Buckley Sandler LLP

InfoBytes

FINANCIAL SERVICE HEADLINES & DEADLINES FOR OUR CLIENTS AND FRIENDS

December 23, 2011

Topics In This Issue

Federal Issues

DOJ Obtains Historic Fair Lending Settlement to Resolve Countrywide Discriminatory Lending Claims. On December 21, the Department of Justice (DOJ) announced an agreement with Bank of America for the largest fair-lending settlement in history-$335 million-to resolve allegations that Countrywide Financial Corporation, acquired by Bank of America in 2008, engaged in a pattern of discriminatory lending practices. In announcing the settlement, Attorney General Eric H. Holder, Jr. acknowledged, "Today's settlement makes clear that today's Justice Department-and our law enforcement and government partners-will not hesitate to move aggressively in holding lenders, including the nation's largest, accountable for discrimination and financial misconduct."

Assistant Attorney General for the Civil Rights Division Thomas Perez described DOJ's review of data from over 2.5 million loans originated by Countrywide between 2004 and 2008 and DOJ's conclusion that more than 200,000 African-American and Latino borrowers in forty-one states and the District of Columbia were charged higher rates and fees than similarly-situated white borrowers. Perez stated that this discrimination resulted from (i) Countrywide's discretionary loan pricing policy, which gave loan officers, with little oversight or guidance, the ability to charge different amounts to different borrowers, and (ii) the absence of any meaningful fair-lending compliance program at Countrywide. Among these more than 200,000 borrowers, Perez noted that 10,000 were prime-eligible minority borrowers who were steered into subprime loans. Perez also noted that this matter resulted from referrals from both the Federal Reserve Board and the former Office of Thrift Supervision (now a part of the Office of the Comptroller of the Currency).

The settlement is the most significant accomplishment of the nascent Fair Lending Unit in the DOJ's Civil Rights Division, established in January 2010 to enforce the Fair Housing Act and Equal Credit Opportunity Act. Previously, the largest settlement secured by the Fair Lending Unit came in March 2010 when two subsidiaries of AIG agreed to pay $6.1 million. The settlement also resolves fair lending claims brought against Countrywide by the Illinois Attorney General.

Click here for a copy of the DOJ press release with links to related materials; click here for a copy of the Illinois Attorney General's announcement.

FRB Releases Proposed Rules for Oversight of Largest Banks and Systemically Important Non-Banks. On December 20, the Federal Reserve Board (FRB) released proposed rules related to supervision and regulation of (i) all U.S. bank holding companies with assets of $50 billion or more, and (ii) non-bank financial firms designated as systemically important by the Financial Stability Oversight Council. Sections 165 and 166 of the Dodd-Frank Act requires the FRB to develop a set of enhanced prudential standards for such firms. The resulting proposal addresses various areas, including: (i) risk-based capital and leverage requirements, (ii) liquidity requirements, (iii) stress tests, (iv) single-counterparty credit limits, and (v) early remediation requirements. The proposal also includes standards focusing on risk management and risk committee requirements, and debt-to-equity limits. Covered institutions would have a year from the date the rules are finalized to comply with the majority of the enhanced standards, but compliance with the stress test rules would be required immediately upon final adoption. As the proposal notes, Dodd-Frank authorizes the FRB to establish standards regarding contingent capital, public disclosures, and short-term debt limits; the FRB has chosen not to do so at this time, although it states that it will continue to consider promulgating such rules. The current proposal also does not address foreign banking organizations or savings and loan holding companies, but the FRB intends to issue rules regarding each of those types of institutions. The FRB set March 31, 2012 as the deadline for comments on the proposal. Click here for a copy of the FRB press release with a link to the proposed rule.

