# Financial Services Update
**June 3, 2015**

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### WBK News

**Mitch Kider** and **Alexandra Karram** will present two webinars to a large regional bank's correspondent customers in the Midwest. The first webinar on June 5 will cover “Construction to Permanent Loans” and the second webinar on June 8 will focus on the “TILA/RESPA Integrated Disclosure Rule”. **MORE INFO**

**Mitch Kider** will deliver a speech on "Affiliated Businesses, Marketing Agreements, and CFPB Enforcement" at the National Settlement Services Summit, sponsored by October Research, on June 10 in Atlanta, GA. **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

### Director Cordray Announces "Sensitivity" to Good Faith TRID Compliance Efforts

On June 3, 2015, CFPB Director Richard Cordray sent a letter to Senators Joe Donnelly of Indiana and Tim Scott of South Carolina, responding to concerns raised by them and many in the industry regarding TRID compliance. In that letter, Director Cordray states that he will be "sensitive to the progress made" by companies "that have squarely focused on good-faith efforts" to comply with the rule in time. Director Cordray likened this "sensitivity" to the CFPB's approach to enforcement of the new mortgage rules in January 2014.

While this announcement is welcome news, it is important to note that Director Cordray's statement does not delay the implementation or effective date of the new rule. Furthermore, it has no effect on the enforcement of any private rights of action on behalf of borrowers for violations of the rule.

### CFPB Cites Developers for Failing to Maintain Roadways

On May 1, 2015, the CFPB entered into a consent order with a Florida-based land development company and several individuals (collectively, the "developers") that requires the repair of neglected roads at Hawks Bluff, a Tennessee development.

The order finds that the developers violated the Interstate Land Sales Full Disclosure Act (ILSA) and the UDAAP provisions of the Consumer Financial Protection Act (CFPA) by misrepresenting the status of the roads in Hawks Bluff in HUD-registered property reports and in advertising and marketing materials to consumers.

The advertisements and reports stated that all roadways in the development were complete and built to county standards for approved private status. In addition, the reports represented that the seller would maintain the roads until they were accepted by Van Buren County, Tennessee.

The CFPB's order states that the developers did not maintain the roads and that the roads have not been accepted by Van Buren County. The company and individuals accepted the CFPB's findings of fact and law and admitted liability for their conduct. Pursuant to the order, the developers must repair the roads in the development to the CFPB's satisfaction within 180 days.

A copy of the order is available at: http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-property-developers-for-marketing-violations/.

**HUD Issues Record $200 Million Conciliation Agreement for Redlining Allegations**

On May 26, 2015, the U.S. Department of Housing and Urban Development announced a settlement agreement totaling $200 million dollars with Associated Bank, N.A., to settle allegations of redlining. According to HUD's press release, it is one of the largest redlining complaints ever pursued by the federal government, and the largest by HUD. HUD filed the complaint based on Associated Bank's Home Mortgage Disclosure Act data for 2008-2010. The complaint alleges that Associated Bank discriminated on the basis of race and national origin by disproportionately denying loan applications of African Americans or Hispanic populations despite high demand in such areas, and by underserving neighborhoods with significant African-American or Hispanic populations despite high demand. The Department's analysis covered 5 metropolitan areas over the time period of 2008-2013.

Associated Bank denied any allegation that it engaged in discriminatory lending, and stated they have served the upper Midwest for over 150 years without incident. Associated Bank also had contracted with Charles River Associates, an economic consulting firm, who found no evidence of disparate treatment on a prohibited basis during that time frame.

Despite Associated Bank's independent review, HUD's conciliation agreement requires Associated Bank to pay close to $10 million to create a subsidy fund for reduced interest rate, down payment and closing cost assistance for qualified loan applicants in certain majority-minority census tracts. On top of the $10 million, the bank agreed to provide the following in the same majority-minority census tracts:

- Originate, fund or purchase nearly $200 million in mortgage loans;
- Provide qualified 501(c)(3) home repair nonprofits roughly $3 million for individual grants;

- Provide nearly 1.4 million dollars of targeted marketing outreach;
- Invest in community financial education programs specific to individuals and small business owners;
- Commit $1.35 million in Community Reinvestment Training and Education;
- Open one full-service branch in a majority-minority tract in Chicago within 30 months, and remain open for 5 years;
- Open smaller loan production offices within 30 months and remain open for 5 years.

