Buckley Sandler LLP

InfoBytes, June 24, 2011

Topics in this issue:

Federal Issues

Mortgage Loan Modification Business Must Pay Nearly $19 Million to Settle FTC Charges. On June 21, the Federal Trade Commission (FTC) issued a press release announcing that it had entered into a settlement agreement with First Universal Lending, a mortgage loan modification business, and its owners. In its complaint, the FTC alleged that the defendants deceived distressed homeowners by falsely claiming that the defendants would negotiate with lenders to modify the homeowners' mortgages. The FTC alleged that the defendants collected large up-front fees from homeowners, encouraged them to stop paying their mortgages, and then did little else to assist them. The suit was brought as part of Project Stolen Hope, a federal-state crackdown on foreclosure rescue and loan modification scams. The settlement agreement imposes a judgment of more than $18.8 million on the defendants (First Universal Lending and its owners) and orders them to cease engaging in the mortgage loan modification business. For a copy of the press release, please see http://www.ftc.gov/opa/2011/06/universal.shtm. For a copy of the final order, please see http://www.ftc.gov/os/caselist/0923130/110621firstuniversalstip.pdf.

FTC Finalizes Order Settling Charges of Deceptive Practices by Online Advertising Company. On June 17, the Federal Trade Commission (FTC) issued a press release announcing the unanimous approval of an order to settle allegations that Chitika, Inc. (Chitika), an online advertising company, engaged in deceptive practices by continuing to track consumers' online activities after consumers opted out of such tracking. Among other things, the final order (i) bars Chitika from misrepresenting the extent of its consumer data collection and the extent to which consumers can control the collection, use, or sharing of their data, (ii) requires a hyperlink on its website and mechanism to be provided to consumers to opt out of data collection and targeted advertising within 30 days after the date of service of the order, (iii) mandates that, within 90 days after the date of service of the order, every targeted ad include a hyperlink that directs consumers to an opt out mechanism

permitting the consumer to opt out for at least five years, and (iv) prohibits Chitika from using, disclosing, selling, renting, leasing, or transferring any information that can be associated with a Chitika user obtained prior to March 1, 2010. For a copy of the press release, please see http://www.ftc.gov/opa/2011/06/chitika.shtm. For a copy of the final order, please see http://www.ftc.gov/os/caselist/1023087/110617chitikado.pdf.

Senate and House Introduce Location Privacy Bills. On June 15, a bill was introduced in both the United States Senate and the United States House of Representatives setting forth limits on the use, access, and sale of geolocation information obtained from cell phones, laptops, and navigation devices by law enforcement and private entities. The Geolocational Privacy and Surveillance (GPS) Act of 2011 (S. 1212/H.R. 2168), introduced by Senator Wyden (D-OR) and Representative Chaffetz (R-UT) in their respective chambers, would prohibit wireless service providers from sharing a customer's geolocational information without the customer's consent. On June 16, Senator Franken (D-MN) introduced a similar GPS-related bill. The Location Privacy Protection Act of 2011 (S. 1223), co-sponsored by Senator Blumenthal (D-CT), would require wireless companies that obtain a customer's location from the customer's mobile device to get the customer's express consent before collecting location data and before sharing location data with third parties. For a copy of S. 1212, please see http://www.gpo.gov/fdsys/pkg/BILLS-112s1212is/pdf/BILLS-112s1212is.pdf. For a copy of H.R. 2168, please see http://www.gpo.gov/fdsys/pkg/BILLS-112hr2168ih/pdf/BILLS-112hr2168ih.pdf. For a copy of S. 1223, please see http://www.gpo.gov/fdsys/pkg/BILLS-112s1223is/pdf/BILLS-112s1223is.pdf.

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State Issues

Florida Governor Signs Law Clarifying the Validity of Electronically Recorded Real Property Instruments. On June 17, Florida Governor Rick Scott signed into law H.B. 951, which retroactively and prospectively ratifies the validity of electronic documents submitted to and accepted by a court clerk or county recorder for recordation, whether or not such documents were in strict compliance with the statutory and regulatory framework applicable to the submission or recording of electronic documents in effect at the time. The law provides that all such documents are deemed to provide constructive notice of ownership and encumbrances affecting a property. The law does not alter the duty of a court clerk or county recorder to comply with the Uniform Real Property Electronic Recording Act (URPERA) or any rules adopted by the Florida Department of State pursuant to URPERA. For a copy of H.B. 951, please see http://www.myfloridahouse.gov/Sections/Documents/loaddochb951.

