Financial Services Update
January 28, 2015

HIGHLIGHTS

Federal Regulatory Developments

CFPB Finalizes Amendments to RESPA-TILA Integrated Disclosure Rule

CFPB Takes Action against Banks for Illegal Mortgage Kickbacks

CFPB Accepting Applications for Advisory Groups

FHA Issues Final Rule Eliminating Post-Settlement Interest Charges

State Regulatory Developments

New York Issues New Force-Placed Insurance Regulations

Litigation Developments

Court Holds Lender Could be Subject to TILA Violation for Failure to Disclose Lender Placed Insurance Costs

WBK News

Mitch Kider will present a webinar on TILA/RESPA Integration sponsored by the Ohio and New York MBAs on February 4 at 1:30 to 3:00 pm ET. For more information and to register go to: http://www.ohiomba.org/index.php/theyre-not-just-new-forms/

Michael Kieval and **Jason McElroy** will conduct a webinar with SAI Global on February 4 titled "RESPA Section 8 Enforcement Trends: The CFPB Sets its Sights on

Marketing Services Agreements." For more information contact Jason at mcelroy@thewbkfirm.com.

Mitch Kider will lead a panel session titled "What to Expect from Enforcement Actions" at MBA's National Mortgage Servicing Conference on February 24 at 2:00 pm in Dallas, TX. For more information and to register go to: http://events.mortgagebankers.org/Servicing2015/default.html.

SUMMARIES

Federal Regulatory Developments

CFPB Finalizes Amendments to RESPA-TILA Integrated Disclosure Rule

On January 18, 2015, the CFPB published a final rule making amendments to the RESPA-TILA Integrated Disclosure Rule (the Integrated Disclosure Rule). The final rule extends the timing requirement for creditors to provide a revised Loan Estimate when a consumer locks a rate. It also permits certain language relating to construction loans to be added to the Loan Estimate.

First, the final rule requires that creditors provide a revised Loan Estimate within three business days after a consumer locks in a floating interest rate. The Integrated Disclosure Rule originally required that creditors provide a revised Loan Estimate on the same day that the consumer locked a floating interest rate. Based upon feedback received from the industry, the CFPB acknowledged that a short turnaround time for providing a revised Loan Estimate could potentially pose challenges for creditors that currently allow consumers to lock interest rates late in the day or after business hours. In October 2014, the CFPB issued a proposed rule that would have required creditors to issue the revised Loan Estimate the day after the rate was locked. However, the final rule changes the required timeframe to three business days. The CFPB indicated that moving the timeframe to three business days would alleviate certain operational challenges to creditors that would arise if they were required to provide the disclosure within one business day. This change also harmonizes the timing requirement for issuing a revised Loan Estimate when the rate is locked with the timing requirement for other circumstances when a revised Loan Estimate must be issued under the Integrated Disclosure Rule.

Second, the final rule allows a statement regarding redisclosure for certain new construction loans to be placed on the Loan Estimate, designates where this statement must be placed, and provides specific language for the statement. For new construction loans where consummation is expected to occur more than 60 days after the initial Loan Estimate is provided, the Integrated Disclosure Rule allows creditors to issue revised disclosures as long as the creditor included a statement to this effect on the initial Loan Estimate. However, the Integrated Disclosure Rule did not previously address the requirement for the statement in the parts of the Rule that govern the content of the

disclosures. To address this inconsistency, the final rule added a specific statement relating to new construction loans to be placed on the Loan Estimate. In particular, creditors may add the following language on page 3 of the Loan Estimate under the master heading Additional Information About This Loan and the heading Other Considerations: "You may receive a revised Loan Estimate at any time prior to 60 days before consummation."

Third, the final rule amends provisions of Regulation Z that require a creditor to include on certain loan documents its name and NMLSR ID and the name and NMLSR ID of the loan originator with primary responsibility for the loan. The final rule expressly includes the integrated disclosures among the loan documents that require the placement of the NMLSR ID. The final rule also makes certain clarifying, non-substantive changes to the Integrated Disclosure Rule. The final rule becomes effective the same date as the Integrated Disclosure Rule, which is August 1, 2015.

The final rule is available at:
http://files.consumerfinance.gov/f/201501_cfpb_final-rule_trid.pdf.

CFPB Takes Action against Banks for Illegal Mortgage Kickbacks

On January 22, 2015, the CFPB and Maryland Attorney General announced an action against Wells Fargo and JPMorgan Chase (the Banks) for a marketing services kickback scheme with a now-defunct title company in alleged violation of Section 8 of RESPA. The proposed consent orders would require $24 million in civil penalties from Wells Fargo, $600,000 in civil penalties from JPMorgan Chase, and $11.1 million in redress to consumers whose loans were involved in the scheme. The action also would require a former loan officer employee and his wife to pay a $30,000 penalty for their individual involvement.