HUD's press release on the Associated Bank action, which includes a link to the conciliation agreement, can be found here: http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2015/HUDNo_15-064b&hootPostID=c7e82b7806a8a0e2c47b92a1a1729428

**CFPB and DOJ Issue Consent Order for Fair Lending Violations Based on Allegations of Improper Broker Pricing Discretion**

The Consumer Financial Protection Bureau and Department of Justice field a complaint and consent order on May 28, 2015 against Provident Funding Associates, LP, alleging that its pricing policies allowing considerable discretion to mortgage brokers in the pricing of loans resulted in discrimination against African American and Hispanic borrowers, in violation of the Fair Housing Act (FHA) and Equal Credit Opportunity Act (ECOA). The Consent Order includes payment of a $9 million penalty.

The complaint filed by the CFPB and DOJ in federal court in Northern California, alleges that Provident Funding Associates violated the FHA and ECOA by charging African American and Hispanic borrowers higher total broker fees on wholesale mortgage loans than non-Hispanic white borrowers.

The complaint alleges, from 2006-2011, Provident gave the mortgage brokers subjective and unguided discretion to determine the total broker fees they would charge the borrower. Total broker fees included a yield spread premium from Provident to brokers who gave a borrower an interest rate that exceeded the risk-based par rate, and a direct from broker to consumer charge. The Complaint also alleges that, although Provident set a broker cap at 3.5%, it did not evaluate the changes in rates among individual borrowers for discrimination among African-Americans and Hispanics.

As a result, the complaint alleges that Provident charged African-American customers total broker fees between 16.9 and 58.2 basis points higher than those charged to white borrowers from 2006 to 2011. Similarly, the complaint alleges that Provident charged Hispanic borrowers total broker fees between 19.8 to 31.8 basis points higher than the total broker fees charged to white borrowers from 2006 to 2011.

Pursuant to the consent order, Provident must pay $9 million for direct and indirect damages to affected borrowers over a five year period. They must also hire a settlement administrator to distribute funds to victims through cost-free methods. In addition, the company must submit to a monitoring program that will oversee Provident's wholesale loans and look for potential disparities based on race and national origin.

The CFPB press release on the enforcement action, which includes links to the complaint and the consent order, is available here:
http://www.consumerfinance.gov/newsroom/cfpb-and-department-of-justice-take-action-against-provident-funding-associates-for-discriminatory-mortgage-pricing/

**CFPB Takes Action Against PayPal in Connection with PayPal Credit**

On May 19, 2015, the CFPB filed a complaint and a proposed consent order against PayPal, Inc. and Bill Me Later, Inc. in connection with their online credit product, PayPal Credit. The CFPB alleges violations of the Consumer Financial Protection Act (CPFA) for unfair, deceptive, and abusive acts and practices in connection with PayPal Credit.

PayPal, Inc., through its wholly-owned subsidiary, Bill Me Later, Inc., offers a line of credit called PayPal Credit (formerly called "Bill Me Later") to consumers making purchases through eBay and other online merchants. The CFPB alleges that the Defendants' offering, marketing, and servicing of PayPal Credit violated the CFPA in a number of ways.

The CFPB alleges that the Defendants enrolled consumers in, and caused consumers to use, PayPal Credit without their consent. Further, the Defendants allegedly engaged in deceptive advertising by failing to honor their promotional offers. According to the complaint, the Defendants failed to provide consumers with adequate information about their deferred interest practices. The complaint also alleges defects in the Defendants' payment processing and billing dispute practices.

Under the proposed consent order, which was filed in the United States District Court of the District of Maryland, PayPal would pay $15 million in redress to affected consumers and $10 million to the CFPB's Civil Penalty Fund. PayPal would also be required to improve its disclosures to consumers, payment processing system, and billing dispute process. The consent order was required to receive judicial approval prior to becoming effective. It was signed by the court on May 20, 2015.

The CFPB's Announcement, along with links to the complaint and consent order, can be found at:
http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-PayPal-for-illegally-signing-up-consumers-for-unwanted-online-credit/

## CFPB Announces Spring 2015 Rulemaking Agenda

On May 22, the CFPB published a blog post regarding its Spring 2015 rulemaking agenda. Included on the agenda are:

- HMDA Updates – the CFPB noted that it is working on the finalization of their proposed HMDA rule, and expect the final rule to be issued "in late summer;"
- TRID – The CFPB drew attention to the industry and consumer guides it has released, and noted again that the rule takes effect on August 1, 2015;
- Prepaid Financial Products – the CFPB noted it is finalizing its proposal from December 2014 regarding prepaid financial products, and expects a final rule in "early 2016;"
- Payday, Auto Title, and Other Loans – the CFPB drew attention to its recent proposals on regulating payday lenders and auto title lenders, noting that they plan on issuing a Notice of Proposed Rulemaking "later this year;"
- Overdrafts – the CFPB stated they are continuing to analyze overdraft services, and are assessing whether rulemaking is warranted;
- Debt Collection – the CFPB noted that it is developing proposed rules, but did not provide any timeline for completion;
- Arbitration – the CFPB noted that it is considering whether rulemaking governing arbitration clauses may be warranted in light of its recent study and the feedback it has received from that.

