

March 18, 2011

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## Federal Issues

**Debt Collection Company Agrees to Pay Record \$2.8 Million Civil Penalty to Settle FTC Charges.** On March 16, the Federal Trade Commission (FTC) announced that West Asset Management Inc., a leading debt collection company, has agreed to pay a civil penalty of \$2.8 million to settle charges that its collection techniques violated federal law. The settlement is the largest ever obtained by the FTC in a debt collection case. The FTC complaint, which was filed by the Department of Justice on behalf of the FTC, in U.S. District Court for the Northern District of Georgia, alleged that the collection company violated both the FTC Act and the Fair Debt Collection Practices Act by, among other things: (i) calling consumers multiple times each day, often regarding accounts that did not belong to them, and sometimes using abusive language, (ii) disclosing the existence of consumers' debts to third parties, (iii) withdrawing funds from consumers' bank accounts and charging their credit cards without consent, (iv) falsely claiming that consumers would be sued, arrested, or have their property seized, (v) falsely claiming that partial payments would be accepted as full settlements on accounts, and (vi) falsely claiming that negative information would remain on consumers' credits reports until debts were paid. The settlement order, in which the collection company did not admit any wrongdoing, permanently prohibits the company from using certain debt collection practices alleged to be false, deceptive or unfair. For a copy of the press release, please see <http://www.ftc.gov/opa/2011/03/wam.shtm>.

**FTC and Commerce Department Call for Online Consumer Privacy Legislation.** On March 16, the U.S. Senate Committee on Commerce, Science, and Transportation heard testimony from Federal Trade Commission (FTC) Chairman Jon D. Leibowitz, and Assistant Secretary of Commerce for Communications and Information, National Telecommunications and Information Administration Lawrence E. Strickling on the state of online consumer privacy. Chairman Leibowitz discussed the FTC's efforts to protect consumer privacy through enforcement actions, consumer education, and policy initiatives like its recent preliminary privacy report. The preliminary privacy report proposes an online consumer privacy framework to build privacy protections into everyday business practices, simplify and streamline privacy choices for consumers, improve transparency with clearer, shorter

privacy notices, and educate consumers about commercial data practices and the choices available to them. The FTC Chairman also advised Congress of the Commission's progress in implementing Do Not Track (DNT), a mechanism proposed in its preliminary privacy report last December that would allow consumers to choose not to have their internet browsing tracked by third parties. At the same hearing, Assistant Secretary Strickling called on Congress to enact legislation to provide a stronger statutory framework to protect consumers' online privacy interests. He recommended that such legislation contain three key elements: (i) a "consumer privacy bill of rights" to provide baseline consumer data privacy protections, (ii) authority to the FTC to enforce these baseline protections, and (iii) a framework that creates incentives, such as a safe harbor, for firms to develop and adopt codes of conduct as well as continued innovation around privacy protections. For the complete record, please see [The State of Online Consumer Privacy hearing record](#).

**MBA Announces Courson's Departure and David H. Stevens' Arrival in May.** On March 15, the Mortgage Bankers Association (MBA) announced that its President and CEO, John A. Courson, will be leaving the association, effective June 1, 2011. He will be replaced in May 2011 by David H. Stevens, currently the Assistant Secretary for Housing and Commissioner of the Federal Housing Administration at the U.S. Department of Housing and Urban Development. During his tenure at the FHA, Commissioner Stevens implemented numerous changes relating to FHA's risk management function and had direct responsibility for oversight and administration of the FHA insurance portfolio. Prior to being confirmed at HUD, Stevens was the President and Chief Operating Officer of Long and Foster Companies, the nation's largest, privately-held real estate firm. [Click here for a copy of the announcement](#).

**Company to Pay \$250,000 to Settle FTC Charges of Misleading Online Advertising.** On March 15, the Federal Trade Commission (FTC) announced a proposed consent agreement settling allegations that Legacy Learning Systems Inc. and its owner, Lester Gabriel Smith, deceptively advertised its products through online affiliate marketers posing as ordinary consumers or independent reviewers. According to the FTC's administrative complaint, the company recruited online affiliate marketers to promote its Learn and Master Guitar program through endorsements in blog posts, articles, and other online materials in exchange for substantial commissions for products sold. The FTC alleged that these endorsements were deceptive and violated FTC guidelines, revised in 2009, because they purported to represent the views of ordinary consumers or independent reviewers without clearly disclosing that the affiliates were paid for sales they generated. Under the proposed settlement, which is subject to public comment through April 15, 2011, the company and Mr. Smith will pay \$250,000 and will be required to monitor and submit monthly reports regarding the company's affiliate marketers. The FTC press release announcing the proposed consent agreement is available at <http://www.ftc.gov/opa/2011/03/legacy.shtm>.