Louisiana Provides Additional Exemptions from Mortgage Loan Originator Licensing Requirement. On June 21, Louisiana Governor Bobby Jindal signed into law H.B. 492, which exempts certain individuals that originate residential mortgage loans exclusively for one federally chartered depository institution from the mortgage loan originator licensing requirement set forth under the Louisiana S.A.F.E. Residential Mortgage Lending Act (the Act). To be eligible for the exemption, such individuals must also, among other things, (i) originate no more than five residential mortgage loans per calendar year, (ii) be contractually prohibited from soliciting, processing, negotiating, or placing a residential mortgage loan with a person other than the single federally chartered depository institution, (iii) enroll with the Louisiana Office of Financial Institutions as an individual who originates exclusively with a single federal depository institution until the time federal law or regulation requires such individuals to register with the Nationwide Mortgage Licensing System and Registry, and (iv) be sponsored by a life insurance company or

an affiliate of the company which is authorized to engage in business in Louisiana and which is licensed as a Louisiana mortgage loan broker or originator. The bill also exempts individuals employed by certain non-profit organizations approved by the Department of Housing and Urban Development from the Act's mortgage loan originator licensing requirement. Finally, the bill removes from the Act eligibility and filing requirements previously applicable to persons meeting the definition of registered mortgage loan originator. These provisions are effective immediately. For a copy of H.B. 492, please see http://www.legis.state.la.us/billdata/streamdocument.asp?did=758160.

Michigan Issues Letter Regarding Expiration of Mortgage Loan Originator Licensing Extension. On June 17, the Michigan Office of Financial and Insurance Regulation issued a letter reminding mortgage servicers that any employees that solely perform loan modification activities on the servicer's behalf must be licensed as mortgage loan originators in Michigan by July 31, 2011. According to the letter, such individuals who continue to engage in mortgage loan modification activities after July 31, 2011, without an approved Michigan mortgage loan originator license in place will be subject to regulatory enforcement action and appropriate penalties. For a copy of the letter, please see http://www.michigan.gov/documents/lara/Mortgage_Modifiers_MLO_License_Required_355891_7.pdf.

Oregon Provides Confidential Status to Mortgage Loan Documents Obtained During Licensee Examinations. Recently, Oregon Governor John Kitzhaber signed into law H.B. 2083, which amends the Oregon Mortgage Lender Law to provide confidential status to mortgage loan documents obtained by the Director of the Oregon Department of Consumer and Business Services as part of an examination. Effective immediately, any mortgage loan documents that the Director obtains during an examination of a mortgage banker, mortgage broker, or mortgage loan originator is not admissible as evidence in a private civil action or subject to (i) public inspection as a public record, (ii) subpoena, or (iii) discovery. However, the amendment permits the Director to disclose an individual's mortgage loan documents obtained during an examination to that individual, so long as the Director authenticates the individual's identity before disclosure. For a copy of H.B. 2083, please see http://www.leg.state.or.us/11reg/measpdf/hb2000.dir/hb2083.en.pdf.

Texas Prohibits Execution of Deeds Conveying Residential Real Estate in Certain Transactions. On June 17, Texas Governor Rick Perry signed into law S.B. 1320, which forbids a seller or a mortgagee in a residential real estate transaction, before or at the time of the conveyance of the residential real estate, from requesting or requiring the purchaser or mortgagor to execute and deliver a deed conveying the residential real estate to the seller or mortgagee (*i.e.*, a deed-in-lieu of foreclosure executed in advance so the lender can later avoid foreclosure). The law makes voidable a deed executed in violation of the law, unless a subsequent purchaser for value obtains an interest in the property after the deed was recorded, but without notice of the violation (including notice provided by actual possession of the property by the grantor of the deed). The law also establishes a statute of limitation and provides attorney's fees for an action to void a deed under the law. S.B. 1320 takes effect on September 1, 2011. For a copy of S.B. 1320, please see http://www.legis.state.tx.us/tlodocs/82R/billtext/pdf/SB01320F.pdf#navpanes=0.

Texas Adopts Provisions Regarding Criminal Prosecution of Mortgage Fraud. On June 17, Texas Governor Rick Perry signed into law S.B. 485, which adds an article to the Texas Code of Criminal Procedure to provide that offenses that are prosecuted as mortgage fraud may be brought in (i) the county in which the real estate is located, (ii) any county in which part of the transaction occurred, including the generation of documentation supporting the transaction, or (iii) any county authorized by Article 13.27, *i.e.*, any county in which any material document was

sent or any county in which any such material document was delivered. The amendment is effective September 1, 2011. For a copy of S.B. 485, please see http://www.legis.state.tx.us/tlodocs/82R/billtext/pdf/SB00485F.pdf#navpanes=0.

Texas Adds Military Disclosure Requirement to Foreclosure Notices. On June 17, Texas Governor Rick Perry signed into law S.B. 101, which requires certain foreclosure notices to now include a statement directed to active duty military servicemembers. The new requirement, which takes effect on September 1, 2011, requires both the notice of default and the notice of sale to include the name and address of the sender and conspicuous language advising the recipient that, if they or their spouse are serving on active military duty, they should immediately send written notice of such active duty military service to the sender of the notice at the addressed provided. For a copy of S.B. 101, please see http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00101F.pdf#navpanes=0.