The CFPB's Spring 2015 Rulemaking Agenda Blog post is available here: http://www.consumerfinance.gov/blog/spring-2015-rulemaking-agenda/

## Federal Agencies Release Final Rule on AMC Minimum Requirements

On April 23, 2015, the FDIC, the Office of the Comptroller of the Currency, the Federal Reserve Board, the NCUA, the CFPB, and the Federal Housing Finance Agency (collectively, the "Agencies") released the final version of the rule on AMC minimum requirements (the "Final Rule"). The Agencies had released an initial draft for comment on April 9, 2014.

The Final Rule implements the minimum requirements contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") for States that engage in the registration and supervision of AMCs, as well as the minimum requirements in the Dodd-Frank Act for AMCs that are subsidiaries owned and controlled by an insured depository institution and regulated by a federal financial institutions regulatory agency ("Federally-regulated AMCs").

<u>Effective Date</u>

The Final Rule will become effective 60 days after its publication in the Federal Register (the "Effective Date").

Federally-regulated AMCs do not need to register with a State but are required to comply with the applicable provisions of the Final Rule (discussed below) no later than 12 months from the Effective Date.

Additionally, States (which includes Guam, the Mariana Islands, Puerto Rico, and the U.S. Virgin Islands) that wish to implement registration and supervision programs for non-Federally-regulated AMCs ("State-regulated AMCs") in accordance with the provisions of the Final Rule (discussed below) must do so within 36 months of the Effective Date.

The Final Rule does not require States to implement such registration and supervision programs ("Registration Programs"). However, State-regulated AMCs generally will not be permitted to operate in States that do not implement Registration Programs in the required timeframe (subject to certain exceptions described below). Federally-regulated AMCs would still be permitted to operate in such States, provided they comply with the provisions applicable to them in the Final Rule.

Under the Final Rule, States are to report to the Appraisal Subcommittee (ASC) of the Federal Financial Institutions Examination Council (FFIEC) the information required by the ASC to administer the new national registry of AMCs (AMC National Registry).

Scope of the Final Rule

While the Final Rule contains provisions applicable to both State-regulated AMCs and Federally-regulated AMCs, it does contain several important exceptions.

First, the base definition of "AMC" used within the Final Rule only includes persons or entities that:

- provide appraisal management services to creditors or to secondary mortgage market participants, including affiliates;
- provide such services in connection with valuing a consumer's principal dwelling as security for a consumer credit transaction or incorporating such transactions into securitizations; and
- within a 12-month period (either a calendar year or another 12-month period as defined by the applicable State), oversee an appraiser panel of more than 15 State-certified or State-licensed appraisers in a State or 25 or more State-certified or State-licensed appraisers in two or more States.

An “appraiser panel” is defined for these purposes as a network, list or roster of licensed or certified appraisers approved by an AMC to perform appraisals as independent contractors for the AMC (which includes both appraisers who have been accepted by the AMC for consideration for future appraisal assignments and appraisers actually engaged by the AMC to perform one or more appraisals).

For these purposes, an appraiser is deemed to be part of an AMC’s appraiser panel as of the earliest date that the AMC either accepts the appraiser for consideration for future appraisal assignments, or actually engages the appraiser to perform one or more appraisals. Such appraisers are deemed to remain on the panel until the date on which the AMC either sends written notice to the appraiser removing him or her from the panel (with an explanation for the removal), or receives written notice from the appraiser asking to be removed from the panel (or the AMC receives notice of the death or incapacity of the appraiser).

The Final Rule defines “appraisal management services” as one or more of the following:

- recruiting, selecting, and retaining appraisers;
- contracting with State-licensed or State-certified appraisers to perform appraisal assignments;
- managing the process of having an appraisal performed, including providing administrative services, submitting completed reports to creditors, collecting fees from creditors, and paying appraisers; and
- reviewing and verifying appraisers’ work.

The Agencies did not establish with the Final Rule a requirement that AMCs follow minimum standards when performing appraisal reviews. The Agencies stated that a future rulemaking to implement section 1110 of FIRREA provides the appropriate opportunity to address the requirement for appraisal reviews.