SEC Brings Enforcement Action Against Former Fannie Mae and Freddie Mac Executives. On December 16, the Securities and Exchange Commission (SEC) filed complaints against six former executives of Fannie Mae and Freddie Mac. The complaints allege that the former executives violated the Securities Exchange Act and misled investors by causing their firms to materially misstate company holdings of subprime mortgage loans. The Fannie Mae executives also are alleged to have materially misstated Fannie Mae's holding of Alt-A mortgages. The SEC is seeking civil penalties, disgorgement, injunctive relief, and officer and director bars against the six individuals. The SEC noted that Fannie Mae and Freddie Mac executed Non-Prosecution Agreements with the SEC, pursuant to which the firms accepted responsibility for their conduct without admitting or denying liability and agreed to cooperate with the SEC's litigation against former executives. Click here for a copy of the SEC press release with links to the complaints.

SEC Appeals District Court Decision to Reject Citigroup MBS Settlement. On December 15, the SEC filed an appeal of the Southern District of New York's recent decision to deny a consent judgment between the SEC and Citigroup to resolve a mortgage-backed securities fraud suit. (See *InfoBytes* December 2, 2011.) The District Court held that because the consent judgment did not include an admission of wrongdoing, the agreement would deprive the public "of ever knowing the truth in a matter of obvious public importance." In announcing the appeal, SEC Director of the Division of Enforcement Robert Kuhzami stated that "the district court committed legal error by announcing a new and unprecedented standard that inadvertently harms investors by depriving them of substantial, certain and immediate benefits." The SEC argues that the new standard will require it to take more cases to trial, even when a settlement would recover the majority of the funds the SEC

might recover at trial and would preserve the rights of investors to pursue their own claims for relief. Click here for a copy of the SEC press release with a link to the notice of appeal.

House Committee to Review SEC Settlement Practices. On December 16, the House Financial Services Committee announced that it will hold a hearing in 2012 to examine the SEC's practice of entering into agreements without requiring admission or denial of wrongdoing. The Chairman and Ranking Member of the Committee jointly announced the hearing and raised concerns with the SEC's practice. For a copy of the Committee's announcement, click here.

Lawmakers Urge DOJ to Investigate SCRA Violations and to Not Release SCRA Claims in Potential Servicer Settlement. On December 21, Congressmen Brad Miller and Walter Jones of North Carolina released a letter they sent to Attorney General Eric Holder imploring the DOJ to vigorously investigate and prosecute potential violations of the Servicemembers Civil Relief Act (SCRA). The lawmakers further asked that the Attorney General not release SCRA claims in any settlement between state attorneys general, federal agencies, and mortgage servicers regarding improper foreclosure practices. For a copy of the press release with a link to the Congressmen's letter, please click here.

Freddie Mac Updates Mortgage and Appraisal Requirements. On December 16, Freddie Mac issued Bulletin 2011-25 to announce updates to its Single-Family Seller/Servicer Guide. Effective immediately, mortgage eligibility and credit underwriting requirements are updated for (i) mortgages used to pay off balances under land contracts or contracts for deeds, and (ii) cash-out refinance mortgages. The Guide also includes property eligibility and appraisal requirements, effective April 1, 2012, that (i) require the use of specific appraisal forms, (ii) provide guidance on reconciling multiple opinions on market values, and (iii) update language in the Guide to provide consistency with the Uniform Standards of Professional Appraisal Practice. Freddie Mac further updated the Guide to reflect the 2012 base conforming loan limits and maximum loan limits for mortgages secured by properties in designated high-cost areas. The Bulletin also contained a reminder, originally set forth in an August 12, 2011 Industry Letter and Bulletin 2011-23, regarding increased mortgage insurer rescissions, cancellations, and denials of coverage of Freddie Mac mortgages, and the possibility that such actions by mortgage insurers will result in Freddie Mac repurchase demands. Click here for a copy of the Bulletin.

