# InfoBytes

*November 25, 2011*

**Topics In This Issue**



## Federal Issues

**FRB Issues Final Rule Regarding Capital Plan Requirements for Top-Tier U.S. Bank Holding Companies**. On November 22, the Federal Reserve Board (FRB) released a final rule establishing annual capital plan requirements for U.S. bank holding companies with total consolidated assets of $50 billion or more (large U.S. bank holding companies or institutions). Under the final rule, which goes into effect December 30, each large U.S. bank holding company must draft a capital plan that contains (i) an assessment of its expected uses and sources of capital, (ii) a description of its process for assessing capital adequacy, (iii) a copy of its capital policy, and (iv) a discussion of any material changes to its business plan. Additionally, the rule requires that each institution evaluate each element of its plan under two scenarios, first assuming expected market conditions and next assuming stressed market conditions. Once the plan is complete, the FRB will review it to evaluate the institution's (i) capital adequacy, (ii) internal capital assessment processes, and (iii) capital distribution plan. Based upon the outcome of this evaluation, the FRB either will approve or reject the institution's capital plan. The rule's regulatory framework builds upon the Comprehensive Capital Analysis and Review (CCAR) program conducted by the FRB earlier this year. The FRB also issued two sets of instructions that outline procedures for the CCAR in 2012 (one set for institutions that participated in the 2011 CCAR program and another set for institutions that did not). Under these instructions, all large U.S. bank holding companies must submit a capital plan to the FRB by January 9, 2012. Click here for more information about the final rule.

**OCC Issues Interim Report on Implementation of Foreclosure-Related Consent Orders**. On November 22, the Office of Comptroller of the Currency (OCC) published an interim report summarizing the progress made by 12 OCC-regulated institutions in their efforts to comply with the April 13, 2011 consent orders issued by the OCC and the former Office of Thrift Supervision to address each institution's foreclosure practices. Principally, the report identifies the independent consultants retained by each institution to conduct the independent foreclosure reviews mandated by the orders, and outlines the processes by which the OCC and the independent consultants will

conduct the reviews. However, the report also summarizes actions taken by the institutions (i) to revise servicing processes and procedures, (ii) to improve oversight and management of third-party service providers and other agents, including MERS, (iii) to develop enhanced management information systems used in support of servicing and foreclosure activities, (iv) to implement adequate risk assessment and risk management plans, and (v) to establish compliance committees and robust compliance programs. Finally, the report indicates that the OCC expects all of the institutions to complete implementation of most of their new processes, policies, and enhanced controls during the first part of 2012. Click here for a copy of the OCC's report.

**Freddie Mac Announces Updates to Single-Family Seller/Servicer Guide**. On November 18, the Freddie Mac published Bulletin 2011-23, an update to its servicer requirements for single-family seller/servicers. Through the Bulletin, Freddie Mac announced that it has eliminated a requirement that borrowers who are more than 120 days delinquent must list their property for sale before they may be eligible for a deed-in-lieu of foreclosure. Additionally, the Bulletin clarifies several other servicer and servicing agent obligations, revises a number of servicing agent requirements, and provides an explanation of new forms 902, 902A, and 902SA, which are to be used by servicers and servicing agents to designate individuals authorized to use Freddie Mac's service loan application. The Bulletin also provides additional information regarding (i) short sale affidavit requirements, (ii) short payoff requirements, and (iii) the calculation of target payment and current monthly housing expense-to-income ratios for HAMP trial period plans when a mortgage is subject to an interest rate cap pursuant to the Servicemembers' Civil Relief Act. Finally, the bulletin provides guidance for sending late notices/reminders to borrowers and for contacting delinquent borrowers via telephone, and reiterates servicers' obligation to maintain mortgage insurance coverage for Freddie Mac's benefit. The Bulletin's guidance regarding short payoff requirements is effective January 1, 2012. All other guidance announced in the Bulletin is effective immediately. Click here for a copy of the Bulletin.