As a consequence of these definitions, the Final Rule will not apply to smaller AMCs that do not meet the appraiser panel size thresholds. Additionally, the Final Rule will not apply to appraisal firms that engage in appraisal management services but only utilize their own appraiser employees and do not utilize independent contractors. Both types of entities will be permitted to perform appraisal management services in States that do not implement Registration Programs.

Beginning 36 months from the Effective Date of the Final Rule, an AMC that meets the statutory size threshold may not provide services for a Federally related transaction in a State unless the AMC is registered with the State or is subject to oversight by a Federal financial institutions regulatory agency. Each State is effectively allowed up to three years to establish registration and supervision systems that meet the requirements of

the Final Rule before AMCs in the State will be subject to the above restriction in the absence of such a regime.

The ASC, with the approval of the FFIEC, may delay the restriction for an additional year if the ASC makes a written finding that a State has made substantial progress toward implementation of a system that meets the criteria in Title XI of FIRREA. Even after the three-year implementation period has passed, a State may still elect to establish a regime, at which point AMCs operating in the State would be able to provide appraisal management services for Federally related transactions.

Importantly, a State is not required to establish an AMC registration and supervision program, nor is a penalty imposed on a State that does not establish a regulatory structure for AMCs within 36 months of the Effective Date of this Final Rule. However, in a State that has not adopted the AMC minimum requirements established by the Final Rule, AMCs are barred from providing appraisal management services for Federally related transactions, unless they are owned and controlled by a Federally regulated depository institution.

Thus, if a State does not establish a regulatory structure for AMCs within 36 months of the Effective Date of this Final Rule, appraisal management services may still be provided for Federally related transactions in non-participating States by individual appraisers, by AMCs that are below the minimum statutory panel size threshold, or by Federally-regulated AMCs.

The Final Rule: (1) provides that the standard for determining whether an appraiser is an independent contractor will be based on how the appraiser is treated for Federal income taxes, as determined under Internal Revenue Service (IRS) guidance; (2) clarifies that an AMC credit union service organization (CUSO) is not considered to be a Federally-regulated AMC, and therefore would be regulated by the State or States in which the AMC CUSO operates; (3) clarifies that the rule does not bar the use of trainee appraisers; (4) provides that the registration limitations on individuals who have had their licenses refused, denied, cancelled, surrendered in lieu of revocation, or revoked, should not be construed to apply to appraisers whose licenses have been revoked for non-substantive reasons, as determined by the appropriate State appraiser certifying and licensing agency and whose licenses have been subsequently reinstated; and (5) revises the provision on reporting of information by Federally-regulated AMCs to clarify that Federally-regulated AMCs will report information required for the AMC National Registry directly to the States.

<u>Required Features of Registration Programs</u>

Under the Final Rule, a Registration Program for State-regulated AMCs must ensure that the State-regulated AMCs meet certain ownership requirements (described below) and must have the legal authority and mechanisms to do the following:

- review and approve or deny an AMC's application for initial registration;
- review and renew or deny an AMC's registration periodically;
- examine the books and records of the AMC and require the AMC to submit reports, information, and documents;
- verify that the appraisers on the AMC's appraiser panel hold valid State certifications or licenses, as applicable;
- conduct investigations of AMCs to assess potential violations of applicable appraisal-related laws, regulations, or orders ("Applicable Law");
- discipline, suspend, terminate, or deny renewal to an AMC that violates such Applicable Law; and
- report an AMC's violation of such Applicable Law as well as disciplinary and enforcement actions and other relevant information about an AMC's operations to the Appraisal Subcommittee.

Additionally, each State electing to establish a Registration Program must impose rules on State-regulated AMCs requiring such AMCs to:

- register with and be subject to supervision by the State appraiser certifying and licensing agency;
- engage only State-certified or State-licensed appraisers for Federally related transactions in conformity with any Federally related transaction requirements;
- establish and comply with processes and controls reasonably designed to ensure that such AMCs select appraisers who are independent of the transaction and who have the requisite education, expertise, and experience necessary to competently complete the appraisal assignment for the particular market and property type;
- direct the appraiser to perform assignments in accordance with USPAP; and
- establish and comply with processes and controls reasonably designed to ensure that such AMCs conduct their appraisal management services in accordance with the valuation independence requirements of the Truth in Lending Act ("TILA") and its implementing Regulation Z, such as the customary and reasonable compensation requirements found at 12 C.F.R. § 1026.42(f).