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VA Publishes Final Rule on Mortgage Modifications. On December 20, the Department of Veterans Affairs (VA) published a final rule designed to loosen loan modification requirements and

broaden options for helping veterans avoid foreclosure. The final rule follows and modifies an interim final rule published in February 2011. Under the final rule, the maximum interest rate allowable on a modified loan is determined as of the date the modification is approved, as opposed to the date the modification is executed. The final rule also (i) authorizes actually incurred foreclosure costs to be capitalized into a modified loan balance, and (ii) provides clarification as to when the holder of a loan may seek VA approval for a modification. Click here for a copy of the VA's final rule.

FTC Announces Personnel and Organizational Changes to the Bureau of Consumer Protection. On December 20, the Federal Trade Commission (FTC) announced that, as of January 9, 2012, Jessica Rich will become Associate Director and head of the Bureau of Consumer Protection's Division of Financial Practices. Ms. Rich currently is the Deputy Director of the Bureau of Consumer Protection and has held a variety of positions at the FTC for over twenty years, including leadership positions in the Division of Privacy and Identity Protection. The FTC also announced that the Bureau of Consumer Protection's Mobile Team will move to the Division of Financial Practices in support of the FTC's increased focus on mobile commerce and mobile payment systems. Click here for a copy of the FTC announcement.

CFPB Continues Republishing Regulations Transferred to the Bureau. This past week, the Consumer Financial Protection Bureau (CFPB) continued republishing regulations transferred to it pursuant to the Dodd-Frank Act. This week's regulations, which are republished as interim final rules with effective dates of December 30, 2011 include, among others: (i) Regulation F, implementing the Fair Debt Collection Practices Act, (ii) Regulation C, implementing the Home Mortgage Disclosure Act, (iii) Regulations G and H, implementing the S.A.F.E. Mortgage Licensing Act, (iv) Regulation X, implementing the Real Estate Settlement Procedures Act, (v) Regulation B, implementing the Equal Credit Opportunity Act (ECOA), (vi) Regulation V, implementing the Fair Credit Reporting Act, and (vii) Regulation Z, implementing the Truth in Lending Act. In republishing these regulations the CFPB is making only technical changes and does not intend to alter any substantive requirements. Some rules, however, may provide insight into future CFPB activities. For example, in republishing Regulation B (ECOA), the CFPB notes that it plans to amend that regulation to implement certain changes required by the Dodd-Frank Act, including the addition of small business loan data collection and changes to consumers' right to a copy of an appraisal. The CFPB may also increase the duration of the regulation's record-keeping requirement, given that Dodd-Frank extended the statute of limitations for ECOA liability. The public is permitted to submit comments on all of the republished regulations. Click here for copies of the interim final rules.

FinCEN Assesses Civil Money Penalty for Willful SAR Disclosure. On December 15, the Financial Crimes Enforcement Network (FinCEN) announced a $25,000 civil money penalty against a former bank employee for willfully disclosing the existence of a Suspicious Activity Report (SAR) to the subject of the report, in violation of the Bank Secrecy Act. The bank employee was previously found by a California federal court to have solicited and accepted bribes from the subject of the SAR in return for assisting the subject with a bank investigation and possible federal criminal investigation. Click here for a copy of the FinCEN announcement with a link to the assessment.

inCEN Issues SARs Advisory Related to Account Takeover Activity. On December 19, the FinCEN issued an Advisory to aid financial institutions with identifying account takeover activity and filing SARs. The Advisory notes that cybercriminals increasingly obtain access to customer accounts by using methods such as malware, spyware, Trojans, and worms. The Advisory states that financial institutions can employ ongoing account monitoring to identify irregular account activity-such as unusual ATM activity, clustered Automated Clearing House transactions in different geographic areas, sudden wire transfers, or changes to customer and account profiles-that can indicate an illegal account takeover. FinCEN reminds financial institutions that filing a SAR might be required once account takeover activity is identified, and provides instructions for filing SARs regarding such activity. Click here for a copy of the Advisory.