Texas Governor Signs Residential Mortgage Loan Servicer Registration Act Into Law. On June 17, Texas Governor Rick Perry signed into law S.B. 17, the Residential Mortgage Loan Servicer Registration Act, which requires all residential mortgage loan servicers in Texas to register with the Commissioner of the Texas Department of Savings and Mortgage Lending (Commissioner). The registration requirement applies to both companies acting purely in a servicing capacity, as well as mortgage bankers acting as residential mortgage loan servicers. In addition to setting forth registration requirements, the law allows the Commissioner to investigate consumer complaints against registrants, impose an investigation fee to cover costs incurred in any such investigation, and order a non-compliant registrant to cease and desist and/or pay a consumer for damages. Additionally, no later than 30 days after commencing the servicing of a loan, registrants are required to provide borrowers with a specific notice that sets forth the Texas Department of Savings and Mortgage Lending's contact information for reference in registering complaints. S.B. 17 takes effect on September 1, 2011. For a copy of S.B. 17, please see http://www.legis.state.tx.us/tlodocs/82R/billtext/pdf/SB00017F.pdf#navpanes=0.

Texas Amends Requirements under Mortgage Broker License Act and Texas SAFE Act. On June 17, Texas Governor Rick Perry signed into law S.B. 1124, which amends the Texas Mortgage Broker License Act (now referred to as the Texas Residential Mortgage Loan Company and Residential Mortgage Loan Originator Licensing and Registration Act) to, among other things, replace the mortgage broker and loan officer licensing requirements with a residential mortgage loan company and residential mortgage loan originator licensing requirement, respectively. The bill defines "residential mortgage loan company" to include a credit union subsidiary organization, independent contractor loan processor or underwriter company, and financial services company, among others. Additionally, the bill amends the Act's exemption provisions, changes the period of time for which a license is valid, and revises reporting requirements triggered by certain licensee changes (e.g., change of qualified individual). Finally, the bill amends the Texas Secure and Fair Enforcement for Mortgage Licensing Act of 2009 to exempt certain individuals that originate residential mortgage loans exclusively for one federally chartered depository institution from the mortgage loan originator licensing requirement set forth under the Act. To be eligible for the exemption, such individuals must also, among other things, (i) originate no more than five residential mortgage loans in any 12-consecutive-month period, (ii) be contractually prohibited from soliciting, processing, negotiating, or placing a residential mortgage loan with a person other than the single federally chartered depository institution, (iii) enroll with the Texas Department of Savings and Mortgage Lending as a financial exclusive agent until the time federal law or regulation requires such individuals to register with the Nationwide Mortgage Licensing System and Registry, and (iv) be sponsored by a life insurance company or an affiliate of the company which is authorized to engage in business in Texas. For a copy of S.B. 1124, please see http://www.legis.state.tx.us/tlodocs/82R/billtext/pdf/SB01124F.pdf#navpanes=0.

Texas Passes Bill Targeting Debt Cancellation Agreements. On June 17, Texas Governor Rick Perry signed into law H.B. 2931, which adds a new subchapter to the Texas Finance Code (Code) relating to debt cancellation agreements made in connection with retail installment contracts that include insurance coverage as part of a retail buyer's responsibility to the holder. Among other things, the bill sets forth mandatory agreement provisions and requires all agreements to be submitted to the Texas Office of the Consumer Credit Commissioner for prior approval. The bill also enumerates requirements and restrictions applicable to the refunding of a debt cancellation agreement fee. H.B. 2931 takes effect on September 1, 2011. For a copy of H.B. 2931, please see http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB02931F.pdf#navpanes=0.

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Courts

Supreme Court Strikes Down Vermont Prescription Data Law. On June 23, the United States Supreme Court held that the Vermont Prescription Confidentiality Law (PCL) improperly restrains speech in violation of the First Amendment to the United States Constitution, which is likely to have impact on similar restrictions on use of financial information. *Sorrell v. IMS Health Inc.*, No. 10-779 (June 23, 2011). The PCL, absent a prescriber's consent, prohibits prescriber-identifying information from being (i) sold by pharmacies and similar entities, (ii) disclosed by pharmacies and similar entities for marketing purposes, or (iii) used for marketing purposes by pharmaceutical manufacturers. However, the PCL sets forth a number of exceptions to these prohibitions-for example, if the information is to be used for "health care research." Vermont enacted the PCL to, among other things, address pharmaceutical manufacturers' use of prescriber-identifying information to more effectively promote brand name drugs through sales representatives that meet with prescribers. The Court found that the provisions of the PCL under examination impose content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. In doing so, the Court emphasized that the law disfavors speech with a particular content (*i.e.* , marketing) and particular speakers (*i.e.*, the sales representatives), while allowing prescriber-identifying information to be purchased, acquired, and used for other types of speech and by other types of speakers. Therefore, the Court found that the PCL provisions are subject to heightened judicial scrutiny. Under such a standard, the PCL, in order to sustain its restriction on protected expression, would need to advance a substantial government interest and be drawn to achieve that interest. The Court found that while the PCL possibly advances a proper interest (*e.g.*, lowering healthcare costs and improving public health), it does not permissibly achieve such an interest, making the selling, sharing, and use limitations of the PCL unconstitutional. The decision, authored by Justice Kennedy and joined by five others, affirmed the Second Circuit's judgment. For a copy of the opinion, please see http://www.supremecourt.gov/opinions/10pdf/10-779.pdf.