**FDIC Issues Proposed Rules on Orderly Liquidation Authority Claims Process.** On March 15, the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) approved a Notice of Proposed Rulemaking (NPR) which establishes a comprehensive framework for the priority payment of creditors and procedures for filing and pursuing claims under the Orderly Liquidation Authority (OLA) created by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The NPR also defines the ability of the receiver to recoup compensation from executives who are

"substantially responsible" for the financial condition of the company under Section 210(s) of Dodd-Frank. The rules would require a receiver to consider whether the senior executive performed his or her responsibilities with the requisite degree of skill and care and whether the individual caused a loss that materially contributed to the failure of the financial company. For most senior executives, there would be a presumption that they are substantially responsible and thus, subject to recoupment of up to two years of compensation. A safe haven is created for executives recently hired for the purpose of improving the company's condition. The NPR further establishes that the preferential and fraudulent transfer provisions of Dodd-Frank are implemented consistently with the corresponding provisions of the Bankruptcy Code. Finally, the NPR defines which companies may be subject to resolution under the OLA by clarifying the definition of a "financial company." Under the proposal, a financial company is one that is "predominantly engaged" in financial activities. To be "predominately engaged" in financial activities, the company must have derived at least 85 percent of its total consolidated revenue from financial activities over the two most recent fiscal years. Public comments on the proposed rule will be accepted for 60 days after its publication in the *Federal Register*. [Click here to see the FDIC's press release.](#) [Click here for a copy of the proposed rule.](#)

**Chitika, Inc. Reaches Settlement with FTC Regarding Alleged Deceptive Practices.** On March 14, the Federal Trade Commission (FTC) announced a proposed consent order settling allegations that Chitika, Inc. (Chitika) engaged in deceptive practices by continuing to track consumers' online activities after consumers opted out of such tracking. The FTC alleged, in particular, that: i) Chitika's Privacy Policy acknowledged that the company was collecting data regarding consumer's preferences by placing "cookies" on consumers' computer browsers; and ii) that Chitika's Privacy Policy stated that consumers could opt out of having cookies placed on their browsers and opt out of receiving targeted advertisements. The FTC further alleged that Chitika's practices were deceptive because the opt out only lasted 10 days, after which, Chitika placed tracking cookies on browsers of the consumers who previously had opted out. Under the proposed administrative settlement, which is subject to public comment through April 14, 2011, Chitika is barred from making misleading statements about the extent of consumer data collection and the extent to which consumers can control the collection, use, or sharing of their data. The settlement also requires that 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. [Click here for a copy of the press release.](#)

## State Issues

**Virginia Passes Law Regarding Electronic Signatures.** On March 15, the Virginia Assembly enacted legislation expanding the acceptance of electronic signatures. The new law provides that financial disclosure forms, lobbyist registration statements, and notary applications for recommission may be signed by electronic signature. For a copy of the bills, [click here](#) and [click here](#).

## Courts

**Pennsylvania State Appellate Court Affirms Ruling That Debt Collector Failed to Authenticate Credit Card Account Records It Obtained When Acquiring a Debt.** The Superior Court of Pennsylvania recently affirmed a trial court's decision to exclude account records and other exhibits