FinCEN Delays New Form Requirements. On December 20, FinCEN announced that it is delaying mandatory use of new SAR and Currency Transaction Report forms until March 31, 2013. FinCEN noted that it is extending the deadline in response to industry concerns that institutions do not have sufficient time to transition to the new reports, including by changing internal processes and IT systems. FinCEN stated that it will make the new forms available for use before March 31, 2013, and that it will continue to accept both "legacy" forms and the new forms until that date. Click here for a copy of the FinCEN announcement.

Bank Regulators Announce 2012 CRA Asset-Size Threshold Adjustments. On December 19, the Federal Reserve Board, the Office of Comptroller of the Currency, and the Federal Deposit Insurance Corporation jointly announced the adjusted thresholds for asset size used to define small and intermediate small banks and savings associations under the Community Reinvestment Act. Effective January 1, 2012, a small bank or savings association will mean an institution that, as of December 31 of either of the past two years, had assets of less than $1.160 billion. An intermediate small bank or savings association will mean an institution with assets of at least $290 million as of December 31 of both of the prior two years, and less than $1.160 billion as of December 31 of either of the prior two years. Click here for the joint announcement.

State Issues

California Petitions Court to Force Fannie Mae and Freddie Mac to Cooperate with Mortgage-Related Investigations. On December 20, the California Attorney General (AG) filed separate lawsuits against Fannie Mae and Freddie Mac (the GSEs) seeking to force those entities to cooperate with the AG's effort to investigate mortgage-related activities, including the GSEs' management of real estate owned properties. Last month, the AG's office sought information and documents related to, among other matters, whether: (i) foreclosed properties owned by the GSEs present health, safety, and social welfare concerns, (ii) borrowers, including members of the California National Guard, were illegally foreclosed upon, and (iii) the marketing or sale of securities issued by the GSEs violated California's securities laws. The petitions allege, however, that the GSEs, at the direction of their conservator, the Federal Housing Finance Agency (FHFA), refuse to respond to the extensive set of investigative interrogatories because the FHFA (i) objects to the interrogatories for being vague, ambiguous, and overly broad, and (ii) contends that FHFA has exclusive authority under

federal law to regulate the GSEs. The AG seeks a court ordering requiring the GSEs to appear before the court to show cause for why they refused to comply with the interrogatories.

For a copy of the Fannie Mae petition, please click here; for the Freddie Mac petition, please click here.

Nevada AG Files Mortgage-Related Consumer Fraud Suit. On December 15, the Nevada Attorney General filed suit against default mortgage service company Lender Processing Services, Inc., alleging foreclosure-related violations of the Nevada Deceptive Trade Practices Act, including so-called robo-signing activities. The suit alleges that the firm and its subsidiaries (i) notarized more than 4,000 documents per day, often without ensuring that the notary was in the presence of the person signing the document, (ii) falsified, forged, or fraudulently executed foreclosure documents and signatures, (iii) misrepresented the scope and severity of the document execution fraud, (iv) exercised improper oversight over foreclosure attorneys and the foreclosure process, and (v) misrepresented fees and services. Click here for a copy of the Attorney General's press release with a link to the complaint.

Courts

Federal Court of Appeals Finds That Victims of a Data Breach Lack Standing Because They Did Not Suffer Actual Injuries. On December 12, the U.S. Court of Appeals for the Third Circuit found that victims of a data breach lacked standing when they alleged threatened harm from data misuse without showing actual injury. *Reilly v. Ceridian Corp.*, No. 11-1738, 2011 WL 6144191 (3d Cir. Dec. 12, 2011). The plaintiffs were employees of a law firm whose payroll was administered by the defendant when hackers infiltrated the defendant's system and potentially gained access to the plaintiffs' personal and financial information. The court found that the plaintiffs' "hypothetical speculation" that the hackers intended to use the plaintiffs' personal information to commit future criminal acts did not satisfy the Article III requirement that threatened injury be "imminent" and "certainly impending." The court held that until such conjectures become true, there had been no misuse of the plaintiffs' information and no harm suffered by the plaintiffs. The court further concluded that the plaintiffs' prophylactic purchase of account monitoring services reflected costs to detect speculative and hypothetical future events or acts, and were not costs incurred due to actual injury. Therefore, these costs were insufficient to confer Article III standing. In making its holding, the court rejected recent decisions from the Seventh and Ninth Circuits that found standing in situations involving data breaches.

