# Financial Services Update

**May 8, 2015**

## HIGHLIGHTS

### Federal Regulatory Developments

CFPB and State of Maryland End Allegedly Illegal Mortgage Referral Operation

CFPB Brings First Overdraft Fee Action

CFPB Fair Lending Report Looks at HMDA Data Integrity, Underwriting and Redlining Risk

FHA Extends for 90 Days SF Handbook Effective Date

CFPB Releases TRID Mortgage Origination Exam Update

### State Regulatory Developments

Bipartisan SAFE Transitional License Act Introduced in House

### Litigation Developments

Can a Statute Give a Consumer the Right to Sue Without a Concrete Injury?

Defendants Can Remove State Court Actions to Federal Court before Service

**WBK News**

**Jack Konyk** will speak on "Development and Trends in Mortgage Enforcement Actions" at the Ohio MBA's Annual Convention on May 12 in Columbus, OH. MORE INFO

**Mitch Kider** and **Fed Kamensky** will conduct a webinar titled "Understanding the New TILA/RESPA Integrated Disclosure Rule" hosted by SAI Global on May 13 at 2:00 pm EDT. MORE INFO

**Mitch Kider** will discuss RESPA/TILA Integration during the National Association of Professional Mortgage Women (NAPMW) National Education Conference on May 14 in Herndon, VA. MORE INFO

**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. Purchase a copy for $250.

## SUMMARIES

### Federal Regulatory Developments

### CFPB and State of Maryland End Allegedly Illegal Mortgage Referral Operation

RESPA prohibits anyone from giving or accepting a "fee, kickback or thing of value" in exchange for a referral of business related to a real estate settlement service. The CFPB and the Maryland Attorney General on April 29, 2015 took enforcement action against an allegedly illegal kickback operation in Maryland that violated RESPA, in which a title company paid loan officers hundreds of thousands of dollars for referrals of mortgage settlement business.

A complaint filed by the CFPB and state of Maryland in federal court in Baltimore alleges that Maryland-based Genuine Title and four loan officers violated RESPA, the Consumer Financial Protection Act and the Maryland Consumer Protection Act by funneling illegal cash kickbacks through a network of companies and exchanging marketing services for referrals.

In proposed consent orders filed in court, five of the six individual defendants—two executives of the title company and three loan originators--are banned from the mortgage industry from two to five years and ordered to pay a total of $662,500 in redress and penalties. Three of the loan originator defendants must disclose this

enforcement action to the Nationwide Mortgage Licensing System and Registry (NMLSR).

Genuine Title, which went out of business in 2014, is prohibited from violating RESPA again and banned from the mortgage industry for five years.

In the "pay-to-play" scheme, the complaint alleges, from 2009 to 2013 Genuine Title paid loan officers for referrals of settlement, or mortgage closing, business. These payments were funneled from the title company to limited liability companies set up by the loans officers, because a title company executive knew that it would look "fishy" to pay cash directly to the loan originators from Genuine Title's operating account.

The title company made cash payments ranging from $175 to $800 to loan officers for each loan referred. One loan originator was paid more than $500,000 for referrals between 2011 and 2013.

Genuine Title also allegedly provided marketing services to loan officers in exchange for referrals of loan closing services. The title company bought and analyzed marketing leads, and provided them to loan officers, as well as paying for "marketing letters directed to the consumer leads to be printed, folded and stuffed into envelopes and mailed," according to the complaint.

These direct mail campaigns were managed and overseen by the title company. Loan officers participating in the alleged marketing scheme generally did not pay for the full cost of the leads, the printing and processing of the marketing materials, or the cost of postage to mail the marketing materials.

This enforcement action is related to the CFPB's action in January 2015 against Wells Fargo and JPMorgan for its loan officers being involved in a kickback scheme with Genuine Title. The bureau cited that the banks did not have adequate systems in place to catch the alleged RESPA violations. The banks agreed to pay $35 million in penalties and redress.

The CFPB press release on the enforcement action, which includes links to the complaint and the various consent orders, is available here: http://www.consumerfinance.gov/newsroom/cfpb-and-state-of-maryland-take-action-against-pay-to-play-mortgage-kickback-scheme/.

