Financial Services Update

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WBK News

Weiner Brodsky Kider PC recently held exclusive TRID Workshops for clients which provided an overview and understanding of the key elements of TRID, and how the rule will affect the policies, procedures and training implemented by mortgage lenders. The firm now has made available the WBK TRID Workbook, which covers integrated disclosure readiness as the workshops did, from pre-application to post-closing under TRID. **Click here to purchase a copy for $250**.

SUMMARIES

Federal Regulatory Developments

CFPB Authorizes Consumer Narratives in Public Complaints

The CFPB on March 19, 2015 issued a Final Policy Statement giving consumers the option to provide complaint narratives that will be published on the CFPB's public-facing Consumer Complaint Database.

Until now, consumer complaints have been listed on the CFPB database since 2012 as basic, anonymous information about complaints received, including the relevant company, the consumer's zip code, the product type, the issue driving the complaint and the company's response, but without a narrative of the consumer's specific complaint.

The Final Policy Statement puts in place the narrative complaint changes proposed by the CFPB in July 2014, with a small number of changes, after receiving and considering comments from industry trade associations, consumer groups, companies and individuals.

Starting March 19, 2015, when consumers submit a complaint to the CFPB, they will have the option to share their narrative publically in the database. To provide time for companies to learn about the new system, the CFPB will not post any complaint narratives to the site for at least 90 days after March 24, 2015, the date of the policy statement's publication in the Federal Register.

The CFPB takes the position that giving people the ability to publicly share accounts of their complaints about consumer financial products and services will provide context to the complaints. These first-hand accounts of the consumers' experiences will "spotlight specific trends and help consumers make informed decisions," according to a CFPB press release.

However, the mortgage industry is concerned about many aspects of the new policy, particularly that the complaint narratives would be unverified and not representative of companies in the industry.

The Mortgage Bankers Association stated that “the posting of unverified consumer complaints under the imprimatur of the federal government [is] bound to mislead the very consumers CFPB is charged with protecting.” MBA noted that the new policy has no provisions to ensure that consumer narratives are valid.

The narratives will not contain any personal information of the consumers in order to minimize the risk of re-identification. According to the CFPB, it “will use a thorough process to ensure complaints are scrubbed of information such as names, telephone numbers, account numbers, Social Security numbers, and other direct identifiers.”

In finalizing the CFPB’s original proposal, the Final Policy Statement makes a number of minor changes. The most notable of these is that, rather than permitting companies to write free-form responses to be published with the complaint narratives, companies will be limited to selecting from a set list of structured response options “as a public-facing response to address consumer complaints.”

The CFPB stated that “[c]ompanies will be under no obligation to offer a public response, and they have 180 days after the consumer complaint is routed to them to select the optional, public response.”

While this change will mitigate the burden that companies would have been under, to give enough detail to respond to or refute the complaint without providing details that could enable identification of the consumers in question, it also will tend to limit how persuasive companies can be in their responses.

In response to industry comments, the CFPB also is considering whether to enable consumers to submit positive feedback, rather than only complaints. In addition to the Final Policy Statement, the CFPB issued a Notice and Request for Information to solicit comment on the potential collection and sharing of consumers’ positive interactions with financial institutions, with comments due May 26, 2015.

The Final Policy Statement does not alter the current timetable for company response to consumer complaints. Companies have 15 calendar days to provide an initial response to the CFPB and up to 60 calendar days to submit a final response.

Though complaint narratives are not verified by the CFPB, they still must meet certain requirements set out by the policy statement in order to be published in the CFPB database. The complaint must be submitted through the CFPB’s website and cannot be

a duplicate submission. The consumer also must have a confirmed relationship with the financial institution.

In order to post a complaint narrative, the consumer must opt in by checking a box on the CFPB's online complaint form. Consumers also have the ability to opt out and withdraw consent to publish their narratives at any time.

Also of interest, the CFPB, in addressing an individual commenter's concern "that the public posting of consumer narratives would create an incentive for companies to require consumers to sign non-disclosure agreements," noted that it had not uncovered widespread use of non-disclosure agreements in connection with consumer complaints.