Click here for a copy of the opinion.

Federal Court of Appeals Finds that Lender Did Not Violate TILA in Its Choice of Model Form. On December 14, the U.S. District Court for the Fourth Circuit upheld a district court's dismissal of a suit brought against a lender for using Truth in Lending Act (TILA) Model Form H-8 in a refinance. *Watkins v. SunTrust Mortgage, Inc.*, No. 10-1915, 2011 WL 6188751 (4th Cir. Dec. 14, 2011). The borrower argued that Form H-8 is for use only with new loans, and that the lender was permitted only to use Model Form H-9 for a refinancing loan. The borrower alleged that the failure to provide the

correct form constituted a material violation of TILA because Form H-8 did not provide the borrower with adequate notice of his right to rescind. Citing prior decisions in the First, Sixth, and Eleventh circuits, the Fourth Circuit upheld the district court's dismissal and found that Form H-8 includes all the notice information required by TILA and Regulation Z. The court further found that "nothing in TILA requires a lender specifically to advise the borrower of the specific 'effects' of rescinding a mortgage refinancing, as distinct from rescinding an initial mortgage financing." Click here for a copy of the opinion.

California Court Refuses to Certify Class Against Payday Lenders. Recently, the U.S. District Court for the Southern District of California denied a motion for class certification by a putative class of Spanish-speaking borrowers in a suit brought against payday lenders. *Stone v. Advance America, Cash Advance Centers, Inc.*, No. 08-1549, 2011 WL 6151636 (S.D. Cal. Dec. 12, 2011). Plaintiffs allege, among other things, that the lenders violated the California Deferred Deposit Transaction Law by failing to disclose borrower rights and written loan agreements in Spanish, the language that the borrowers allegedly principally used during loan negotiations. Relying on the U.S. Supreme Court's decision earlier this year in *Wal-Mart v. Dukes*, 131 S. Ct. 241 (2011), the district court held that the proposed class does not satisfy the commonality element required to certify a class of plaintiffs under Federal Rule of Civil Procedure 23(a)(1)(2). The court found that the dissimilarities in the proposed class "'impeded the generation of common answers'" because evaluating whether Spanish was principally used would require determining on a case-by-case basis each potential class member's use of Spanish during the loan process. The court concluded that such an inquiry is necessarily fact intensive and not conducive to class treatment. Please click here for a copy of the court's opinion.

Miscellany

Draft European Commission Regulation Regarding General Data Protection Circulated. Recently, a European Commission draft General Data Protection Regulation governing consumer protection with respect to the processing and free movement of personal data was unofficially released. The proposal is meant to update the existing rules governing these issues as rapid technological developments have brought new challenges. The numerous provisions in the draft General Data Protection Regulation include (i) alteration of the definition of "consent" by requiring consent to be "explicit," (ii) the right to data portability, (iii) "the right to be forgotten and to erasure," (iv) a requirement to notify a data breach subject within 24 hours of the breach, and (v) requirements for large enterprises to designate a data protection officer. This regulation is still in draft form; the final document, due in January 2012, might diverge from the proposal.

For a copy of the draft General Data Protection Regulation, please click here.

Firm News

Donna Wilson will be participating as a panelist at the Round Table on 2011-2012 Legal Developments and Trends for the Retail and Fashion Industries on January 19, 2012 in New York, New York.