**CFPB Brings First Overdraft Fee Action**

The abuse of bank overdraft fees has been on the CFPB's radar screen for the past few years. And on April 28, 2015, the bureau entered into a consent agreement with

Regions Bank, representing its first overdraft fee enforcement action. The bank already has paid $49 million in refunds of alleged illegal fees it charged consumers who had not opted-in for fee-based overdraft protection.

The CFPB fined Regions $7.5 million, but stated the penalty could have been even larger had the bank not promptly self-reported the errant overdraft fees to the CFPB after senior management had become aware of them and voluntarily reimburse consumers.

In the consent order, the CFPB charged Regions Bank with violations of UDAAP, the Electronic Fund Transfer Act (EFTA) and the Consumer Financial Protection Act (CFPA). The violations stemmed from the 2010 Federal Reserve opt-in rule, which requires depository institutions to obtain a consumer's affirmative consent, or opt-in, before enrolling them in overdraft services for which they may be charged fees.

The alleged EFTA violations occurred when the bank charged consumers with overdraft fees for ATM and one-time debit card transactions after failing to obtain affirmative opt-ins, according to the consent order. Among the alleged CFPA and UDAAP violations cited by the CFPB, the bank misrepresented in advertisements and information to consumers that they would not be charged with overdraft fees for ATM and debit card transactions, as well as for loan repayments under the bank's deposit advance product.

The consent order requires Regions to refund in full more consumers affected by the illegal overdraft fees that the bank identified in January 2015, beyond the $49 million the bank already has reimbursed. The bank must hire an independent consultant for the purpose of identifying any remaining customers who the bank illegally charged.

As ordered by the CFPB, Regions must find and correct all negative credit reporting errors that resulted from charging consumers the alleged illegal overdraft fees. The bank also may not violate the opt-in rule again and must put in place a plan to ensure that its policies, procedures and processing systems comply with EFTA. And Regions may not expressly represent or imply that it will not or does not charge overdraft and non-sufficient funds fees when in fact it does.

In July 2012, an internal consensus at the bank determined that the overdraft fees violated the opt-in rule and reported it to the CFPB, 10 months after a mid-level employee made the same determination. The CFPB cited the bank for delays in fixing the overdraft problem.

The CFPB press release on the Regions Bank enforcement action, including a link to the consent order, is available here: http://www.consumerfinance.gov/newsroom/cfpb-fines-regions-bank-7-5-million-for-unlawful-overdraft-practices/

**CFPB Fair Lending Report Looks at HMDA Data Integrity, Underwriting and Redlining Risk**

In its Fair Lending Report for 2014, the CFPB noted that mortgage lending, along with auto finance, were the bureau's key priorities for fair lending supervision and enforcement matters. Home Mortgage Disclosure Act (HMDA) data integrity and validation also was cited as an area of CFPB interest.

The CFPB pointed out in the Fair Lending Report, which was released on April 28, 2015, that the bureau's Office of Fair Lending continues to focus on mortgage underwriting and redlining as areas of potential fair lending risk, given the tight credit conditions of the past few years. The CFPB also looks at the fair lending implications of pricing policies and practices in the mortgage market.

Through 2014, the CFPB's fair lending enforcement program has included Equal Credit Opportunity Act (ECOA) "targeted reviews at institutions responsible for approximately 40% of the applications and originations pursuant to HMDA," according to the report.

The CFPB uses  fair lending data analysis, which evaluates trends and developments at both the institutional and market levels, to help it identify lenders that "appear to deviate significantly from their peers in, for example, the extent to which they provide access to credit in communities of color," the report noted.

The report highlighted the proposed rule the CFPB published in August 2014 to amend HMDA (Regulation C) to require lenders to report new HMDA data elements. The CFPB received around 400 comments on the proposal and is working on a final rule.

The CFPB noted in the report that it is exploring ways to improve the consistency of data standards and information flows through modernizing and streamlining HMDA reporting and data collection.