Nonetheless, the CFPB did warn companies that "the Bureau would likely look disfavorably upon agreements that require a consumer to withdraw his or her consent to have a narrative published as a condition of settlement."
The CFPB's press release can be found at:
http://www.consumerfinance.gov/newsroom/cfpb-finalizes-policy-to-give-consumers-the-opportunity-to-voice-publicly-complaints-about-financial-companies/.

The Final Policy Statement is available at: http://www.gpo.gov/fdsys/pkg/FR-2015-03-24/pdf/2015-06722.pdf.

The Notice and Request for Information on positive consumer feedback is available at: http://www.gpo.gov/fdsys/pkg/FR-2015-03-24/pdf/2015-06707.pdf.

RHS Proposes QM Rule

The Dodd-Frank Act charged HUD, the VA, USDA, and RHS with prescribing regulations to define a "qualified mortgage" for loans that each agency insures, guarantees, or administers, as applicable. Once the agency adopts its own QM rule, it replaces the CFPB's Temporary QM definition for the respective agency.

HUD and the VA have already issued final QM rules, and on March 5, 2015 the Rural Housing Service issued a proposed rule to adopt a QM definition for its Single Family Housing Guaranteed Loan Program.

RHS essentially proposes to incorporate the Temporary QM requirements as its qualified mortgage definition. Specifically, a loan that is guaranteed by RHS would be a QM if it meets applicable RHS guidance as well as the CFPB's QM requirements for regular periodic payments, a maximum 30 year term, and the points and fees limit, as required by sections 1026.43(e)(2)(i)-(iii) and 1026.43(e)(3) of Regulation Z.

The RHS in fiscal year 2014 issued $19 billion of mortgage guarantees, representing 139,000 loans. The USDA agency is streamlining its operations in order to process

more loan applications and it is expanding the number of financial institutions that can offer RHS loans.

In addition to the proposed QM definition, RHS seeks comment on amending its Single Family Housing Guaranteed Loan Program regulations to:

- expand its lender indemnification authority for loss claims in the case of fraud, misrepresentation, or noncompliance with applicable loan origination requirements;
- add a new special principal reduction loan servicing option that lenders may utilize while still maintaining the loan guarantee;
- remove the refinance requirement that the new interest rate be at least 100 basis points below the original loan rate and instead require that the new interest rate not exceed the interest rate on the original loan; and
- add a new refinance option, "streamlined-assist," which was formally the Rural Refinance Pilot.

Comments are due May 4, 2015. The proposal is available at: http://www.gpo.gov/fdsys/pkg/FR-2015-03-05/pdf/2015-03711.pdf.

Trade Groups Submit Integrated Disclosures Grace Period Request to CFPB

A group of 16 mortgage industry trade associations and organizations submitted a letter on March 18, 2015 to CFPB Directory Richard Cordray urging the CFPB to implement a "restrained enforcement and liability" or "grace period" when the TILA-RESPA Integrated Disclosure Rule (Rule) goes into effect on August 1, 2015.

This request comes on the heels of Cordray's March 3 testimony before the House Financial Services Committee. In that testimony, Cordray indicated that the industry needs to take the Rule's August 1 effective date seriously, especially since industry will have had nearly 21 months from the time the Rule was issued to the time it goes into effect.

The industry groups cited several reasons why a grace period is necessary. According to the letter, there are situations not addressed by the Rule that require additional guidance from the CFPB, such as what happens when closing cannot go forward on schedule because of occurrences outside of the control of the parties.

The groups also cited the uncertainty surrounding liability under the Rule, since it is unclear whether RESPA's or TILA's liability provisions apply in certain instances. The groups also assert that since the Rule does not give creditors the option to comply early, the industry will not be able to test their systems in real time prior to August 1.

In light of these factors, the groups urge the CFPB to implement a “restrained enforcement and liability” or “grace period” from August 1 through the end of 2015 for those seeking to comply in good faith. Significantly, the groups urge the CFPB to restrain not only enforcement during the grace period, but also liability.

