Financial Services Update

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HIGHLIGHTS

Federal Regulatory Developments

CFPB Says New TRID Document Will Not Cause Closing Delays

One in 10 American Adults Have No Credit History, CFPB Finds

CFPB Orders Sprint and Verizon to Pay $120 Million in Refunds for Unauthorized Wireless Charges – But Federal Judge Requires More Information

Litigation Developments

D.C. Circuit Affirms Dismissal of Constitutional Challenge to CFPB

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. Purchase a copy for $250.

SUMMARIES

Federal Regulatory Developments

CFPB Says New TRID Document Will Not Cause Closing Delays

With the August 1, 2015 TILA-RESPA Integrated Disclosure (TRID) deadline looming, many in the industry are concerned that any changes made to the new Closing Disclosure form might delay loan closings. Don't worry, CFPB Director Richard Cordray recently told realtors, the new document, which must be presented to mortgage applicants three business days before closing, is unlikely to cause such problems.

"There has been some serious misunderstanding about what kind of major changes would cause a delay of the closing date, so I want to take a moment to clear that up right now," Cordray said in a May 12, 2015 speech to the National Association of Realtors (NAR). "The timing of the closing date is not going to change based on any problems you discover with the home on the final walk-through, even matters that might change some of the sales terms or require seller's credits."

It appears that Director Cordray's comments were intended to point out that there are only three specific situations that trigger a new three-business day waiting period before consummation when the creditor provides a corrected Closing Disclosure to the consumer. Specifically, Cordray noted that the CFPB limited the number of reasons for possible closing delays to three narrow sets of circumstances:

- an increase in the APR by more than one-eighth of a percent for fixed-rate loans and more than one-quarter of a percent for variable-rate loans;
- adding a prepayment penalty; and
- a change in the loan product, such as replacing a fixed-rate loan with a variable-rate loan.

With respect to the first reason, it should be noted that while Director Cordray's comments focused on "increases" in the APR, the actual provisions under TRID require a new three-business day waiting period when the APR becomes "inaccurate," which could, under certain circumstances, include an APR that was over-disclosed above the applicable APR tolerance limitation.

Further, this statement could be viewed as confusing due to its reference to fixed- and variable-rate loans, rather than regular and irregular transactions. An ARM loan is not necessarily an "irregular transaction" for purposes of APR redisclosure tolerance thresholds.

Importantly, although the three reasons noted above technically are the only instances when a new three-business day waiting period would be required prior to consummation, there are other circumstances when an event that occurs shortly before scheduled consummation could cause complications for the creditor under the language of the new rules, as currently drafted. Director Cordray's comments did not address these areas of uncertainly.

Nevertheless, “[t]hat is it,” Cordray said, adding that the TRID rule makes allowances for ordinary changes “without delaying the closing date in ways that neither the buyer nor the seller may be able to accommodate very easily.”

Cordray noted the CFPB through its work in supporting industry implementation of TRID has learned that most market players “have put themselves in position” to be ready for TRID by August 1. The bureau also has received substantial input on this issue and has been “listening closely in order to consider and assess that input.”

In other news, Cordray said the bureau is continuing to work on its electronic closing initiative, eClosings, to create a smoother and more effective closing system for consumers and the industry. The goal is to provide early delivery of closing documents so that consumers have more time to review them, to consult with family members and others, and to ask the lender questions.

As an automated process, eClosings can make it easier to detect discrepancies in closing documents, leading to more accurate closings. Cordray pointed out that errors and delays in closings are a “big source of frustration” for consumers. A year ago the CFPB launched an eClosings pilot project and it soon will be analyzing the results.

Richard Cordray’s prepared remarks to the NAR are available here: http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-national-association-of-realtors/.

One in 10 American Adults Have No Credit History, CFPB Finds

Being credit invisible with no credit history sounds sort of tempting. No one hassling you for money you owe. But with no credit record or credit score, you’ll find it hard to start a business, buy a home, rent an apartment or even get a better job. In a research report issued on May 5, 2015, “Data Point: Credit Invisibles,” the CFPB estimated that 26 million adults in America, one in 10, are credit invisible and another 19 million have insufficient credit histories for obtaining a credit score.

Not surprisingly, the study found that many consumers who lack a credit history or have an unscored credit record are young. Of the 26 million considered to be credit invisible, more than 10 million are younger than 25. “Consumers in this age group also account for a disproportionate share of insufficient-unscored credit records,” the report noted. The young haven’t had much time to amass credit at all.

