THE REVIEW OF

BANKING & FINANCIAL SERVICES

A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS

Vol. 34 No. 12 December 2018

CYBER-SECURITY INSURANCE ISSUES IN MORTGAGE LENDING

Regulators and prosecutors are flexing their enforcement muscles in new and sometimes novel ways. New York officials have brought significant actions against non-US banks for violating US sanction regulations. The SEC and the CFTC have used expansive views of supervisor liability to extend failure-to-supervise charges beyond direct line supervisors. Federal officials are using FIRREA to bring civil charges against financial institutions instead of on their behalf. And the SEC is investigating potential FCPA violations by financial institutions in connection with sovereign wealth funds and hiring practices. The authors discuss these developments.

By Leslie C. Thorne *

Major data breaches make headlines on a near-weekly basis. These attacks are increasing in size and frequency for a number of reasons, but it all boils down to this: companies' and individuals' confidential data is valuable to hackers. Law, accounting, and financial firms have traditionally been high-value targets because they hold a large amount of sensitive client data. Mortgage lenders can be particularly vulnerable because large numbers of third parties transfer data in connection with the mortgage lending process. They can be particularly attractive to cyber-criminals because they possess more specific and comprehensive financial data on any given individual than almost any other single entity. To mitigate the risk and effect of cyber-attacks, lenders should take steps to prevent data breaches and mitigate the damage if one does occur. Because financial institutions and regulatory agencies have been on the forefront of cyber- security, the models and guidelines provided in that sector are helpful to any institution looking to develop or bolster its cyber-security planning.

Key to a mortgage lender's ability to protect itself is insurance. In addition to the direct financial losses a mortgage lender may itself face as a result of a breach or attack, it can also face catastrophic claims from all quarters: clients, shareholders, other banks, regulators, etc.

CYBER-SPECIFIC INSURANCE POLICIES

Losses stemming from claims and litigation after a breach can be substantial and go on for years. But insurance — and cyber-coverage in particular — allows lenders to shift a broad array of the attendant costs. Depending on the policy, cyber-insurance may comprehensively cover the wide range of losses causes by a breach: (1) forensic investigation and system restoration costs; (2) defense and indemnity costs associated with litigation resulting from the loss of personal information or other sensitive data; (3) defense costs and penalties associated with regulatory investigations; (4) notification costs and credit

* *LESLIE C. THORNE is a partner in the Austin office of Haynes and Boone, LLP. Her e-mail address is leslie.thorne@haynesboone.com.*