Supreme Court to Hear RESPA Standing Appeal. On June 20, the United States Supreme Court granted a title insurer's petition for a writ of certiorari in a Real Estate Settlement Procedures Act (RESPA) kickback case. *First Am. Fin. Corp. v. Edwards*, Nos. 08-56536, 08-56538 (June 20, 2011). The Court limited its grant to resolve the question of whether the plaintiff-who alleged a kickback in connection with a settlement service for which she was charged without alleging that the kickback impacted the price or quality of the service that she purchased-lacked standing to sue because she had not suffered an "injury-in-fact." The petition was filed after the Ninth Circuit Court of Appeals, following the Third and Sixth Circuits, held that RESPA confers a statutory right of judicial relief that by itself provides the required injury-in-fact, even where

the plaintiff has not suffered an actual injury. The Court granted the petition notwithstanding a brief filed by the United States, which had been invited by the Court to express its views as Amicus Curiae, recommending that the Court deny the petition. For a copy of the amicus brief, please see http://www.justice.gov/osg/briefs/2010/2pet/6invit/2010-0708.pet.ami.inv.pdf.

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Firm News

Andrew Sandler and **Jonice Gray Tucker** will speak during an American Bar Association webinar on mortgage servicing issues on July 21 at 1:00 p.m. The webinar, which is entitled "Mortgage Servicing Under Fire: Regulatory, Litigation, and Enforcement Trends Stemming from the Foreclosure Crisis and More" will also feature Terry Goddard, the former Arizona Attorney General, as a speaker.

Andrew Sandler will be teaching the Litigation Strategy Session: Developing Strong Protocols, Admissible Documentation & Comprehensive Strategies in Order to Survive Regulatory Enforcement Actions & Litigation Workshop on July 26, in Chicago. This workshop precedes ACI's Consumer Finance Class Actions & Litigation Conference taking place on July 27-28 at the Sutton Place Hotel in Chicago.

Andrew Sandler will be speaking at the ACI's Consumer Finance Class Actions & Litigation Conference on July 28. Mr. Sandler's panel is: "Class Action Developments: What Recent Cases and Pending Policy Changes Mean for Your Litigation, Investigation and Settlement Strategies."

Jonice Gray Tucker will be moderating a panel focusing on Regulatory and Litigation Developments in Servicing at the California Mortgage Bankers' Servicing Conference on August 29 in Las Vegas.

Firm Publications

John Kromer and **Melissa Klimkiewicz** authored OCC Issues Proposed Rule to Implement Dodd-Frank Preemption, which was published in the June 22 issue of *Consumer Financial Services Law Report*.

David Baris authored Approving Loans Is a Risky Role for Bank Directors, which was published in the June 14 issue of *American Banker*.

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Miscellany

House Committees Request Documents Reflecting CFPB's Involvement in Mortgage Servicing Settlement Negotiations. On June 21, leaders of the Financial Services Committee and the Oversight and Government Reform Committee sent a letter to Treasury Secretary Timothy Geithner requesting documents relating to the Consumer Financial Protection Bureau's (CFPB) role in ongoing settlement negotiations between mortgage servicers and state and federal authorities in connection with allegations of irregularities in the foreclosure process. The letter

expresses concern about a lack of transparency and accountability at the CFPB and comes after Judicial Watch, a nonpartisan public interest group that investigates government corruption, uncovered e-mails, meeting minutes, and other records that show the CFPB has been involved in the negotiations. This is the latest attempt in an ongoing effort to get answers from the Treasury Department regarding the extent of CFPB's role in the negotiations. For a copy of the letter, please see http://financialservices.house.gov/UploadedFiles/06-20-11_STB-Issa-Capito-Garrett-Neugebauer-McHenry_letter_to_Geithner.pdf.