The actions are the result of a joint investigation by the CFPB, the State of Maryland, and the Maryland Insurance Administration, which regulates title insurance providers. The investigation identified more than 100 Wells Fargo loan officers in at least 18 branches, largely in Maryland and Virginia, that allegedly participated in the scheme and referred thousands of loans. At least six loan officers at three different JPMorgan Chase branches in Maryland, Virginia, and New York also were allegedly involved and referred almost 200 loans to the title company.

According to the complaint, the title company provided Bank loan officers with marketing services that assisted the loan officers in generating business, including analyzing and purchasing marketing leads from a third-party vendor and providing those leads to the Bank loan officers. Other loan officers allegedly received additional marketing services paid for or subsidized by the title company, such as paying for marketing letters to be printed, folded, stuffed into envelopes, and mailed to the consumer leads. The complaint alleges that the loan officers participating in the different marketing arrangements did not pay for the full cost of the leads, printing, and processing of the

marketing materials provided by the title company. Instead, under agreements or understandings between the title company and loan officers, the loan officers allegedly would refer settlement-service business to the title company in violation of Section 8 of RESPA.

The scheme allegedly was intended to increase the amount of business that the loan officers generated, resulting in increased commissions for the loan officers and, through referrals, increased profits for the title company. The complaint alleges that Wells Fargo had multiple warnings regarding the illegal arrangements, and both Banks failed to take action to stop the practices and did not have adequate systems in place to identify the violations.

The title company also allegedly paid an individual loan officer, formerly employed by Wells Fargo and an unnamed financial institution, tens of thousands of dollars in cash payments in exchange for referrals. Such payments were paid to the loan officer's then-girlfriend, now wife, in alleged efforts to disguise the nature of the payment. In addition to the $30,000 civil penalty, the former employee would be banned from participation in the mortgage industry for two years.

Additional loan officers at the unnamed financial institution also allegedly participated in the scheme with the title company. However, according to the CFPB, the unnamed institution self-identified the problematic practices, terminated the loan officers involved, cooperated with the CFPB's investigation, and self-initiated a remediation plan. As a result, the CFPB resolved the investigation of the unnamed financial institution without an enforcement action, consistent with the CFPB's Bulletin on Responsible Business Conduct, which is available at:
http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf.

A copy of the press release announcing the actions, which includes links to the complaint and proposed consent orders, can be found at:
http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-wells-fargo-and-jpmorgan-chase-for-illegal-mortgage-kickbacks/.

CFPB Accepting Applications for Advisory Groups

The CFPB recently announced that it is accepting applications for membership in three of its advisory groups: the Consumer Advisory Board; the Credit Union Advisory Council; and the Community Bank Advisory Council. Advisory boards and councils serve the CFPB as formal means to solicit external feedback on a range of topics including consumer engagement, policy development, and research.

The CFPB is looking for:

- Experts in consumer protection, community development, consumer finance, fair lending, and civil rights;
- Experts in consumer financial products or services;

- Representatives of banks that primarily serve underserved communities;
- Representatives of communities that have been significantly impacted by higher priced mortgage loans;
- Current employees of credit unions and community banks;
- Academics (experts in research methodologies, framing research questions, data collection, and analytic strategies).

Appointments to the Advisory Board are typically for three years and appointments to the Advisory Councils are typically for two years. The CFPB expects to announce the selection of new members in August 2015.

The CFPB will accept applications until February 28, 2015, and a complete application packet (including a resume for each applicant, a completed application, and a letter of recommendation from a third party) must be provided in order to be considered.

Additional information, instructions to submit an application, a downloadable application form, and answers to Frequently Asked Questions can be found at http://www.consumerfinance.gov/blog/accepting-applications-for-our-advisory-board-and-councils-2015/.

FHA Issues Final Rule Eliminating Post-Settlement Interest Charges

On August 26, 2014, FHA published in the Federal Register (Docket No. FR-5360-F-02) its final rule which eliminates post-settlement interest for FHA insured mortgages. This rule revises FHA's regulations that permitted an FHA approved lender to charge the mortgagor interest through the end of the month in which the mortgage is paid off. The final rule permits lenders to charge interest only through the date the mortgage is paid and prohibits the charging of interest beyond that date.

The final rule is available at: http://www.gpo.gov/fdsys/pkg/FR-2014-08-26/pdf/2014-20214.pdf

Effective Date: January 21, 2015

State Regulatory Developments

New York Issues New Force-Placed Insurance Regulations

On January 7, 2015, the New York Department of Financial Services ("NYDFS") finalized new regulations regarding force-placed insurance practices in New York. The regulations are intended to provide enhanced protections to consumers by setting forth rules regarding the rates for and placement of force-placed insurance. We highlight some of the new requirements below.

The regulations come as a result of a prior investigation by the NYDFS, which found that the rates for force-placed hazard insurance bore little relation to insurers' actual loss experiences. Among other things, the investigation also found that consumers often failed to receive adequate notice that insurers and mortgage servicers were force-placing insurance policies on the consumers' homes. Further, the investigation found that insurers were offering financial incentives to mortgage servicers, including commissions to servicer-affiliated insurance producers who were doing little to no work, thus creating artificially inflated insurance premiums charged to homeowners.

