SAFE Act to reflect changes to the federal law and to adjust originator registration fees. With regard to mortgage servicers, H.B. 2502 allows the Commissioner of Financial Institutions to require registration with the NMLS and makes it unlawful for a servicer to provide loan modifications without first complying with certain licensing requirements. Another bill, H.B. 1875 makes numerous changes to the state's foreclosure laws, largely implementing recommendations from the Mortgage Foreclosure Task Forcecreated by the state legislature in 2010. Finally, with regard to mortgages, H.B. 2375 establishes criminal penalties for certain violations of the state's Mortgage Rescue Fraud Prevention Act. Hawaii also recently enacted S.B. 2419, which prohibits businesses from scanning a customer's identification card or driver's license with an electronic device capable of obtaining information electronically encoded on that identification card, except for specific purposes.

California Expands Servicemember Protections. On July 13, California enacted AB 2476, which expands the period of time during which servicemembers are protected from high interest rates. Under current law, a creditor cannot charge, during a servicemember's period of military service, an interest rate in excess of 6% on any obligation or liability incurred by a servicemember before that person's entry into service. The bill expands the interest rate protections to prevent an increase in any such rate on a mortgage, trust deed, or other security in the nature of a mortgage for one year after the period of military service.

Delaware AG Settles Case Against Electronic Mortgage Registry. On July 13, Delaware Attorney General Beau Biden announced a settlement of the state's lawsuit against a national electronic mortgage registry. The state alleged that the registry system created inaccurate and unreliable records that undermined chain of title in that state. Under the agreement, the registry has agreed to (i) maintain a database that allows homeowners to clearly see who owns the mortgage and who services the loan, (ii) record assignments of mortgages with the county Recorder of Deeds Office before a foreclosure can proceed, (iii) not foreclose in its name for the next five years, (iv) audit its records for accuracy and report results to the Attorney General, and (v) increase oversight

and training, including annual examinations of documents signed by employees of its 25 largest members to check the identity and authority of the person who signed the documents. These steps are consistent with those already taken by the registry nationally, and the agreement does not include any monetary payment

BANKING

Senate Subcommittee Explores Money Laundering Vulnerabilities at Global Institutions. On July 17, the Senate Homeland Security and Government Affairs Committee, Permanent Subcommittee on Investigations, held a hearing to review money laundering and terrorist financing vulnerabilities that can emerge from certain international banking activities. In connection with the hearing, the Subcommittee released a report about its investigation into past money laundering and terrorist financing compliance failures at one multinational financial institution. The report notes that despite congressional efforts to strengthen anti-money laundering laws (AML), and financial institutions' diligence in bolstering AML controls, money laundering risks associated with correspondent banking persist. Using the investigation and its findings as a case study, the report reiterates that effective AML compliance programs at U.S. banks should include written standards, sufficient and knowledgeable staff, effective training, and a positive compliance culture. With regard to specific issues that U.S. banks might face with regard to correspondent banking, the report recommends that U.S. banks implement programs that effectively (i) screen high-risk affiliates, (ii) prevent circumvention of OFAC prohibitions, (iii) avoid providing U.S. correspondent services to banks with links to terrorism, (iv) ensure traveler check controls restrict acceptance of suspicious bulk travelers checks, and (v) eliminate bearer share accounts. The report also identifies regulatory gaps and recommends that the OCC (i) treat AML deficiencies as a safety and soundness matter, (ii) develop a policy to coordinate internal divisions conducting AML examinations, (iii) consider the use of formal or informal enforcement actions to address mounting AML failures, and (iv) strengthen AML examinations by citing violations and focusing on specific business units and a bank's AML program as a whole.