State Bank Settles Lending Discrimination Allegations with DOJ. On June 17, Nixon State Bank (Nixon) entered into a settlement agreement with the Department of Justice (DOJ) to resolve allegations of loan discrimination based on national origin against Hispanic borrowers, wherein Nixon agreed to establish uniform pricing policies, provide borrowers a notice of non-discrimination, conduct employee training, maintain a complaint resolution program, and pay $91,600 into a settlement fund to compensate affected persons. In its complaint, the DOJ alleged that, between at least 2007 and 2009, Nixon charged higher interest rates on unsecured consumer loans to Hispanic borrowers than to non-Hispanic borrowers in violation of the Equal Credit Opportunity Act. The DOJ further alleged that the higher interest rates charged to Hispanic borrowers for unsecured consumer loans were not justified by business necessity or legitimate business interests, and were a consequence of Nixon giving its employees broad discretion in handling all aspects of loan transactions without supervising or monitoring their performance to ensure compliance with fair lending laws. For a copy of the press release regarding the settlement, please see http://www.justice.gov/opa/pr/2011/June/11-crt-791.html. For a copy of the proposed consent order, please see http://www.stopfraud.gov/news/nixon-state-bank-unopposed-motion.pdf. For a copy of the complaint, please see http://www.stopfraud.gov/news/nixon-state-bank-complaint.pdf.

California Federal Court Sentences Loan Modification Fraud Defendant to 30 Months in Prison. On June 10, the United States Department of Justice issued a press release announcing that Michael Trap was sentenced to 30 months in prison (to be followed by three years of supervised release), after pleading guilty to money laundering and conspiracy to commit money laundering and wire fraud for his role in operating a fraudulent telemarketing scheme related to mortgage loan modifications. Trap was also ordered to pay $460,249 in restitution to the victims of the scheme. Trap admitted that he and several partners set up a company that fraudulently induced delinquent homeowners to purchase loan modification services from the company by falsely claiming, among other things, that the company's lawyers and forensic accountants would deal with banks' loss mitigation departments to procure loan modification agreements for the homeowners (the company did not employ any lawyers or forensic accountants) and that the company had a high loan modification success rate (the company did not have a high loan modification success rate). Over 300 homeowners paid over $900,000 in total funds to the company. Trap admitted that a partner and he used the customer funds to pay company expenses and their own compensation. Trap's partner was previously sentenced to 63 months in prison in connection with the scheme and tax offenses. The case was brought in coordination with the interagency Financial Fraud Enforcement Task Force. For a copy of the press release, please see http://www.stopfraud.gov/news/news-06102011-02.html.

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Mortgages

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Louisiana Provides Additional Exemptions from Mortgage Loan Originator Licensing Requirement. On June 21, Louisiana Governor Bobby Jindal signed into law H.B. 492, which exempts certain individuals that originate residential mortgage loans exclusively for one federally chartered depository institution from the mortgage loan originator licensing requirement set forth under the Louisiana S.A.F.E. Residential Mortgage Lending Act (the Act). To be eligible for the exemption, such individuals must also, among other things, (i) originate no more than five residential mortgage loans per calendar year, (ii) be contractually prohibited from soliciting, processing, negotiating, or placing a residential mortgage loan with a person other than the single federally chartered depository institution, (iii) enroll with the Louisiana Office of Financial Institutions as an individual who originates exclusively with a single federal depository institution until the time federal law or regulation requires such individuals to register with the Nationwide Mortgage Licensing System and Registry, and (iv) be sponsored by a life insurance company or an affiliate of the company which is authorized to engage in business in Louisiana and which is licensed as a Louisiana mortgage loan broker or originator. The bill also exempts individuals employed by certain non-profit organizations approved by the Department of Housing and Urban Development from the Act's mortgage loan originator licensing requirement. Finally, the bill removes from the Act eligibility and filing requirements previously applicable to persons meeting the definition of registered mortgage loan originator. These provisions are effective immediately. For a copy of H.B. 492, please see http://www.legis.state.la.us/billdata/streamdocument.asp?did=758160.

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Texas Amends Requirements under Mortgage Broker License Act and Texas SAFE Act. On June 17, Texas Governor Rick Perry signed into law S.B. 1124, which amends the Texas Mortgage Broker License Act (now referred to as the Texas Residential Mortgage Loan Company and Residential Mortgage Loan Originator Licensing and Registration Act) to, among other things, replace the mortgage broker and loan officer licensing requirements with a residential mortgage loan company and residential mortgage loan originator licensing requirement, respectively. The bill defines "residential mortgage loan company" to include a credit union subsidiary organization, independent contractor loan processor or underwriter company, and financial services company, among others. Additionally, the bill amends the Act's exemption provisions, changes the period of time for which a license is valid, and revises reporting requirements triggered by certain licensee changes (e.g., change of qualified individual). Finally, the bill amends the Texas Secure and Fair Enforcement for Mortgage Licensing Act of 2009 to exempt certain individuals that originate residential mortgage loans exclusively for one federally chartered depository institution from the mortgage loan originator licensing requirement set forth under the Act. To be eligible for the exemption, such individuals must also, among other things, (i) originate no more than five residential mortgage loans in any 12-consecutive-month period, (ii) be contractually prohibited from soliciting, processing, negotiating, or placing a residential mortgage loan with a person other than the single federally chartered depository institution, (iii) enroll with the Texas Department of Savings and Mortgage Lending as a financial exclusive agent until the time federal law or regulation requires such individuals to register with the Nationwide Mortgage Licensing System and Registry, and (iv) be sponsored by a life insurance company or an affiliate of the company which is authorized to engage in business in Texas. For a copy of S.B. 1124, please see http://www.legis.state.tx.us/tlodocs/82R/billtext/pdf/SB01124F.pdf#navpanes=0.