that a debt collector sought to introduce during trial because the debt collector could not establish the authenticity, trustworthiness, and reliability of records made and maintained by the original credit card issuer. *Commonwealth Financial Systems, Inc. v. Smith*, No. 3435 EDA 2009 (Pa. Super. Ct. Feb. 14, 2011). The defendant obtained a credit card from Citibank in 1989 and accrued approximately \$2,000 in debt by 2002. NCOP Capital, Inc. (NCOP) acquired the debt from Citibank, and subsequently sold the debt to the plaintiff, Commonwealth Financial Systems (CFS). CFS sought to collect the debt, participated in arbitration, but lost and appealed the decision to the state trial court. During the trial, plaintiff sought to admit five exhibits into evidence: (i) two monthly billing statements related to the defendant's account, (ii) an unsigned, standard form 1996 Citibank card agreement issued seven years after the defendant's account was opened, (iii) the agreement governing Citibank's sale of the defendant's debt to NCOP, (iv) the agreement governing NCOP's sale of the defendant's debt to plaintiff, and (v) an affidavit from a NCOP employee regarding NCOP's records concerning the defendant's account and debt. CFS presented only one witness at trial, a CFS employee who testified regarding the records related to defendant's account and the debt that NCOP transferred to CFS. During the trial, the CFS witness acknowledged that he was not familiar with how Citibank or NCOP created or maintained business records. Ultimately, the trial court excluded the exhibits, finding that CFS did not satisfy the business records exception and did not establish the trustworthiness and reliability of the records. Because the records were excluded, the trial court held that CFS had not established the existence of a contract and entered judgment in favor of the defendant. On appeal, the Superior Court affirmed the trial court's ruling regarding the admissibility of the five CFS exhibits. In doing so, it rejected CFS's argument that the court should adopt the federal "rule of incorporation" providing that records taken into custody by a business are "made" by the business. The appellate court further noted that the trial court's ruling was supported by the following facts: (i) the CFS witness acknowledged that he had limited knowledge regarding the making and maintenance of the original records; and, (ii) the 1996 Citibank card agreement which contained different terms than CFS asserted applied to the plaintiff's account. Because the appellate court affirmed the trial court's exclusion of the evidence at issue, it also affirmed the trial court's finding that CFS had not established a contract. For a copy of the opinion, please see [http://www.pacourts.us/OpPosting/Superior/out/a26038\\_10.pdf](http://www.pacourts.us/OpPosting/Superior/out/a26038_10.pdf).

## Firm News

BuckleySandler LLP will host its West Coast Mortgage Lending and Servicing Today Conference on Monday, April 11 at the Balboa Bay Club and Resort in Newport Beach, CA. The conference will focus on compliance, regulatory and litigation issues in today's changing mortgage lending and servicing environment. For more information, please visit

<http://fairlendingtoday.com/>. To register for the conference, please email Anne McKenzie at [amckenzie@bucklesandler.com](mailto:amckenzie@bucklesandler.com).

Join Us! 2011 Fair Lending Today Conference on Compliance, Regulatory & Litigation Issues in Today's Changing Enforcement Environment, hosted by BuckleySandler LLP.

2011 Panel Topics Include:

- Fair and Responsible Lending Enforcement and Litigation Overview
- Fair Mortgage Servicing: The Foreclosure Affidavit Crisis and More Challenges for Services
- The New Wave of SCRA Enforcement
- Dodd-Frank and the Consumer Financial Protection Bureau: Implementation, Preemption, State Regulation, and UDAP
- The New Enforcement Environment and Financial Services Regulation
- Privacy, Data Security, and Data Breach Litigation Nationally and Internationally
- Community Reinvestment Act: A Revitalized Statute?
- Key Trends in Fair Lending Risk Management Programs
- Fair Lending Issues Impact on Bank Merger & Acquisition Activity

When: Monday, May 2

Where: The Fairmont Hotel in Washington, DC

Register or Learn More: Visit <http://fairlendingtoday.com> or email [fairlending@buckleysandler.com](mailto:fairlending@buckleysandler.com).

[James Parkinson](#) spoke on the Foreign Corrupt Practices Act as a Visiting Lecturer at Universidad Panamericana, Mexico (via videoconference), on March 16.

[Margo Tank](#) will participate on a panel entitled "eMortgage Implementation - How Do I Get Started?" at the MBA's National Technology in Mortgage Banking Conference & Expo, on March 27 - 30.

[Margo Tank](#) will participate in a webinar entitled "Protecting Your Scientific Intellectual Property Requires More Than Just Digital Signatures" at 2pm on March 31.

[Margo Tank](#) will be speaking at the E-Signature Summit for Banking Executives in New York on April 8.

[James Parkinson](#) will participate on a panel entitled "The Role of the Lawyer in Preventing Corruption," at the International Bar Association's Bar Leaders Conference in Miami, on May 4.

[James Parkinson](#) will be speaking at the ACI's "FCPA Compliance in Emerging Markets" program in Washington, D.C., on June 15 -16.

#### Firm Publications

An article by

[Jerry Buckley](#) entitled "How Do You Rate Your Fairness Awareness?" appeared in the March 9, 2011 issue of *American Banker*.

## Mortgages

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

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