Federal Reserve Board Initiates Acquisition Guidance Program. On July 12, the Federal Reserve Board issued supervisory guidance outlining a new optionalprocess for a supervised institution to request feedback on a potential bank and nonbank acquisition or other transactional proposal prior to the submission of a formal application or notice. The supervision and regulation letter explains that under the new optional process, supervised institutions may submit "pre-filings" to the appropriate Reserve Bank. Pre-filings can include inquiries seeking (i) advice about a specific aspect of a proposal, business plans or pro forma financial information related to a potential filing, or presentations outlining specific potential proposals, (ii) feedback on draft transactional and structural documents, and (iii) guidance regarding the type of filing required or the individuals or entities that would need to join a filing. In most cases, pre-filing and submitted information will be reviewed within 60 days. The guidance cautions that Federal Reserve staff review will focus on the specific request, and a review is not intended to identify or resolve all issues or concerns related to a possible future application or notice. The Federal Reserve also notes that it is not inviting negotiations on the structure of a potential proposal or for resolving significant issues of policy or law as part of this advance guidance program.

Congress Acts on Bills Regarding Protection of Information Submitted to CFPB and ATM Fee Disclosure Requirements. On July 12, Representatives Renacci (R-OH) and Perlmutter (D-CO) introduced H.R. 6125, a bill that would amend the Federal Deposit Insurance Act to grant protections to documents and information submitted by banks and nonbanks to the CFPB and state bank and financial regulators. H.R. 4014, a similar bill, previously passed the House with broad bipartisan support. The House also recently passed by a wide margin H.R. 4367, a bill to eliminate

the EFTA requirement that ATM providers attach a fee disclosure placard to their machines. On July 17, Senate Banking Committee Chairman Johnson (D-SD) introduced with the support of Ranking Member Shelby (R-AL) S. 3394, which combines versions of H.R. 4014 and H.R. 4367 for Senate consideration.

Major Settlement Reached in Consolidated Interchange Fee Litigation. On July 13, the parties to the long-running consolidated class action litigation against the two major payment network providers and 17 banks filed a proposed settlement to resolve allegations that the defendants unlawfully conspired to fix the fees that merchants are charged each time a customer uses a card for a purchase, so-called "swipe" or "interchange" fees. Class Settlement Agreement, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, No. 05-MD-1720 (E.D.N.Y. Jul. 13, 2012). In total, the settlement is valued at $7.25 billion. Of that total amount, roughly $6 billion would be paid to a class of millions of merchants and certain individual merchants. Another $1.2 billion of the total amount would be used to provide merchants with a temporary reduction in interchange fees. Further, the agreement allows merchants, for the first time, to apply a surcharge to customer transactions processed over the payment networks.

CONSUMER FINANCE

CFPB Announces First Public Enforcement Action; Issues Related Compliance Bulletin. On July 18, the CFPB announced its first public enforcement action - a Consent Order entered into by a major credit card issuer to resolve allegations that the issuer's vendors deceptively marketed ancillary products such as payment protection and credit monitoring. The OCC made a corresponding enforcement announcement and released a Cease and Desist Order and Civil Money Penalty to resolve related charges. Under the CFPB order, the issuer will refund approximately $140 million to roughly two million customers, and will pay a $25 million penalty. The OCC order requires restitution of approximately $150 million (of which $140 million overlaps with the CFPB order) and an additional $35 million civil money penalty. Under both agencies' actions, the issuer is prohibited from selling and marketing certain ancillary products until it obtains approval to do so from the regulators, and the issuer must take specific actions to enhance compliance with consumer financial laws.

Concurrently, the CFPB issued Bulletin 2012-06, which states that the CFPB expects supervised institutions and their vendors to offer ancillary products in compliance with federal consumer financial laws. The guidance cites "CFPB supervisory experience [that] indicates that some credit card issuers have employed deceptive promotional practices when marketing" such products, including (i) failing to adequately disclose terms and conditions, (ii) enrolling customers without their consent, and (iii) billing for services not performed. The Bulletin reviews applicable federal law and outlines the compliance program components that the CFPB expects supervised institutions to maintain.