James Parkinson will be speaking at the Activist Investor Conference on January 23-24, 2012 in New York, on a panel entitled "Activism in China: Understanding Foreign Corrupt Practices Act (FCPA) Enforcement."

Benjamin Klubes will be participating on a panel addressing fair lending enforcement legal theories at the Mortgage Bankers Association Fair Lending Workshop on January 24, 2012 in Washington, DC.

James Parkinson will be speaking on a panel at the ACI Latin America Summit on Anti-Corruption held in Sao Paulo, Brazil on February 8, 2012. The panel is entitled: "Assessing the Risk of Personal Liability in Bribery Investigations."

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

Donna Wilson will be speaking at the ABA Section of Litigation Insurance Coverage CLE Seminar held at the Loews Ventana Canyon Resort in Tucson, Arizona from March 1-3, 2012. Ms. Wilson will be representing the defense counsel perspective in a plenary session panel entitled "The Credit Crisis and D&O Insurance Coverage: Challenges facing Insureds, Insurers, and Regulators" on March 1 from 1:00 PM to 2:10 PM.

Andrew Sandler will be speaking at PLI's A Guide to Financial Institutions 2012 Program in New York on March 6, 2012 at 4:00 PM in a session entitled "The New Era of Consumer Protection & Enforcement: The CFPB & Other Initiatives."

James Parkinson will be chairing a panel at the International Bar Association's 10th Annual Anti-Corruption Conference in Paris, France on March 13 and 14, 2012. The panel is entitled: "The Privileged Profession: Risks faced by legal professionals advising in international transactions."

James Parkinson will be speaking at a PLI program seminar entitled "Foreign Corrupt Practices Act 2012" in San Francisco, California on April 17, 2012 and in New York, New York on May 4, 2012.

Firm Publications

Donna Wilson published an article entitled "1st Circuit Decision Could Bring a New Dawn for Plaintiffs or Doom History to Repeat Itself" in *InsideCounsel* on December 22, 2011. The article reviews recent privacy class action court decisions, including a decision by the First Circuit Court of Appeals which may improve plaintiffs' ability to proceed past the motion to dismiss stage in litigation arising out of data security breaches, even absent actual theft or misuse of customers' data by a third party. Click here for the full article.

Mortgages

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Banking

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FinCEN Issues SARs Advisory Related to Account Takeover Activity. On December 19, the FinCEN issued an Advisory to aid financial institutions with identifying account takeover activity and filing SARs. The Advisory notes that cybercriminals increasingly obtain access to customer accounts by using methods such as malware, spyware, Trojans, and worms. The Advisory states that financial institutions can employ ongoing account monitoring to identify irregular account activity-such as unusual ATM activity, clustered Automated Clearing House transactions in different geographic areas, sudden wire transfers, or changes to customer and account profiles-that can indicate an illegal account takeover. FinCEN reminds financial institutions that filing a SAR might be required once account takeover activity is identified, and provides instructions for filing SARs regarding such activity. Click here for a copy of the Advisory.

FinCEN Delays New Form Requirements. On December 20, FinCEN announced that it is delaying mandatory use of new SAR and Currency Transaction Report forms until March 31, 2013. FinCEN noted that it is extending the deadline in response to industry concerns that institutions do not have sufficient time to transition to the new reports, including by changing internal processes and IT systems. FinCEN stated that it will make the new forms available for use before March 31, 2013, and that it will continue to accept both "legacy" forms and the new forms until that date. Click here for a copy of the FinCEN announcement.

Bank Regulators Announce 2012 CRA Asset-Size Threshold Adjustments. On December 19, the Federal Reserve Board, the Office of Comptroller of the Currency, and the Federal Deposit Insurance Corporation jointly announced the adjusted thresholds for asset size used to define small and intermediate small banks and savings associations under the Community Reinvestment Act. Effective January 1, 2012, a small bank or savings association will mean an institution that, as of December 31 of either of the past two years, had assets of less than $1.160 billion. An intermediate small bank or savings association will mean an institution with assets of at least $290 million as of December 31 of both of the prior two years, and less than $1.160 billion as of December 31 of either of the prior two years. Click here for the joint announcement.