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next available business day. This change to Fannie Mae's guidance went into effect immediately. In a separate notice dated November 22, Fannie Mae also reminded servicers to report delinquency status codes and related information by the second business day of each month for all portfolio loans and MBS pool loans that are 30 days delinquent as of the end of the preceding month. While servicers are not required to do so until the March 2012 report, Fannie Mae is encouraging servicers to start with the December report. Click here for a copy of Fannie Mae's Servicing Guidance Announcement SVC-2011-21. Click here for the enterprise's reminder notice.

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**CFPB Seeks Comments on Collection of Information Regarding State Actions Pursuant to Dodd-Frank**. On November 21, the Consumer Financial Protection Bureau (CFPB) published a notice and request for comment regarding its planned information collection activities with regard to legal actions filed by state officials pursuant to authority granted in section 1042(a) of the Dodd-Frank Act. Under that section of the Act, state attorneys general and state regulators have authority to bring legal actions against certain financial institutions to enforce provisions of Title X of the Act, or regulations promulgated under that title. CFPB issued an interim final rule in July 2011 establishing the notification procedures regarding action taken, as required by section 1042(c) of the Act. In the current notice, CFPB notes that the burden of providing such information falls on the state entities pursuing legal action, and the CFPB does not expect to make such information publicly available unless it already is made available by the state official reporting the action. Still, the CFPB is asking the public to provide comment on a number related issues, such as whether the collection of such information will have "practical utility" and "is necessary for the proper performance of the Bureau." Click here for a copy of the *Federal Register* notice.

**FINRA Investigation Finds Misleading Marketing Materials and Insufficient Data Security Policies**. On November 22, the Financial Industry Regulatory Authority (FINRA) reported that it had fined Wells Investment Securities, Inc. (Wells), a dealer-manager and wholesaler (unrelated to Wells Fargo) responsible for the public offering of Wells Timberland Real Estate Investment Trust (REIT), for approving and distributing "advertising and sales materials containing misleading, unwarranted or exaggerated statements." Although Wells initially informed investors that it intended for the fund to qualify as a REIT, the FINRA investigation revealed 116 instances over the course of more than two years in which Wells failed to disclose that the fund was not, in fact, a REIT and, therefore, would not provide investors with tax benefits typically available to REIT investors. According to FINRA, Wells also provided misleading information about portfolio diversification and the fund's ability to make distributions and redemptions. During the course of the investigation, Wells also was found to have

lacked certain security measures to protect sensitive customer information and proprietary data appropriately. Click here for a copy of the FINRA release.

## Courts

**Illinois Court of Appeals Rejects TILA Right to Rescind Defense As Untimely Filed by One Day**. Recently, in *U.S. Bank National Association v. Manzo*, No. 06 CH12995, 2011 WL 5578914 (Ill. App. Ct. Nov. 10, 2011), the Illinois Court of Appeals affirmed the dismissal of the borrowers' counterclaim for rescission in a foreclosure action as untimely filed under the Truth in Lending Act (TILA), but remanded the counterclaim for damages. The borrowers filed their counterclaim for rescission under TILA § 1635(f) and for damages under TILA § 1640(e) three years and one day after entering into the loan agreement with the original lender. The appeals court found that multiple letters to the creditor and a leave to file a counterclaim filed within three years of loan origination stated only an intention to rescind in the future and not an affirmative rescission, and, thus, did not satisfy the three-year statute of repose imposed by TILA § 1635(f). The appeals court also rejected the borrowers' argument that the counterclaim for rescission fell within the exception in TILA § 1635(i)(3) as a right of rescission in recoupment under Illinois law. The appeals court remanded the counterclaim for damages under TILA § 1640(e), however, concluding that damages claims may be brought in recoupment pursuant to the Illinois Code of Civil Procedure after the one-year time limit expires for such claims. Click here for a copy of the court's opinion.