The fair lending report also reiterated the CFPB's supervisory experience in conducting HMDA Data Integrity Reviews, which were first described in the Fall 2014 edition of Supervisory Highlights. The CFPB noted that "examination teams have found that many lenders have adequate HMDA compliance systems, resulting in HMDA data with no errors or very few errors."

However, at some institutions the bureau has found "inadequate management systems and severely compromised lending data," according to the report.

A copy of the CFPB's 2014 Fair Lending Report is available here:
http://files.consumerfinance.gov/f/201504_cfpb_fair_lending_report.pdf

**FHA Extends for 90 Days SF Handbook Effective Date**

FHA on April 30, 2015 gave lenders an extra 90 days before the policies contained in the new Single Family Policy Handbook (HUD Handbook 4000.1) go into effect. The new effective date has been moved from June 15, 2015 to September 14, 2015.

The agency stated that the date was extended as a courtesy to lenders because of all the new initiatives occurring at that time in the mortgage industry. This extension should help FHA lenders assure compliance when the new and revised policies in HUD Handbook 4000.1 go into effect.

The effective date for all published sections in the Single Family Handbook has been extended, including the following:

- Updates to the Origination through Post-Closing/Endorsement for Title II Forward Mortgages section;
- Doing Business with FHA—Lenders and Mortgagees section;
- Quality Control, Oversight and Compliance section;
- 203(k) Rehabilitation Mortgage Insurance Program policies subsection;
- 203(k) Consultant requirements subsection;
- Appraiser and Property Requirements for Title II Forward and Reverse Mortgage subsection; and
- Appraisal Report and Data Delivery Requirements guide.

The Single Family Policy Handbook is available here: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/handbook_4000-1.

**CFPB Releases TRID Mortgage Origination Exam Update**

The CFPB recently updated its Mortgage Origination examination procedures to account for the upcoming implementation of the TILA-RESPA Integrated Disclosure Rule (TRID). The new exam procedures, released on May 4, 2015, provide valuable guidance to financial institutions and others in the real estate industry on how compliance examinations will be conducted by the CFPB in light of TRID, which goes into effect on August 1, 2015.

The CFPB Mortgage Origination procedures, among other criteria, are designed to assess the quality of an institution's compliance management system regarding origination activity, identify acts or practices that can increase the risk of violating federal consumer financial law and to gather facts to help determine whether a lender engages in such acts or practices that likely violate the law.

A copy of the updated CFPB Mortgage Origination examination procedures can be found here: http://files.consumerfinance.gov/f/201505_cfpb_mortgage-origination-exam-procedures.pdf.

**State Regulatory Developments**

**Bipartisan SAFE Transitional License Act Introduced in House**

Under current mortgage licensing law, it is anything but a smooth transition for a loan officer at a federally-insured bank to take a similar job in the same state with a non-bank mortgage originator. He or she likely will spend weeks trying to meet state licensing requirements before originating a loan. But new legislation introduced in the House by a bipartisan group of lawmakers aims to make that process smoother.

Seven members of the House Financial Services Committee led by Rep. Steve Stivers (R-OH) earlier this week introduced H.R. 2121, the SAFE Transitional License Act, which would make a minor change to the Secure and Fair Enforcement Act for Mortgage Licensing of 2008 (SAFE Act) by requiring states to issue a transitional license to individuals who are registered loan originators and already employed by a depository institution or an affiliate.

These individuals could then move to a state-licensed, non-depository lender and continue originating loans for 120 days while working to meet state licensing requirements. The bill also would give a state-licensed originator in one state who moves to another for a similar position a 120-day grace period to obtain a license in the new state, allowing them to continue working and originating loans.

The problem depository institution loan officers who want to take a job with a non-bank lender face today is that state licensing requirements for non-bank originators are much more rigorous than what's required of them as depository institution loan officers. This includes comprehensive testing and continuing education requirements. The transitional elements in the new bill would allow them to keep working while they go through the state licensing process.