House Committees Request Documents Reflecting CFPB's Involvement in Mortgage Servicing Settlement Negotiations. On June 21, leaders of the Financial Services Committee and the Oversight and Government Reform Committee sent a letter to Treasury Secretary Timothy Geithner requesting documents relating to the Consumer Financial Protection Bureau's (CFPB) role in ongoing settlement negotiations between mortgage servicers and state and federal authorities in connection with allegations of irregularities in the foreclosure process. The letter expresses concern about a lack of transparency and accountability at the CFPB and comes after Judicial Watch, a nonpartisan public interest group that investigates government corruption, uncovered e-mails, meeting minutes, and other records that show the CFPB has been involved in the negotiations. This is the latest attempt in an ongoing effort to get answers from the Treasury Department regarding the extent of CFPB's role in the negotiations. For a copy of the letter, please see http://financialservices.house.gov/UploadedFiles/06-20-11_STB-Issa-Capito-Garrett-Neugebauer-McHenry_letter_to_Geithner.pdf.

State Bank Settles Lending Discrimination Allegations with DOJ. On June 17, Nixon State Bank (Nixon) entered into a settlement agreement with the Department of Justice (DOJ) to resolve allegations of loan discrimination based on national origin against Hispanic borrowers, wherein Nixon agreed to establish uniform pricing policies, provide borrowers a notice of non-discrimination, conduct employee training, maintain a complaint resolution program, and pay $91,600 into a settlement fund to compensate affected persons. In its complaint, the DOJ alleged that, between at least 2007 and 2009, Nixon charged higher interest rates on unsecured consumer loans to Hispanic borrowers than to non-Hispanic borrowers in violation of the Equal Credit Opportunity Act. The DOJ further alleged that the higher interest rates charged to Hispanic borrowers for unsecured consumer loans were not justified by business necessity or legitimate business interests, and were a consequence of Nixon

giving its employees broad discretion in handling all aspects of loan transactions without supervising or monitoring their performance to ensure compliance with fair lending laws. For a copy of the press release regarding the settlement, please see http://www.justice.gov/opa/pr/2011/June/11-crt-791.html. For a copy of the proposed consent order, please see http://www.stopfraud.gov/news/nixon-state-bank-unopposed-motion.pdf. For a copy of the complaint, please see http://www.stopfraud.gov/news/nixon-state-bank-complaint.pdf.

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Litigation

Supreme Court Strikes Down Vermont Prescription Data Law. On June 23, the United States Supreme Court held that the Vermont Prescription Confidentiality Law (PCL) improperly restrains speech in violation of the First Amendment to the United States Constitution, which is likely to have impact on similar restrictions on use of financial information. *Sorrell v. IMS Health Inc.*, No. 10-779 (June 23, 2011). The PCL, absent a prescriber's consent, prohibits prescriber-identifying information from being (i) sold by pharmacies and similar entities, (ii) disclosed by pharmacies and similar entities for marketing purposes, or (iii) used for marketing purposes by pharmaceutical manufacturers. However, the PCL sets forth a number of exceptions to these prohibitions-for example, if the information is to be used for "health care research." Vermont enacted the PCL to, among other things, address pharmaceutical manufacturers' use of prescriber-identifying information to more effectively promote brand name drugs through sales representatives that meet with prescribers. The Court found that the provisions of the PCL under examination impose content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. In doing so, the Court emphasized that the law disfavors speech with a particular content (*i.e.* , marketing) and particular speakers (*i.e.*, the sales representatives), while allowing prescriber-identifying information to be purchased, acquired, and used for other types of speech and by other types of speakers. Therefore, the Court found that the PCL provisions are subject to heightened judicial scrutiny. Under such a standard, the PCL, in order to sustain its restriction on protected expression, would need to advance a substantial government interest and be drawn to achieve that interest. The Court found that while the PCL possibly advances a proper interest (*e.g.*, lowering healthcare costs and improving public health), it does not permissibly achieve such an interest, making the selling, sharing, and use limitations of the PCL unconstitutional. The decision, authored by Justice Kennedy and joined by five others, affirmed the Second Circuit's judgment. For a copy of the opinion, please see http://www.supremecourt.gov/opinions/10pdf/10-779.pdf.