**Federal Court in California Denies Motion to Dismiss Loan Modification Putative Class Action, Based on Expanded Interpretation of Lenders' Obligations under Trial Modification Plans**. On November 17, a federal judge in California denied a servicer's motion to dismiss a putative class action alleging that the servicer wrongly rejected the borrower's mortgage modification application and improperly initiated foreclosure proceedings. The borrower identified as named plaintiff in *Gaudin v. Saxon Mortgage Services., Inc.*, No. 11-1663 RS (N.D. Cal. Nov. 17, 2011) contends that a trial modification plan provided to her by Saxon constituted a binding contract that required Saxon to evaluate plaintiff under the Home Affordable Modification Program (HAMP) and, if all conditions of the trial plan were satisfied, offer the borrower a permanent modification. In her original complaint, the borrower failed to aver that all conditions of the trial plan had been met, and the complaint was dismissed without prejudice. The borrower filed an amended complaint to correct the deficiency, but Saxon again moved to dismiss arguing that the trial plan only required Saxon to evaluate the borrower's eligibility for a modification, and did not require Saxon to offer a modification. In its decision on the instant motion to dismiss, the court held that the express language of the trial plan does not limit Saxon's obligation to only evaluating the borrower's eligibility. Instead, once Saxon provided the executed trial plan to the borrower, a permanent modification was contingent only on plaintiff satisfying the conditions of that plan. Finding that the borrower's amended complaint sufficiently pleads facts regarding satisfaction of the trial plan, the court denied Saxon's motion to dismiss the amended complaint. In doing so, the court also distinguished *Wright v. Bank of America, N.A.*, 2010 WL 2889117 (N.D. Cal. Jul. 22, 2010) and other such cases in which borrowers' claims were dismissed because HAMP does not allow borrowers to assert a third-party beneficiary claim for breach of contract under HAMP. Here, the court held the borrower is not arguing that Saxon

breached its obligations under HAMP, but rather is properly alleging breach of contract under the trial plan entered into between the borrower and the lender. Click here for a copy of the court's decision.

**Federal Court Permits State AGs to Intervene in BAC Settlement Dispute**. On November 18, the U.S. District Court for the Southern District of New York permitted the Attorneys General for New York and Delaware to intervene in an ongoing dispute over the fairness of a proposed $8.5 billion settlement between Bank of America and certain mortgage-backed securities investors. *Bank of New York Mellon v. Walnut Place LLC*, No. 1:11-cv-05988 (S.D.N.Y. Nov. 18, 2011). The case began in June 2011, when the trustee for several securitization trusts entered into an agreement with Bank of America Corp. and Countrywide Financial Corp., purporting to settle all claims against the two companies on behalf of 530 separate trusts. After the trustee filed an action to enforce the settlement (which was removed to federal court), the Delaware and New York Attorneys General sought to intervene. Over the objections of the trustee, the district court agreed that the two state Attorneys General could appropriately intervene to represent the interests of absent investors, adding that the Attorneys General also had "*parens patriae* standing" to preserve an "honest marketplace." The court further justified the interventions by noting that the case implicates "the vitality of the national securities markets." In granting the Attorneys' General motions to intervene, however, the court refused to consider any counterclaims from the AG intervenors until the Second Circuit reviewed the court's earlier decision on a motion for remand. Click here for a copy of the court's decision.

**Retailers Sue FRB Over Interchange Fee Rule**. On November 22, a group of retail organizations and two retailers filed suit in the U.S. District Court for the District of Columbia against the Federal Reserve Board (FRB) over the debit interchange transaction fee rule the FRB issued earlier this year. *Nat'l Ass'n of Convenience Stores, et al. v. Bd. of Governors of the Fed. Reserve*, No. 1:11-cv-02075 (D.D.C. Nov. 22, 2011). Under section 1075 of the Dodd-Frank Act, also known as the "Durbin Amendment," the FRB was required to "establish standards for assessing whether the amount of any interchange transaction fee . . . is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." The Act provided further direction to the FRB to distinguish between the "incremental cost incurred by an issuer" and other costs "not specific to a particular" transaction and avoid considering the latter costs in establishing the interchange fee standards. The retailers allege in their suit, among other things, that the FRB's final rule "vastly expand[ed] the categories of recoverable costs," resulting in a higher allowable interchange fee. Based on that alleged disregard of statutory direction, and other purported improper aspects of the rulemaking, the retailers argue that portions of the FRB rule violate the Administrative Procedure Act and, therefore, are invalid. Click here for a copy of the complaint.