Consumer Finance

FTC Announces Personnel and Organizational Changes to the Bureau of Consumer Protection. On December 20, the Federal Trade Commission (FTC) announced that, as of January 9, 2012, Jessica Rich will become Associate Director and head of the Bureau of Consumer Protection's Division of Financial Practices. Ms. Rich currently is the Deputy Director of the Bureau of Consumer Protection and has held a variety of positions at the FTC for over twenty years, including leadership positions in the Division of Privacy and Identity Protection. The FTC also announced that the Bureau of Consumer Protection's Mobile Team will move to the Division of Financial Practices in support of the FTC's increased focus on mobile commerce and mobile payment systems.

Click here for a copy of the FTC announcement.

CFPB Continues Republishing Regulations Transferred to the Bureau. This past week, the Consumer Financial Protection Bureau (CFPB) continued republishing regulations transferred to it pursuant to the Dodd-Frank Act. This week's regulations, which are republished as interim final rules with effective dates of December 30, 2011 include, among others: (i) Regulation F, implementing the Fair Debt Collection Practices Act, (ii) Regulation C, implementing the Home Mortgage Disclosure Act, (iii) Regulations G and H, implementing the S.A.F.E. Mortgage Licensing Act, (iv) Regulation X, implementing the Real Estate Settlement Procedures Act, (v) Regulation B, implementing the Equal Credit Opportunity Act (ECOA), (vi) Regulation V, implementing the Fair Credit Reporting Act, and (vii) Regulation Z, implementing the Truth in Lending Act. In republishing these regulations the CFPB is making only technical changes and does not intend to alter any substantive requirements. Some rules, however, may provide insight into future CFPB activities. For example, in republishing Regulation B (ECOA), the CFPB notes that it plans to amend that regulation to implement certain changes required by the Dodd-Frank Act, including the addition of small business loan data collection and changes to consumers' right to a copy of an appraisal. The CFPB may also increase the duration of the regulation's record-keeping requirement, given that Dodd-Frank extended the statute of limitations for ECOA liability. The public is permitted to submit comments on all of the republished regulations. Click here for copies of the interim final rules.

California Court Refuses to Certify Class Against Payday Lenders. Recently, the U.S. District Court for the Southern District of California denied a motion for class certification by a putative class of Spanish-speaking borrowers in a suit brought against payday lenders. *Stone v. Advance America, Cash Advance Centers, Inc.*, No. 08-1549, 2011 WL 6151636 (S.D. Cal. Dec. 12, 2011). Plaintiffs allege, among other things, that the lenders violated the California Deferred Deposit Transaction Law by failing to disclose borrower rights and written loan agreements in Spanish, the language that the borrowers allegedly principally used during loan negotiations. Relying on the U.S. Supreme Court's decision earlier this year in *Wal-Mart v. Dukes*, 131 S. Ct. 241 (2011), the district court held that the proposed class does not satisfy the commonality element required to certify a class of plaintiffs under Federal Rule of Civil Procedure 23(a)(1)(2). The court found that the dissimilarities in the proposed class "'impeded the generation of common answers'" because evaluating whether Spanish was principally used would require determining on a case-by-case basis each potential class member's

use of Spanish during the loan process. The court concluded that such an inquiry is necessarily fact intensive and not conducive to class treatment. Please click here for a copy of the court's opinion.