CFPB Finalizes Rule to Supervise "Larger Participant" Consumer Reporting Agencies. On July 16, the CFPB finalized a rule that will allow it to begin supervising certain consumer reporting agencies (CRAs). Under the Dodd-Frank Act, the CFPB has authority to supervise, regardless of size, nonbanks offering (i) certain mortgage-related products and services, (ii) private education loans, and (iii) payday loans. The CFPB also has the power to supervise "larger participants" in any other market for consumer financial products or services, provided that it first conducts a rulemaking to define "larger participants." Under this first "larger participant" rule, the CFPB will have supervisory authority over CRAs with more than $7 million in annual receipts from consumer reporting activities, effective September 30, 2012. The CFPB believes that the $7 million threshold will cover 30 companies that account for 94% of total industry receipts. The final rule is divided into

two parts: (i) Subpart A sets the definitions and other terms applicable to the CFPB's supervision of "larger participants" in general, and (ii) Subpart B identifies the market, terms, and "larger participant" test for the CRA industry. This latter part will be expanded for each new market the CFPB opts to supervise under its "larger participant" authority. While the rule as proposed also included a threshold for use in identifying "larger participants" in the debt collection market, the CFPB has postponed issuance of the final debt collection "larger participant" rule until the fall. The CFPB described the final rule as "the first in a series of rules to define larger participants of other markets."

CFPB Releases Semiannual Regulatory Agenda. On July 16, the CFPB announced the release of its spring 2012 rulemaking agenda. The agenda lists the regulatory matters that the CFPB anticipates pursuing during the period June 1, 2012 through May 31, 2013. It also updates the CFPB's first-ever such agenda, published as part of the fall 2011 Unified Agenda. For example, the updated agenda indicates that the CFPB expects to issue by January 2013, an Advance Notice of Proposed Rulemaking regarding the registration of certain nonbank entities, whereas the fall 2011 agenda anticipated a Notice of Proposed Rulemaking on this topic by March 2012. Similarly, the new rulemaking agenda updates the date by which the CFPB expects to take further action on developing regulations concerning the expanded HMDA data collection required by the Dodd-Frank Act from October 2012 to April 2013.

Congress Acts on Bills Regarding Protection of Information Submitted to CFPB and ATM Fee Disclosure Requirements. On July 12, Representatives Renacci (R-OH) and Perlmutter (D-CO) introduced H.R. 6125, a bill that would amend the Federal Deposit Insurance Act to grant protections to documents and information submitted by banks and nonbanks to the CFPB and state bank and financial regulators. H.R. 4014, a similar bill, previously passed the House with broad bipartisan support. The House also recently passed by a wide margin H.R. 4367, a bill to eliminate the EFTA requirement that ATM providers attach a fee disclosure placard to their machines. On July 17, Senate Banking Committee Chairman Johnson (D-SD) introduced with the support of Ranking Member Shelby (R-AL) S. 3394, which combines versions of H.R. 4014 and H.R. 4367 for Senate consideration.

Ninth Circuit Reverses Dismissal of Pricing Discrimination Suit Against Auto Dealers. On July 13, the U.S. Court of Appeals for the Ninth Circuit reversed a district court's dismissal of a Department of Justice suit alleging that two automobile dealers violated the Equal Credit Opportunity Act by charging non-Asian customers higher "overages" or "dealer mark-ups" than similarly-situated Asian customers. *United States v. Union Auto Sales, Inc.* No. 9-7124, 2012 WL 2870333 (9th Cir. Jul. 13, 2012).A bank within whose network the automobile dealers operated, settled related charges concurrent with the filing of the case. The automobile dealers chose to litigate, eventually succeeding on a motion to dismiss. On appeal, the court reversed the district court's holding that the complaint lacked sufficient supporting detail to give the defendants fair notice of the claim. Instead, the divided appeals court held that the government need not demonstrate discrimination at the pleading stage, but merely allege facts sufficient to make a discrimination claims plausible, a threshold met by the government's complaint. One judge dissented from the majority opinion and argued that the government's conclusory allegations do not meet the plausibility threshold established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and a subsequent Ninth Circuit decision. The majority also held that the district court erred in dismissing the complaint for failing to articulate intent, noting that under both disparate impact and disparate treatment theories, intent is irrelevant. Further, the court held that the link between names and racial categorization for the purposes of discriminatory conduct is well-established. The case was remanded for further proceedings.