**DOJ Files Suit against California Municipality and HOA for Discriminating against Families with Children**. On November 21, the Justice Department (DOJ) filed a lawsuit in Northern District of California against the City of Santa Rosa (Municipality) and a Homeowner's Association (HOA) alleging that the defendants discriminated against families with children in violation of the Fair Housing Act (FHA). The case arose after the HOA sought to restrict residency at the condominium complex to seniors 55 years and older and obtained a zoning restriction from the Municipality for that purpose. A short time thereafter, an owner of a portion of the condominiums leased apartments to several families with children. In response, the HOA sent a notice of violation and the Municipality

threatened enforcement measures against the owner, who then filed a complaint with the Department of Housing and Urban Development (HUD). HUD investigated the complaint and issued a charge of discrimination against the HOA and Municipality, ultimately referring the matter to the DOJ. Subsequently, the DOJ filed suit alleging that the Municipality and the HOA failed to take the necessary steps to qualify as a senior community under the FHA, and as a result, unlawfully denied housing to families with children. Click here for a copy of the DOJ's press release regarding the suit.

**DOJ Settles FHA Case in Missouri**. On November 21, the U.S. Department of Justice (DOJ) announced that it had settled a Fair Housing Act (FHA) case pending in the U.S. District Court for the Eastern District of Missouri. *U.S. v. Harris, et. al.*, No. 4:09-cv-01859 (Nov. 12, 2009). In Harris, the DOJ accused the defendants of violating the FHA through a pattern of sexual harassment, race and sex discrimination, retaliation, intimidation and coercion against tenants. Under the terms of the settlement agreement, the defendants agreed to pay a civil penalty to the DOJ, as well as monetary compensation to a group of tenants. In addition, the settlement agreement prohibits the defendants from engaging in any further discrimination and compels each of the corporate defendants (i) to adopt non-discrimination policies and (ii) to require their employees to attend fair housing training. The settlement agreement also prohibits one of the individual defendants from managing federally-subsidized housing properties. The lawsuit originally arose out of complaints filed with the Department of Housing and Urban Development (HUD). After investigating the complaints, HUD issued a charge of discrimination and referred the case to the DOJ. The DOJ's settlement agreement still awaits court approval. Click here for a copy of the DOJ's press release regarding the settlement.

## Firm News

### Please Join Us for a Complimentary Webinar: The CFPB in Focus: Where Are We Now and What Lies Ahead?

In this webinar, we will review the current status of the CFPB and its progress to date, including an overview of the scope of its powers, stated priorities, key staff, and the issuance of the CFPB's new Supervision and Examination Manual. We also will discuss the CFPB's enforcement powers: how it intends to enforce consumer protection laws, its plans to collaborate with other federal and state regulators, and concerns regarding how the CFPB will protect confidential data provided by industry in examination, enforcement, and other contexts. We will conclude by projecting what lies ahead for the CFPB, including enforcement of new UDAAP standards and powers in the absence of a confirmed Director. We'll share these valuable insights and more, so please be sure to join us.

Date: Thursday, December 8, 2011

Time: 2:00 - 3:15 PM ET

Click here to register: https://www1.gotomeeting.com/register/335580144

Presenters: Jeff Naimon, Jonice Gray Tucker, Lori Sommerfield.

**Donna Wilson** will be speaking in the Strafford Privacy Data Breach Class Action Webinar on Wednesday, December 7, from 1:00 to 2:30 PM EST/10:00 to 11:30 AM PST. Ms. Wilson's session is entitled: "Class Actions on Data Breach and Privacy on the Rise; Litigating Class Claims, Alleging and Challenging Damages, and Evaluating Insurance."