Income also plays a large role in whether a consumer is credit scored or invisible. About 30% of consumers living in low-income neighborhoods are credit invisible, while another 15% have unscored credit records. In contrast, in higher-income neighborhoods only 4% of the residents are credit invisible and an additional 5% are unscored.

The report noted that a vicious credit circle can develop keeping low-income households in credit reporting purgatory, whereas the better-off face a more virtuous credit circle. For example, because higher-income consumers find it easier to qualify for traditional credit, even when lacking credit histories, "they may be more likely than lower-income consumers to open credit cards, auto loans, or other forms of credit" that are frequently reported to the credit bureaus, according to the report.

Conversely, if lower-income consumers have a hard time qualifying for traditional credit, they will seek non-traditional sources, such as payday or auto-title lenders, who generally do not report information to credit bureaus, the report noted. Thus lower-income consumers don't have the same opportunity to develop credit histories and enjoy the economic opportunities that may follow.

Another significant finding in the report is that African American and Hispanic consumers are more likely than white or Asian consumers to possess limited credit records. The report estimated that 15% of African American and Hispanic consumers are credit invisible, compared to 9% of white consumers. And another 13% of black consumers and 12% of Hispanic consumers have unscored credit records, compared to 7% of white consumers.

"What may be most concerning is that our analysis suggests that these differences across racial and ethnic groups materialize early in the adult lives of these consumers and persist thereafter," said CFPB Director Richard Cordray. He added that reduced access to credit may continue "to hamper their opportunities to growth throughout their lives."

The CFPB press release on the credit invisible report, which includes a link to the report, is available here: http://www.consumerfinance.gov/newsroom/cfpb-report-finds-26-million-consumers-are-credit-invisible/.

CFPB Orders Sprint and Verizon to Pay $120 Million in Refunds for Unauthorized Wireless Charges – But Federal Judge Requires More Information

The CFPB is seeking $120 million in consumer refunds from Sprint and Verizon for allegedly "cramming" customer wireless bills with unauthorized third-party charges for "premium text messages" that included apps, games and other services. On May 12, 2015, the CFPB filed in two federal courts proposed consent orders against Sprint and Verizon which, if approved by the courts, will provide consumer relief, as well as require the companies to pay $38 million in state and federal fines.

The bureau alleged four main areas in which the wireless companies violated the CFPB's prohibition on unfair practices under UDAAP:

1. The companies gave third-party vendors access to their billing systems and failed to properly monitor their activities. This made it easier for third parties to attach charges directly to consumer wireless bills.

2. Consumers were automatically billed for charges without their consent. Sprint and Verizon did not require customers to opt-in to the billing services. This auto-enrollment without consent policy, according to the complaints, “helped perpetuate the wrongdoing because many customers did not spot unauthorized charges, as they were unaware that third parties could place charges on their bills.”
3. The companies disregarded red flags about the actions of the third-party vendors. Both Sprint and Verizon continued to outsource premium message billing despite the filing of lawsuits against some of the same vendors for the cramming of unauthorized charges in other instances.
4. Sprint and Verizon ignored and mishandled customer complaints about the unauthorized charges. They failed to adequately track customer complaints, which resulted in their inability to put in place a basic fraud-alert mechanism.

The two companies were identified as “covered persons” in the complaints for their roles in extending credit to and processing payment for consumers in connection with the purchase of third party goods or services.

The bureau filed the underlying complaint against Verizon on May 12, 2015, alleging violations of the UDAAP provisions in the Consumer Financial Protection Act (CFPA). Earlier, in December 2014, the CFPB filed a similar complaint against Sprint. Coordinating efforts with the CFPB in investigating the allegedly illegal actions of the companies were the Federal Communications Commission (FCC) and the state attorneys general from all 50 states and the District of Columbia.

Besides ordering refunds of $120 million—up to $70 million from Verizon and up to $50 million from Sprint—the CFPB’s proposed enforcement action requires the companies to address the following:

- Clearly and conspicuously disclose third-party charges on wireless bills;
- Obtain verifiable express informed consumer consent (direct or indirectly) before imposing any third-party charges or deducting funds from a prepaid account;
- Send separate purchase confirmations of every third-party charge, which include information regarding the consumer’s blocking options;
- Offer consumers the option of blocking third-party charges and provide information regarding the blocking options;
- Improve dispute resolution procedures for third-party charges; and
- Improve customer-service training programs.

Sprint’s and Verizon’s billing systems enabled merchants and scammers to add allegedly unauthorized charges to wireless bills for premium text messages, bilking consumers out of millions of dollars. According to the allegations in the complaints, Sprint and Verizon outsourced the billing of these messages to billing aggregator

vendors without providing the necessary oversight of the vendor charges as the payment processors.