As precedent, the groups note that when HUD issued its revised RESPA disclosures in 2010, it announced it would not conduct enforcement actions against companies that tried to comply in good faith.

A copy of the letter can be found at:
http://www.aba.com/Advocacy/commentletters/Documents/SignOnletterToCFPBonTILARESPA031815.pdf

CFPB, FTC Reauthorize Agreement to Coordinate Shared Investigatory and Enforcement Authority

The CFPB and the FTC on March 12, 2014 renewed their ongoing Memorandum of Understanding (MOU) for three years to coordinate efforts in investigations and in supervisory, enforcement and rulemaking actions regarding their shared authority under consumer financial laws.

The FTC in a statement said, “The memorandum outlines the working relationship between the two agencies under the terms of the Consumer Protection Act.”

The MOU, first authorized in 2012, is designed to prevent duplicative efforts by the CFPB and FTC in enforcement and supervisory actions, and avoid unnecessary burdens on businesses. It is intended to help the agencies formulate consistent policies on consumer protection, and to coordinate rulemaking activities “to promote the development and application of consistent regulatory provisions,” according to the MOU.

“The parties [the agencies] shall endeavor to coordinate law enforcement activities, including conducting joint investigations where appropriate, to minimize duplication of efforts and burden on MOU Covered Persons,” according to the text of the MOU.

The new MOU is substantially similar to the old one, containing mostly minor administrative tweaks. However, in one substantive change, the MOU alters the definition of “confidential supervisory information.” It clarifies the reach of the term by including cross-references to the CFPB’s own definition.

Under the CFPB’s regulations, this term includes, among other things, reports of examination and any information contained in, derived from, or related to such reports.

The term also includes any communication between the CFPB and the institution related to the CFPB's supervisory activity.

Under the reauthorized MOU, as under the original document, the agencies agree to continue their arrangement of sharing confidential supervisory information. For example, the CFPB must share with the FTC certain information gathered from an examination of a mortgage company, including the examination report, upon the FTC's request.

The CFPB also may, upon request by the FTC, provide the FTC with confidential supervisory information pertaining to a covered person subject to the FTC's jurisdiction, unless the CFPB has good cause not to share the information. The two agencies also agree to confer no less than quarterly to discuss the CFPB's examination plans and the results of the examinations, as well as to coordinate future activities.

The reauthorization of the MOU signifies that the agencies will continue to coordinate their actions. As one example of coordination by the CFPB and FTC, the agencies coordinated their efforts when looking into the marketing practices of companies.

In particular, the CFPB and the FTC conducted a joint "sweep" in which the agencies looked at randomly selected mortgage-related advertisements. This joint action resulted in the CFPB recently taking action against three mortgage lenders for allegedly deceptive marketing practices.

The reauthorized CFPB-FTC MOU is available at: https://www.ftc.gov/system/files/documents/cooperation_agreements/150312ftc-cfpb-mou.pdf.

Freddie Mac Revises Loan Modification Rules and Requirements

Freddie Mac issued Bulletin 2015-3 on March 17, 2015, which changed certain loan modification programs. While many of the changes apply specifically to Step-Rate Mortgages, Freddie Mac also broadened certain eligibility guidelines for other borrowers who may be seeking a loan modification.

Freddie Mac immediately permits, and beginning July 1, 2015 will require, all Freddie Mac approved servicers to evaluate any borrower with a Step-Rate Mortgage for a Streamlined Modification when the loan becomes 60 days delinquent within 12 months following the first payment due date if the delinquency is a result of an interest rate adjustment.

If the servicer determines that the borrower is eligible for a Streamlined Modification, the servicer must send the borrower at least one solicitation that includes the Streamlined

Modification Solicitation Letter and the Streamlined Modification Trial Period Plan Notice no later than 15 days after the eligibility evaluation.