**David Baris**, **Sam Buffone**, and **Donna Wilson** will be hosting and presenting in an AABD complimentary webinar entitled "Legal Actions by the FDIC to Recover Losses of Failed Banks: The Potential Liability of Officers and Directors" on December 7, from 3:00 to 4:30 PM EST/12:00 to 1:30 PM PST. Joining Mr. Baris, Mr. Buffone, and Ms. Wilson will be Richard Osterman, head of the FDIC's Professional Liability Program.

**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 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.

## Mortgages

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of repose imposed by TILA § 1635(f). The appeals court also rejected the borrowers' argument that the counterclaim for rescission fell within the exception in TILA § 1635(i)(3) as a right of rescission in recoupment under Illinois law. The appeals court remanded the counterclaim for damages under TILA § 1640(e), however, concluding that damages claims may be brought in recoupment pursuant to the Illinois Code of Civil Procedure after the one-year time limit expires for such claims. Click here for a copy of the court's opinion.

**Federal Court in California Denies Motion to Dismiss Loan Modification Putative Class Action, Based on Expanded Interpretation of Lenders' Obligations under Trial Modification Plans**. On November 17, a federal judge in California denied a servicer's motion to dismiss a putative class action alleging that the servicer wrongly rejected the borrower's mortgage modification application and improperly initiated foreclosure proceedings. The borrower identified as named plaintiff in *Gaudin v. Saxon Mortgage Services., Inc.*, No. 11-1663 RS (N.D. Cal. Nov. 17, 2011) contends that a trial modification plan provided to her by Saxon constituted a binding contract that required Saxon to evaluate plaintiff under the Home Affordable Modification Program (HAMP) and, if all conditions of the trial plan were satisfied, offer the borrower a permanent modification. In her original complaint, the borrower failed to aver that all conditions of the trial plan had been met, and the complaint was dismissed without prejudice. The borrower filed an amended complaint to correct the deficiency, but Saxon again moved to dismiss arguing that the trial plan only required Saxon to evaluate the borrower's eligibility for a modification, and did not require Saxon to offer a modification. In its decision on the instant motion to dismiss, the court held that the express language of the trial plan does not limit Saxon's obligation to only evaluating the borrower's eligibility. Instead, once Saxon provided the executed trial plan to the borrower, a permanent modification was contingent only on plaintiff satisfying the conditions of that plan. Finding that the borrower's amended complaint sufficiently pleads facts regarding satisfaction of the trial plan, the court denied Saxon's motion to dismiss the amended complaint. In doing so, the court also distinguished *Wright v. Bank of America, N.A.*, 2010 WL 2889117 (N.D. Cal. Jul. 22, 2010) and other such cases in which borrowers' claims were dismissed because HAMP does not allow borrowers to assert a third-party beneficiary claim for breach of contract under HAMP. Here, the court held the borrower is not arguing that Saxon breached its obligations under HAMP, but rather is properly alleging breach of contract under the trial plan entered into between the borrower and the lender. Click here for a copy of the court's decision.

**Federal Court Permits State AGs to Intervene in BAC Settlement Dispute**. On November 18, the U.S. District Court for the Southern District of New York permitted the Attorneys General for New York and Delaware to intervene in an ongoing dispute over the fairness of a proposed $8.5 billion settlement between Bank of America and certain mortgage-backed securities investors. *Bank of New York Mellon v. Walnut Place LLC*, No. 1:11-cv-05988 (S.D.N.Y. Nov. 18, 2011). The case began in June 2011, when the trustee for several securitization trusts entered into an agreement with Bank of America Corp. and Countrywide Financial Corp., purporting to settle all claims against the two companies on behalf of 530 separate trusts. After the trustee filed an action to enforce the settlement (which was removed to federal court), the Delaware and New York Attorneys General sought to intervene. Over the objections of the trustee, the district court agreed that the two state Attorneys General could appropriately intervene to represent the interests of absent investors, adding that the Attorneys General also had "*parens patriae* standing" to preserve an "honest marketplace." The court

further justified the interventions by noting that the case implicates "the vitality of the national securities markets." In granting the Attorneys' General motions to intervene, however, the court refused to consider any counterclaims from the AG intervenors until the Second Circuit reviewed the court's earlier decision on a motion for remand. Click here for a copy of the court's decision.