Supreme Court to Hear RESPA Standing Appeal. On June 20, the United States Supreme Court granted a title insurer's petition for a writ of certiorari in a Real Estate Settlement Procedures Act (RESPA) kickback case. *First Am. Fin. Corp. v. Edwards*, Nos. 08-56536, 08-56538 (June 20, 2011). The Court limited its grant to resolve the question of whether the plaintiff-who alleged a kickback in connection with a settlement service for which she was charged without alleging that the kickback impacted the price or quality of the service that she purchased-lacked standing to sue because she had not suffered an "injury-in-fact." The petition was filed after the Ninth Circuit Court of Appeals, following the Third and Sixth Circuits, held that RESPA confers a statutory right of judicial relief that by itself provides the required injury-in-fact, even where the plaintiff has not suffered an actual injury. The Court granted the petition notwithstanding a brief filed by the United States, which had been

invited by the Court to express its views as Amicus Curiae, recommending that the Court deny the petition. For a copy of the amicus brief, please see http://www.justice.gov/osg/briefs/2010/2pet/6invit/2010-0708.pet.ami.inv.pdf.

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E-Financial Services

Florida Governor Signs Law Clarifying the Validity of Electronically Recorded Real Property Instruments. On June 17, Florida Governor Rick Scott signed into law H.B. 951, which retroactively and prospectively ratifies the validity of electronic documents submitted to and accepted by a court clerk or county recorder for recordation, whether or not such documents were in strict compliance with the statutory and regulatory framework applicable to the submission or recording of electronic documents in effect at the time. The law provides that all such documents are deemed to provide constructive notice of ownership and encumbrances affecting a property. The law does not alter the duty of a court clerk or county recorder to comply with the Uniform Real Property Electronic Recording Act (URPERA) or any rules adopted by the Florida Department of State pursuant to URPERA. For a copy of H.B. 951, please see http://www.myfloridahouse.gov/Sections/Documents/loaddochb951.

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Privacy/Data Security

FTC Finalizes Order Settling Charges of Deceptive Practices by Online Advertising Company. On June 17, the Federal Trade Commission (FTC) issued a press release announcing the unanimous approval of an order to settle allegations that Chitika, Inc. (Chitika), an online advertising company, engaged in deceptive practices by continuing to track consumers' online activities after consumers opted out of such tracking. Among other things, the final order (i) bars Chitika from misrepresenting the extent of its consumer data collection and the extent to which consumers can control the collection, use, or sharing of their data, (ii) requires a hyperlink on its website and mechanism to be provided to consumers to opt out of data collection and targeted advertising within 30 days after the date of service of the order, (iii) mandates that, within 90 days after the date of service of the order, every targeted ad include a hyperlink that directs consumers to an opt out mechanism permitting the consumer to opt out for at least five years, and (iv) prohibits Chitika from using, disclosing, selling, renting, leasing, or transferring any information that can be associated with a Chitika user obtained prior to March 1, 2010. For a copy of the press release, please see http://www.ftc.gov/opa/2011/06/chitika.shtm. For a copy of the final order, please see http://www.ftc.gov/os/caselist/1023087/110617chitikado.pdf.

Senate and House Introduce Location Privacy Bills. On June 15, a bill was introduced in both the United States Senate and the United States House of Representatives setting forth limits on the use, access, and sale of geolocation information obtained from cell phones, laptops, and navigation devices by law enforcement and private entities. The Geolocational Privacy and Surveillance (GPS) Act of 2011 (S. 1212/H.R. 2168), introduced by Senator Wyden (D-OR) and Representative Chaffetz (R-UT) in their respective chambers, would prohibit wireless service providers from sharing a customer's geolocational information without the customer's consent. On June 16, Senator Franken (D-MN) introduced a similar GPS-related bill. The Location Privacy Protection Act of 2011 (S. 1223), co-sponsored by Senator Blumenthal (D-CT),

would require wireless companies that obtain a customer's location from the customer's mobile device to get the customer's express consent before collecting location data and before sharing location data with third parties. For a copy of S. 1212, please see http://www.gpo.gov/fdsys/pkg/BILLS-112s1212is/pdf/BILLS-112s1212is.pdf. For a copy of H.R. 2168, please see http://www.gpo.gov/fdsys/pkg/BILLS-112hr2168ih/pdf/BILLS-112hr2168ih.pdf. For a copy of S. 1223, please see http://www.gpo.gov/fdsys/pkg/BILLS-112s1223is/pdf/BILLS-112s1223is.pdf.