These new requirements will be included in section B65.12.1 of the Freddie Mac Single Family Seller/Servicer Guide. Freddie Mac made this change to assist borrowers with Step-Rate Mortgages, including those with prior modifications under the Home Affordable Modification Program (HAMP), to maintain home ownership following step-rate adjustments and the related increases in their monthly payments of principal and interest.

In addition, Bulletin 2015-3 also adds a new eligible hardship category to Freddie Mac's standard modification Imminent Default Hardship test. Effective July 1, 2015, borrowers will be deemed to be in imminent danger of defaulting on their loans if the principal and interest payment increases as a result of an interest-rate adjustment applied to a Step-Rate Mortgage within 12 months prior to the evaluation date, provided that the other Imminent Default Hardship test requirements are also met.

Once this change takes effect, a borrower with a Step-Rate Mortgage who is current or less than 60 days delinquent, and who is otherwise eligible under the Imminent Default Hardship test, may submit a Borrower Response Package and be evaluated for a loan modification.

Freddie Mac also reduced its eligibility exclusions. For streamlined modifications, the existing three-step exclusion test (based on payment history, hardship reason and FICO score) will no longer apply to Step-Rate Mortgages. For borrowers who hold either a Step-Rate Mortgage or other mortgage products, Freddie Mac increased the permitted total number of previous loan modifications (for both streamlined modifications and standard modifications) from one to two.
Freddie Mac also will allow a mortgage that was both previously modified under Seller/Servicer Guide section B65.18 (a) *Determining the Terms of a Freddie Mac Standard Modification and Freddie Mac Streamlined Modification*, and became 60 or more days delinquent within 12 months of the modification effective date, to be eligible for a streamlined or standard modification so long as the borrower brought the loan current after the delinquency.

Finally, Freddie Mac will require that when a servicer receives a complete Borrower Response Package after the streamlined modification solicitation is sent to the borrower, and prior to sending the modification agreement, the servicer must acknowledge receipt of the package and evaluate the borrower in accordance with the requirements set forth in Bulletin 2015-3.

As noted above, these changes will take effect on July 1, 2015, but Freddie Mac encourages its servicers to implement the changes as soon as possible.

State Regulatory Developments

California Proposes New Mortgage Loan Originator Education Requirements

The state of California plans to initiate new education requirements for prospective and current mortgage loan originators (MLOs). The California Department of Business Oversight (DBO) has filed a notice of rulemaking action that would require MLO applicants to complete two hours of training related to relevant California law and regulations.

The proposal also would require licensed MLOs in the state to complete one hour of continuing education every year on relevant California law and regulations.

The new education requirements are for MLOs licensed, or MLOs seeking to be licensed, under the California Residential Mortgage Lending Act (CRMLA) and the California Finance Lenders Law (CFLL).

The notice also clarifies that the MLO test "may be developed, or deemed acceptable, by the Nationwide Mortgage Licensing System and Registry and enable DBO to adopt the Uniform State Test," according to the DBO.

The proposal would make changes in the composition of the qualified written test for MLO applicants. According to the notice, the test "shall consist of:

(1) the national component and the California state component; or
(2) the national component and the uniform state test; or
(3) the national component with uniform state content.

The updates to education and testing requirements of CRMLA and CFLL were required by CA Senate Bill 1459, which became effective on January 1, 2015.

Comments must be submitted to regulations@dbo.ca.gov by the May 4, 2015 deadline. You can find a copy of the notice, Initial Statement of Reasons and the text of the proposed changes on DBO's website.

Proposed Delaware Legislation Would Speed Up Business Arbitrations

Working its way through the Delaware General Assembly is legislation that would give businesses engaged in complex commercial deals the ability to rapidly resolve disputes with "old-style" arbitration. The proposed Delaware Rapid Arbitration Act lets parties forgo comprehensive and time-consuming pre-hearing evidence gathering, which can be costly, in exchange for a prompt resolution of their dispute.

If it passes, the legislation would provide for all rapid dispute resolution by expert arbitrators to be completed within 120 days. The act allows for the possibility of one extension to 180 days if all parties and the arbitrator agree.