SECURITIES

Federal Court Allows Shareholder Suit Alleging Concealment of Mortgage-Related Risks to Proceed. On July 11, the U.S. District Court for the Southern District of New York declined to dismiss the majority of the claims brought by a putative class alleging that a national bank, certain of its current and former officers and directors, multiple underwriters, and the bank's third-party accounting auditor, deliberately concealed the bank's reliance on an electronic registry system and its exposure to MBS loan repurchase claims. *Pa. Pub. Sch. Employee's Ret. Sys. v. Bank of Am. Corp.* No. 11-733, 2012 WL 2847732 (S.D.N.Y. Jul. 11, 2012). In this case, a state retirement system alleges on behalf of similarly situated shareholders that the bank misrepresented that it had "good title" to loans even though multiple courts had blocked the bank's attempts to foreclosure based on the bank's use of an electronic registry system. The court, in declining to dismiss these claims, held that the use of the registry system "clouded" the bank's ownership of many loans, thereby causing the bank to publish misleading shareholder information. The court also declined to dismiss allegations that the defendants misstated or omitted the bank's exposure to repurchase claims. Further, claims that the bank misled investors about its internal controls also survived. Several other claims, including certain claims against the directors and officers were dismissed without prejudice, while other certain other claims against the defendants were dismissed with prejudice.

E-COMMERCE

Major Settlement Reached in Consolidated Interchange Fee Litigation. On July 13, the parties to the long-running consolidated class action litigation against the two major payment network providers and 17 banks filed a proposed settlement to resolve allegations that the defendants unlawfully conspired to fix the fees that merchants are charged each time a customer uses a card for a purchase, so-called "swipe" or "interchange" fees. Class Settlement Agreement, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, No. 05-MD-1720 (E.D.N.Y. Jul. 13, 2012). In total, the settlement is valued at $7.25 billion. Of that total amount, roughly $6 billion would be paid to a class of millions of merchants and certain individual merchants. Another $1.2 billion of the total amount would be used to provide merchants with a temporary reduction in interchange fees. Further, the agreement allows merchants, for the first time, to apply a surcharge to customer transactions processed over the payment networks.

PRIVACY / DATA SECURITY

California AG Announces Privacy Enforcement Unit. On July 19, California Attorney General Kamala Harris announced the creation of the Privacy Enforcement and Protection Unit. The unit will combine the various existing privacy functions of the California Department of Justice to centrally enforce and protect consumer privacy. The unit will pursue civil prosecution of state and federal privacy laws regulating the collection, retention, disclosure, and destruction of private or sensitive information by individuals, organizations, and the government. These include laws relating to cyber privacy, financial privacy, identity theft, and data breaches, among others. The new unit will reside within the eCrime Unit, which was created in December 2011 to identify and prosecute identity theft crimes, cyber-crimes and other crimes involving the use of technology.

Hawaii Enacts Multiple Mortgage-Related Bills and Legislation to Protect Personal Information. Recently, Hawaii enacted a set of bills related to mortgage origination and servicing. With regard to mortgage origination, S.B. 2763 amends the state SAFE Act to reflect changes to the federal law and to adjust originator registration fees. With regard to mortgage servicers, H.B. 2502 allows the Commissioner of Financial Institutions to require registration with the NMLS and makes it

unlawful for a servicer to provide loan modifications without first complying with certain licensing requirements. Another bill, H.B. 1875 makes numerous changes to the state's foreclosure laws, largely implementing recommendations from the Mortgage Foreclosure Task Forcecreated by the state legislature in 2010. Finally, with regard to mortgages, H.B. 2375 establishes criminal penalties for certain violations of the state's Mortgage Rescue Fraud Prevention Act. Hawaii also recently enacted S.B. 2419, which prohibits businesses from scanning a customer's identification card or driver's license with an electronic device capable of obtaining information electronically encoded on that identification card, except for specific purposes.