Oregon Provides Confidential Status to Mortgage Loan Documents Obtained During Licensee Examinations. Recently, Oregon Governor John Kitzhaber signed into law H.B. 2083, which amends the Oregon Mortgage Lender Law to provide confidential status to mortgage loan documents obtained by the Director of the Oregon Department of Consumer and Business Services as part of an examination. Effective immediately, any mortgage loan documents that the Director obtains during an examination of a mortgage banker, mortgage broker, or mortgage loan originator is not admissible as evidence in a private civil action or subject to (i) public inspection as a public record, (ii) subpoena, or (iii) discovery. However, the amendment permits the Director to disclose an individual's mortgage loan documents obtained during an examination to that individual, so long as the Director authenticates the individual's identity before disclosure. For a copy of H.B. 2083, please see http://www.leg.state.or.us/11reg/measpdf/hb2000.dir/hb2083.en.pdf.

Supreme Court Strikes Down Vermont Prescription Data Law. On June 23, the United States Supreme Court held that the Vermont Prescription Confidentiality Law (PCL) improperly restrains speech in violation of the First Amendment to the United States Constitution, which is likely to have impact on similar restrictions on use of financial information. *Sorrell v. IMS Health Inc.*, No. 10-779 (June 23, 2011). The PCL, absent a prescriber's consent, prohibits prescriber-identifying information from being (i) sold by pharmacies and similar entities, (ii) disclosed by pharmacies and similar entities for marketing purposes, or (iii) used for marketing purposes by pharmaceutical manufacturers. However, the PCL sets forth a number of exceptions to these prohibitions-for example, if the information is to be used for "health care research." Vermont enacted the PCL to, among other things, address pharmaceutical manufacturers' use of prescriber-identifying information to more effectively promote brand name drugs through sales representatives that meet with prescribers. The Court found that the provisions of the PCL under examination impose content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. In doing so, the Court emphasized that the law disfavors speech with a particular content (*i.e.* , marketing) and particular speakers (*i.e.*, the sales representatives), while allowing prescriber-identifying information to be purchased, acquired, and used for other types of speech and by other types of speakers. Therefore, the Court found that the PCL provisions are subject to heightened judicial scrutiny. Under such a standard, the PCL, in order to sustain its restriction on protected expression, would need to advance a substantial government interest and be drawn to achieve that interest. The Court found that while the PCL possibly advances a proper interest (*e.g.*, lowering healthcare costs and improving public health), it does not permissibly achieve such an interest, making the selling, sharing, and use limitations of the PCL unconstitutional. The decision, authored by Justice Kennedy and joined by five others, affirmed the Second Circuit's judgment. For a copy of the opinion, please see http://www.supremecourt.gov/opinions/10pdf/10-779.pdf.

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Criminal Enforcement Action

Stay current on U.S. FCPA enforcement actions and international anti-corruption news by visiting our FCPA & Anti-Corruption Score Card.

Texas Adopts Provisions Regarding Criminal Prosecution of Mortgage Fraud. On June 17, Texas Governor Rick Perry signed into law S.B. 485, which adds an article to the Texas Code of Criminal Procedure to provide that offenses that are prosecuted as mortgage fraud may be brought in (i) the county in which the real estate is located, (ii) any county in which part of the transaction occurred, including the generation of documentation supporting the transaction, or (iii) any county authorized by Article 13.27, *i.e.*, any county in which any material document was sent or any county in which any such material document was delivered. The amendment is effective September 1, 2011. For a copy of S.B. 485, please see http://www.legis.state.tx.us/tlodocs/82R/billtext/pdf/SB00485F.pdf#navpanes=0.

California Federal Court Sentences Loan Modification Fraud Defendant to 30 Months in Prison. On June 10, the United States Department of Justice issued a press release announcing that Michael Trap was sentenced to 30 months in prison (to be followed by three years of supervised release), after pleading guilty to money laundering and conspiracy to commit money laundering and wire fraud for his role in operating a fraudulent telemarketing scheme related to mortgage loan modifications. Trap was also ordered to pay $460,249 in restitution to the victims of the scheme. Trap admitted that he and several partners set up a company that fraudulently induced delinquent homeowners to purchase loan modification services from the company by falsely claiming, among other things, that the company's lawyers and forensic accountants would deal with banks' loss mitigation departments to procure loan modification agreements for the homeowners (the company did not employ any lawyers or forensic accountants) and that the company had a high loan modification success rate (the company did not have a high loan modification success rate). Over 300 homeowners paid over $900,000 in total funds to the company. Trap admitted that a partner and he used the customer funds to pay company expenses and their own compensation. Trap's partner was previously sentenced to 63 months in prison in connection with the scheme and tax offenses. The case was brought in coordination with the interagency Financial Fraud Enforcement Task Force. For a copy of the press release, please see http://www.stopfraud.gov/news/news-06102011-02.html.

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