And there are incentives in the bill to hinder any delays. The act may impose financial penalties on an arbitrator who fails to come to a decision within the specified timeframes.

For many lenders and servicers incorporated in Delaware, this pending legislation may allow for a quicker way to settle certain non-consumer disputes. For arbitrations covered by the bill, one of the business organizations that is a party in the dispute must be formed in Delaware or have its principal place of business in the state.

The arbitration act may be most useful for the resolution of disputes between parties that have an ongoing business relationship and do not want to be part of a protracted dispute resolution.

Arbitration under the act is not available for consumer disputes. This ensures that the act is not misused to impose an unfair requirement on individual consumers and deny them the protections of traditional litigation.

Litigation Developments

Court Upholds CFPB's Constitutionality, Enforcement Authority over ITT but Dismisses TILA Claims as Untimely

In *Consumer Financial Protection Bureau v. ITT*, the CFPB brought claims against ITT Educational Services, Inc. ("ITT") for unfair and deceptive practices related to allegedly coercive activities in recruiting students, and for Truth-in-Lending Act violations related to tuition loans.

In a motion to dismiss, ITT challenged the CFPB's constitutionality and whether ITT was a "covered person" or "service provider" subject to the CFPB's enforcement authority. ITT also challenged the allegations about its recruiting and lending activities. The District Court for the Southern District of Indiana recently upheld the CFPB's constitutionality and its enforcement authority over ITT.

The court also upheld the unfair and deceptive practice claims, but found the TILA claims were barred by the one-year statute of limitations.

ITT's constitutional argument was similar to other challenges to the CFPB, and like many other rulings, the Court held that the novel establishment and operation of the CFPB does not render it unconstitutional. After a lengthy analysis of Supreme Court precedent discussing the establishment of administrative agencies, the court held that the CFPB is a constitutional executive agency.

ITT also argued that it was not a “covered person” or “service provider” subject to the CFPB’s enforcement authority. The court disagreed. Based on the allegations, ITT was a covered person because it “engaged in” providing a financial product or service, *i.e.*, “financial advisory services to consumers on individual finance matters.”

The court explained “engaging in” does not require the activity to be a “primary business purpose.” ITT’s financial advisory services allegedly included credit counseling and assisting students/consumers with debt management.

The court also held the CFPB sufficiently alleged that ITT is a “service provider,” because it provided “a material service to a [different] covered person [a credit union] in connection with the consumer financial product.” Specifically, ITT was “heavily involved” in operating and maintaining a loan program whereby a third-party credit union extended the credit.

Such involvement included developing underwriting criteria, pre-qualifying borrowers, paying membership fees to the lead credit union involved where students obtained loans, and providing a stop-loss guarantee to the credit union for losses exceeding 35 percent of participating students.

As for the substantive claims, the court upheld the first three counts of the complaint related to ITT’s alleged recruiting practices, but the court dismissed the TILA claim as outside the one-year statute of limitations. The CFPB had alleged ITT violated TILA in failing to disclose a finance charge for the repayment of a “Temporary Credit,” a short-term, no-interest loan to cover the costs of tuition gaps.

The CFPB argued it brought the TILA claim under the administrative enforcement section of TILA, which did not have a one-year statute of limitations. The court disagreed because the CFPB had brought a civil action – not an administrative enforcement action.

The court upholding the constitutionality of the CFPB is not surprising. However, finding ITT to be both a “covered person” and “service provider” within the meaning of the Dodd Frank Act, shows the wide breadth of the CFPB’s enforcement authority. Businesses who do not perceive themselves as primarily providing consumer financial services may, nevertheless, be subject to CFPB enforcement lawsuits.

Similarly, the term “service provider” can be interpreted very broadly. Businesses working with “covered persons” can be exposed to CFPB enforcement actions and lawsuits, perhaps unexpectedly, depending on the level of involvement. The primary purpose of a business is not determinative when the CFPB exercises its enforcement authority.

Weiner Brodsky Kider PC regularly defends against CFPB enforcement actions, as well as against alleged violations of unfair and deceptive practice statutes and TILA, throughout the United States.