CREDIT CARDS

CFPB Announces First Public Enforcement Action; Issues Related Compliance Bulletin. On July 18, the CFPB announced its first public enforcement action - a Consent Order entered into by a major credit card issuer to resolve allegations that the issuer's vendors deceptively marketed ancillary products such as payment protection and credit monitoring. The OCC made a corresponding enforcement announcement and released a Cease and Desist Order and Civil Money Penalty to resolve related charges. Under the CFPB order, the issuer will refund approximately $140 million to roughly two million customers, and will pay a $25 million penalty. The OCC order requires restitution of approximately $150 million (of which $140 million overlaps with the CFPB order) and an additional $35 million civil money penalty. Under both agencies' actions, the issuer is prohibited from selling and marketing certain ancillary products until it obtains approval to do so from the regulators, and the issuer must take specific actions to enhance compliance with consumer financial laws.

Concurrently, the CFPB issued Bulletin 2012-06, which states that the CFPB expects supervised institutions and their vendors to offer ancillary products in compliance with federal consumer financial laws. The guidance cites "CFPB supervisory experience [that] indicates that some credit card issuers have employed deceptive promotional practices when marketing" such products, including (i) failing to adequately disclose terms and conditions, (ii) enrolling customers without their consent, and (iii) billing for services not performed. The Bulletin reviews applicable federal law and outlines the compliance program components that the CFPB expects supervised institutions to maintain.

Major Settlement Reached in Consolidated Interchange Fee Litigation. On July 13, the parties to the long-running consolidated class action litigation against the two major payment network providers and 17 banks filed a proposed settlement to resolve allegations that the defendants unlawfully conspired to fix the fees that merchants are charged each time a customer uses a card for a purchase, so-called "swipe" or "interchange" fees. Class Settlement Agreement, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, No. 05-MD-1720 (E.D.N.Y. Jul. 13, 2012). In total, the settlement is valued at $7.25 billion. Of that total amount, roughly $6 billion would be paid to a class of millions of merchants and certain individual merchants. Another $1.2 billion of the total amount would be used to provide merchants with a temporary reduction in interchange fees. Further, the agreement allows merchants, for the first time, to apply a surcharge to customer transactions processed over the payment networks.

CRIMINAL ENFORCEMENT

Bank Officers Charged With Concealing Nonperforming Assets. On July 11, four former bank officers and two of their former customers were indicted in the U.S. District Court for the Eastern District of Virginia on eighteen counts of fraud. Indictment, *United States v. Woodard,* No. 12-105 (E.D. Va.).The indictment alleges that in the run-up to the financial crisis, the bank more than

doubled its assets primarily through brokered deposits, while the directors administered a lending program that violated industry standards and the bank's internal controls. In connection with the financial crisis, the indictment states, the bank's loan portfolio deteriorated and the directors conspired to conceal the institution's financial condition. Ultimately, the bank failed, leaving the federal government insurance fund to cover approximately $260 million in deposits, the indictment claims. In addition to the criminal charges, the U.S. Attorney is seeking forfeiture of the defendants' assets. Other bank officers, employees, and customers already have pled guilty to related charges.

© BuckleySandler LLP. INFOBYTES is not intended as legal advice to any person or firm. It is provided as a client service and information contained herein is drawn from various public sources, including other publications.

We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes.
Email: **infobytes@buckleysandler.com**

For back issues of INFOBYTES (or other BuckleySandler LLP publications), visit **http://www.buckleysandler.com/infobytes/infobytes**