A copy of Rep. Steve Stivers' press release on the new legislation is available here: http://stivers.house.gov/news/documentsingle.aspx?DocumentID=398638

## Litigation Developments

### Can a Statute Give a Consumer the Right to Sue Without a Concrete Injury?

The U.S. Supreme Court granted certiorari last week to determine whether Congress can create Article III standing for a plaintiff who did not suffer any concrete harm (and who therefore would not otherwise have standing to sue), by authorizing a private right of action for a bare violation of a federal statute. This comes three years after the Court dismissed a case raising the same issue after hearing argument.

The case is *Spokeo, Inc. v. Robins*. Robins alleges that Spokeo willfully violated provisions of the Fair Credit Reporting Act (FCRA) through its website by publishing inaccurate personal information about him, including information about his education, marital status and financial circumstances.

Robins filed a lawsuit in California and sought to be the representative of a class of similarly situated plaintiffs. He claimed that the FCRA violations by Spokeo harmed his search for employment. Robins' lawsuit was dismissed, reinstated then dismissed again at the district court level, with the trial court ultimately finding that Robins had not shown a sufficiently concrete injury as a result of a FCRA violation.

On appeal, the Ninth Circuit held that Robins had standing to sue under Article III of the United States Constitution. The Court explained the FCRA provisions create standing because they give the plaintiff a substantive right that could be vindicated with a monetary judgment.

The Court found that Robins' interests in the handling of his credit information were sufficiently concrete and particularized to satisfy the injury-in-fact requirement of Article III. Alternatively, the Court ruled that a party may sue under FCRA *without showing actual harm*, as the statutory cause of action does not require a showing of actual harm when a plaintiff sues for willful violations.

This case presents the Supreme Court with another opportunity to decide whether the violation of a statutory provision, which includes a private right of action, gives a person standing to sue in federal court, even if the consumer was not harmed in any concrete way.

The last time this issue was before the Court, in *Edwards v. First American*, the Court dismissed the writ of certiorari as improvidently granted, after hearing argument. Now, at least four members of the Court appear ready to decide the issue left unresolved in *Edwards*.

Weiner Brodsky Kider frequently defends clients nationwide against consumers seeking statutory penalties.

**Defendants Can Remove State Court Actions to Federal Court before Service**

The Court of Appeals for the First Circuit recently joined the Second, Fifth, and Eleventh Circuits in holding that a defendant can remove a state court action to federal court, before service of the state court action has been effected. This issue is not addressed in the removal statute and has not been addressed by the U.S. Supreme Court. But the First Circuit concluded that service is not required prior to a defendant's removal of a state-court action, as long as the lawsuit is filed and the statutorily defined period for removal has not expired.

Under 28 U.S.C. § 1446 (b) (1), the removal statute and the deadline for filing a notice of removal of a civil action can occur at one of two alternate points. The first is "within 30 days" after the defendant receives the complaint, and the second is "within 30 days" after service of process upon the defendant, if the initial pleading has already been filed in state court and is not required to be served upon the defendant.

The removal statute requires a notice of removal to be filed during "whichever period is shorter" of the two alternate 30-day time periods, but does not specify that service of the complaint is a prerequisite to a defendant's filing of a notice of removal. The Court explained the statute's alternate time periods accommodate different state law requirements governing the inclusion of complaints with the service of a summons, the goal being to ensure defendants have an opportunity to see a complaint before being required to file a notice of removal.

The plaintiff argued that removal was in error in the instant case because formal service of the complaint had not occurred at the time defendant sought removal to federal court, and because service is "fundamental to any procedural imposition" on a defendant. Rejecting this broad reading of § 1446 (b)(1), the Court closely examined the statutory language and its related provisions, emphasizing both the plain use and meaning of the language therein and the relevant legislative history.

The Court found that the plaintiff's interpretation of the "whichever is shorter" portion of the statute would mean the defendant cannot remove before being served during either alternate 30-day period, undermining and negating Congress' inclusion of the "whichever is shorter" language.

Noting that Congress had the opportunity to revise this language when it amended the statute in 2011, the Court found no other legal precedent, and no congressional intent evident at that time or at any other to prevent a defendant from removing a case to federal court before being served.

Weiner Brodsky Kider represents clients nationwide in state and federal courts.

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