The CFPB noted in a statement that the lack of oversight "allowed the vendors to have nearly unfettered access to consumers' wireless accounts." The bureau alleges that "unscrupulous" merchants were able to cram illegitimate charges onto wireless bills, ranging from one-time fees up to $14.99 to monthly subscriptions costing up to $9.99. Verizon and Sprint received 30% to 40% of the gross revenue from the charges.

Interestingly, on May 19, 2015, the federal judge overseeing the Sprint matter requested both parties to submit briefing on the propriety of the proposed consent order, noting that federal courts are not to be used as a "rubber stamp."

He further stated, "If the Bureau wishes to invoke federal subject matter jurisdiction, it must be willing to explain why the proposed settlement is fair, reasonable, and consistent with the public interest. How the Bureau believes a judge can evaluate the proposed settlement with a one sentence joint motion, no memorandum of law, and no declaration, eludes this Court." The federal judge is requiring the parties to submit briefing "as soon as practicable,"

The CFPB press release on the Sprint and Verizon actions, which includes copies of the proposed consent orders and the Verizon complaint, can be found here: http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-obtain-120-million-in-redress-from-sprint-and-verizon-for-illegal-mobile-cramming/.

A copy of the December 2014 Sprint complaint is available here: http://files.consumerfinance.gov/f/201412_cfpb_cfpb-v-sprint-complaint.pdf.

Litigation Developments

D.C. Circuit Affirms Dismissal of Constitutional Challenge to CFPB

By a split decision, the D. C. Circuit Court of Appeals recently affirmed dismissal of a constitutional challenge to the structure and existence of the CFPB. The Court found the lead plaintiff had adequate means in another court to pursue its claims, and the other plaintiff lacked standing.

In *Morgan Drexen v CFPB*, one of the two plaintiffs provides legal support services to debt relief and bankruptcy lawyers. The other plaintiff, Kimberly Pisinski, is an attorney that uses Morgan Drexen's services in her bankruptcy law practice.

After a year-long investigation of Morgan Drexen, the CFPB notified the company it was considering an enforcement action for violations of the Consumer Financial Protection Act and the Telemarketing Sales Rule. The alleged violations consisted of charging

consumers up-front fees for debt relief services disguised as fees for bankruptcy services, which services were either not performed or unnecessary for most consumers.

Before the CFPB took action, Morgan Drexen and Pisinski pre-emptively filed suit on July 22, 2013 in the District Court of the District of Columbia, alleging the independent structure of the CFPB violated separation of powers principles of the Constitution.

The complaint sought injunctive and declaratory relief because: (a) the powers delegated to the Bureau are overbroad; (b) the director of the Bureau can only be removed "for cause;" (c) the normal congressional appropriations process does not apply to the Bureau; and (d) judicial review of the Bureau's actions is limited. Pisinksi also alleged that the Bureau was impermissibly regulating her as an attorney.

Thirty days after the lawsuit was filed, the CFPB filed suit in federal court in California. Shortly thereafter, the District Court of D.C. dismissed plaintiffs' constitutional challenge because Morgan Drexen had an adequate remedy at law in the California court, and because Pisinski lacked Article III standing under the Constitution.

On appeal, the D. C. Circuit agreed that Pisinski lacked standing by failing to show "injury in fact." Among other things, she did not show that her legal practice "is or will be economically harmed by the Bureau's enforcement action against Morgan Drexen."

As to Morgan Drexen, the Court focused on its own discretion to exercise jurisdiction when the same issue is pending in litigation in another forum. Since Morgan Drexen raised its constitutional challenge as a defense in the California action, it was not entitled to injunctive relief in the District of Columbia District Court. Similarly, declaratory relief was not appropriate because hearing the case in D.C. could result in "piecemeal litigation" while the California action continued.

Although the plaintiffs are now foreclosed from challenging the CFPB in D.C. federal court, the opinion was also notable for a short, but cutting, dissent from Judge Kavanaugh. On the issue of Pisinksi's standing, Judge Kavanaugh stated, "[w]e have a tendency to make standing law more complicated than it needs to be. . . . When a regulated party such as Pisinksi challenges the legality of the regulating agency or of a regulation issued by that agency, 'there is ordinarily little question' that the party has standing, as the Supreme Court has indicated.'"

Weiner Brodsky Kider routinely defends clients against the CFPB throughout the United States.

an indication of completeness, applicability to a particular situation, or an indication of future developments or results.