**Retailers Sue FRB Over Interchange Fee Rule**. On November 22, a group of retail organizations and two retailers filed suit in the U.S. District Court for the District of Columbia against the Federal Reserve Board (FRB) over the debit interchange transaction fee rule the FRB issued earlier this year. *Nat'l Ass'n of Convenience Stores, et al. v. Bd. of Governors of the Fed. Reserve*, No. 1:11-cv-02075 (D.D.C. Nov. 22, 2011). Under section 1075 of the Dodd-Frank Act, also known as the "Durbin Amendment," the FRB was required to "establish standards for assessing whether the amount of any interchange transaction fee . . . is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." The Act provided further direction to the FRB to distinguish between the "incremental cost incurred by an issuer" and other costs "not specific to a particular" transaction and avoid considering the latter costs in establishing the interchange fee standards. The retailers allege in their suit, among other things, that the FRB's final rule "vastly expand[ed] the categories of recoverable costs," resulting in a higher allowable interchange fee. Based on that alleged disregard of statutory direction, and other purported improper aspects of the rulemaking, the retailers argue that portions of the FRB rule violate the Administrative Procedure Act and, therefore, are invalid. Click here for a copy of the complaint.

**DOJ Files Suit against California Municipality and HOA for Discriminating against Families with Children**. On November 21, the Justice Department (DOJ) filed a lawsuit in Northern District of California against the City of Santa Rosa (Municipality) and a Homeowner's Association (HOA) alleging that the defendants discriminated against families with children in violation of the Fair Housing Act (FHA). The case arose after the HOA sought to restrict residency at the condominium complex to seniors 55 years and older and obtained a zoning restriction from the Municipality for that purpose. A short time thereafter, an owner of a portion of the condominiums leased apartments to several families with children. In response, the HOA sent a notice of violation and the Municipality threatened enforcement measures against the owner, who then filed a complaint with the Department of Housing and Urban Development (HUD). HUD investigated the complaint and issued a charge of discrimination against the HOA and Municipality, ultimately referring the matter to the DOJ. Subsequently, the DOJ filed suit alleging that the Municipality and the HOA failed to take the necessary steps to qualify as a senior community under the FHA, and as a result, unlawfully denied housing to families with children. Click here for a copy of the DOJ's press release regarding the suit.

**DOJ Settles FHA Case in Missouri**. On November 21, the U.S. Department of Justice (DOJ) announced that it had settled a Fair Housing Act (FHA) case pending in the U.S. District Court for the Eastern District of Missouri. *U.S. v. Harris, et. al.*, No. 4:09-cv-01859 (Nov. 12, 2009). In Harris, the DOJ accused the defendants of violating the FHA through a pattern of sexual harassment, race and sex discrimination, retaliation, intimidation and coercion against tenants. Under the terms of the settlement agreement, the defendants agreed to pay a civil penalty to the DOJ, as well as monetary compensation to a group of tenants. In addition, the settlement agreement prohibits the defendants from engaging in any further discrimination and compels each of the corporate defendants (i) to adopt

non-discrimination policies and (ii) to require their employees to attend fair housing training. The settlement agreement also prohibits one of the individual defendants from managing federally-subsidized housing properties. The lawsuit originally arose out of complaints filed with the Department of Housing and Urban Development (HUD). After investigating the complaints, HUD issued a charge of discrimination and referred the case to the DOJ. The DOJ's settlement agreement still awaits court approval. Click here for a copy of the DOJ's press release regarding the settlement.