In response to these findings, the new regulations implement several new requirements. First, the new regulations establish minimum adequate notification requirements. Such requirements are intended to ensure that homeowners understand their responsibility to maintain homeowners insurance, and that the homeowner may purchase voluntary homeowners insurance coverage at any time. The regulations also set the maximum amount of force-placed insurance coverage that may be issued on a New York property.

In addition, insurers, insurance providers, or their affiliates that receive correspondence related to force-placed insurance from a borrower on behalf of a servicer are required to accept any reasonable form of written confirmation of a borrower's existing insurance coverage. Moreover, insurers, insurance providers, or their affiliates are required to refund all force-placed insurance premiums for any period of overlapping insurance coverage within 15 days of receiving evidence demonstrating that the borrower has had the required hazard insurance in place.

Further, the regulations prohibit certain practices with respect to the payment of commissions to servicer-affiliated insurance providers, the sharing of force-placed insurance premiums or risk with a servicer affiliate, and the issuing of force-placed insurance on property serviced by a servicer affiliated with the insurer.

Finally, the regulations require that insurers regularly inform the NYDFS of loss ratios actually experienced and re-file rates when actual loss ratios are below 40 percent. The regulations set a permissible loss ratio for rate filings to ensure that premiums are set at a rate reasonably related to paid claims.

The majority of the regulations become effective on February 7, 2015, with parts of the new regulation becoming effective later in 2015.

A copy of the new regulations is available at:
http://www.dfs.ny.gov/insurance/r_prop/rp202t.pdf

Litigation Developments

Court Holds Lender Could be Subject to TILA Violation for Failure to Disclose Lender Placed Insurance Costs

The District Court for the Southern District of Florida recently held that a lender may be liable under the Truth in Lending Act (TILA) for failure to disclose the amounts charged for lender placed insurance, which are incurred after the closing of the loan. The case is one of many putative nationwide class actions related to the purchase of lender placed insurance (LPI) on behalf of borrowers who fail to maintain insurance coverage on their properties. The plaintiffs allege that the lender overcharged borrowers for costs not associated with the lender placed insurance, which they characterize as unlawful kickbacks. The complaint included purported violations of TILA, among other claims. The defendants moved to dismiss the complaint, which the Court denied with respect to the TILA claim.

The plaintiffs argued that the lender violated TILA by adding lender placed insurance charges, which changed the borrowers' loan obligations, without issuing new disclosures and by failing to disclose the nature of the purported kickbacks and unlawful charges. The lender argued that the insurance premiums are expressly exempt from TILA disclosures because they relate to property insurance. The Court disagreed, holding that the plaintiffs' allegations do not relate to insurance premiums, but instead relate to purportedly unlawful charges, rendering them potentially subject to TILA.

The Court's holding is problematic for at least two reasons. First, plaintiffs rely on a provision of TILA that requires disclosures before consummation of the loan transaction. However, LPI is purchased after the loan has closed, and the price of the LPI cannot be known until the lender purchases each policy. Thus, regardless of whether the LPI charges qualify as a finance charge, which is explained as improper below, the lender cannot be subject to TILA under plaintiffs' theory because the charges were incurred after the loan closed. What's more troubling is that the Court's own language acknowledged that TILA and related regulations "require that the creditor must disclose the credit's 'finance charge' before 'the credit is extended.'" Notwithstanding this language, the Court held that the lender could be liable for failing to disclose charges after the closing of a loan.

Second, setting aside the timing requirements of TILA disclosures, the Court improperly analyzed whether the LPI premium is a finance charge. In a motion to dismiss, the court assumes as true factual allegations, but need not accept the truth of legal conclusions. Generally, determining whether particular law applies (or does not apply by virtue of an exception) is a legal conclusion. In this case, TILA requires that certain finance charges be disclosed to a borrower. "Finance charge" is defined with certain express exceptions, including some property insurance payments. Therefore, the holding that the LPI charge is not an exception to the finance charge is a legal conclusion.

The Court, however, did not analyze whether the facts supported the ultimate conclusion that LPI charges were not property insurance payments. Instead, the Court simply assumed the conclusion as true based on the plaintiffs' characterization of their claims. The Supreme Court has held that a motion to dismiss requires a court to apply closer scrutiny in such cases. For example, the Court could have analyzed the nature of the transaction and types of charges to determine if it is plausible that such facts support the conclusion that plaintiffs do not challenge insurance premium payments. This analysis is missing. With the Court's approach, the parties now do not have the benefit of a more rigorous analysis that could have limited or eliminated the costs associated with discovery on a claim that ultimately may not survive.

Weiner Brodsky Kider PC has experience defending against lender placed insurance class action and TILA claims.