Securities

SEC Brings Enforcement Action Against Former Fannie Mae and Freddie Mac Executives. On December 16, the Securities and Exchange Commission (SEC) filed complaints against six former executives of Fannie Mae and Freddie Mac. The complaints allege that the former executives violated the Securities Exchange Act and misled investors by causing their firms to materially misstate company holdings of subprime mortgage loans. The Fannie Mae executives also are alleged to have materially misstated Fannie Mae's holding of Alt-A mortgages. The SEC is seeking civil penalties, disgorgement, injunctive relief, and officer and director bars against the six individuals. The SEC noted that Fannie Mae and Freddie Mac executed Non-Prosecution Agreements with the SEC, pursuant to which the firms accepted responsibility for their conduct without admitting or denying liability and agreed to cooperate with the SEC's litigation against former executives.

Click here for a copy of the SEC press release with links to the complaints.

SEC Appeals District Court Decision to Reject Citigroup MBS Settlement. On December 15, the SEC filed an appeal of the Southern District of New York's recent decision to deny a consent judgment between the SEC and Citigroup to resolve a mortgage-backed securities fraud suit. (See *InfoBytes* December 2, 2011.) The District Court held that because the consent judgment did not include an admission of wrongdoing, the agreement would deprive the public "of ever knowing the truth in a matter of obvious public importance." In announcing the appeal, SEC Director of the Division of Enforcement Robert Kuhzami stated that "the district court committed legal error by announcing a new and unprecedented standard that inadvertently harms investors by depriving them of substantial, certain and immediate benefits." The SEC argues that the new standard will require it to take more cases to trial, even when a settlement would recover the majority of the funds the SEC might recover at trial and would preserve the rights of investors to pursue their own claims for relief. Click here for a copy of the SEC press release with a link to the notice of appeal.

House Committee to Review SEC Settlement Practices. On December 16, the House Financial Services Committee announced that it will hold a hearing in 2012 to examine the SEC's practice of entering into agreements without requiring admission or denial of wrongdoing. The Chairman and Ranking Member of the Committee jointly announced the hearing and raised concerns with the SEC's practice. For a copy of the Committee's announcement, click here.

Privacy/Data Security

Federal Court of Appeals Finds That Victims of a Data Breach Lack Standing Because They Did Not Suffer Actual Injuries. On December 12, the U.S. Court of Appeals for the Third Circuit found that victims of a data breach lacked standing when they alleged threatened harm from data misuse without showing actual injury. *Reilly v. Ceridian Corp.*, No. 11-1738, 2011 WL 6144191 (3d Cir. Dec. 12, 2011). The plaintiffs were employees of a law firm whose payroll was administered by

the defendant when hackers infiltrated the defendant's system and potentially gained access to the plaintiffs' personal and financial information. The court found that the plaintiffs' "hypothetical speculation" that the hackers intended to use the plaintiffs' personal information to commit future criminal acts did not satisfy the Article III requirement that threatened injury be "imminent" and "certainly impending." The court held that until such conjectures become true, there had been no misuse of the plaintiffs' information and no harm suffered by the plaintiffs. The court further concluded that the plaintiffs' prophylactic purchase of account monitoring services reflected costs to detect speculative and hypothetical future events or acts, and were not costs incurred due to actual injury. Therefore, these costs were insufficient to confer Article III standing. In making its holding, the court rejected recent decisions from the Seventh and Ninth Circuits that found standing in situations involving data breaches.

Click here for a copy of the opinion.

Draft European Commission Regulation Regarding General Data Protection Circulated. Recently, a European Commission draft General Data Protection Regulation governing consumer protection with respect to the processing and free movement of personal data was unofficially released. The proposal is meant to update the existing rules governing these issues as rapid technological developments have brought new challenges. The numerous provisions in the draft General Data Protection Regulation include (i) alteration of the definition of "consent" by requiring consent to be "explicit," (ii) the right to data portability, (iii) "the right to be forgotten and to erasure," (iv) a requirement to notify a data breach subject within 24 hours of the breach, and (v) requirements for large enterprises to designate a data protection officer. This regulation is still in draft form; the final document, due in January 2012, might diverge from the proposal. For a copy of the draft General Data Protection Regulation, please click here.