It is important to note here that this effectively means that States, in addition to the CFPB, will have the authority to interpret and enforce the valuation independence requirements of TILA and Regulation Z. It is not clear from this Final Rule what would result if a State and the CFPB disagree on interpretations of these requirements. For example, the CFPB theoretically could determine that a State-regulated AMC was in compliance with the customary and reasonable compensation requirement, but the

licensing State could determine that the AMC was not in compliance with that same requirement.

Ownership Limitations

The Final Rule also imposes ownership restrictions on State-regulated AMCs. Under the Final Rule, an AMC will not be eligible for registration as a State-regulated AMC, or eligible for inclusion on the AMC National Registry, if the AMC is owned, in whole or in part, directly or indirectly, by any person who has had an appraiser license or certificate refused, denied, cancelled, surrendered in lieu of revocation, or revoked in any State for any substantive cause, as determined by the appropriate State licensing or registration agency. However, an AMC is not barred as described above if the owner's appraiser license was not revoked for a substantive reason (for example, it was revoked due to non-payment of required dues), and has been reinstated by the applicable State.

Additionally, an AMC will not be eligible for registration as a State-regulated AMC if any person that owns more than 10 percent of the AMC either fails to submit to a background investigation carried out by the State licensing or registration agency, or is determined by such an agency not to have good moral character. The Final Rule does not define further what constitutes "good moral character".

Special Rules for Federally-Regulated AMCs

The Final Rule imposes a number of requirements on Federally-regulated AMCs, several of which are similar to requirements that apply to State-regulated AMCs. First, a Federally-regulated AMC will not be eligible for inclusion on the AMC National Registry if the AMC is owned, in whole or in part, directly or indirectly, by any person who has had an appraiser license or certificate refused, denied, cancelled, surrendered in lieu of revocation, or revoked in any State for any substantive cause, as determined by the Appraisal Subcommittee.

A Federally-regulated AMC is not barred from being included on the AMC National Registry, if the license or certificate of the appraiser with an ownership interest in the AMC has been reinstated by the State or States in which the appraiser was licensed or certified. As with State-regulated AMCs, a Federally-regulated AMC is not barred as described above if the owner's appraiser license was not revoked for a substantive reason (for example, it was revoked due to non-payment of required dues), and has been reinstated by the applicable State. However, the limitation on registration due to lack of good moral character would apply to Federally-regulated AMCs only if they seek to register voluntarily with a State.

Second, a Federally-regulated AMC must comply with the following (which also apply to State-regulated AMCs, as described above):

- engage only State-certified or State-licensed appraisers for Federally related transactions in conformity with any Federally related transaction requirements;
- establish and comply with processes and controls reasonably designed to ensure that such AMCs select appraisers who are independent of the transaction and who have the requisite education, expertise, and experience necessary to competently complete the appraisal assignment for the particular market and property type;
- direct the appraiser to perform assignments in accordance with USPAP; and
- establish and comply with processes and controls reasonably designed to ensure that such AMCs conduct their appraisal management services in accordance with the valuation independence requirements of TILA and Regulation Z.

Third, Federally-regulated AMCs must report to the States in which they operate the information required to be submitted by those States to the Appraisal Subcommittee, including but not limited to the collection of information related to the requirements and limitations applicable to Federally-regulated AMCs described above.

Participating States must have a mechanism for collecting information from identified Federally-regulated AMCs operating in their States and submitting it to the ASC. However, the Final Rule does not require States to identify Federally-regulated AMCs operating in their States, nor are they responsible for supervising or enforcing a Federally-regulated AMC's compliance with information submission requirements related to the AMC National Registry.

Rather, the Federal agencies overseeing Federally-regulated AMCs are responsible for supervising and enforcing the compliance of Federally-regulated AMCs with these requirements, including whether the AMC identifies itself to the State and submits required information. States are also not required to assess whether any licensing issues in that State of owners of a Federally-regulated AMC disqualify the AMC from being on the AMC National Registry, pursuant to the ownership limitations. The Final Rule defers to the ASC to determine whether the cause of an appraiser license issue arose was "substantive."

As noted above, Federally-regulated AMCs are required to comply with the provisions described in this section no later than 12 months from the Effective Date.

The FFIEC's press release and the text of the rule is available here: http://www.fhfa.gov/Media/PublicAffairs/Pages/Agencies-Issue-Final-Rule-on-Minimum-Requirements-for-Appraisal-Management-Companies.aspx

## Litigation Developments

### Supreme Court Rejects Stripping Wholly-Underwater Subordinate Liens in Chapter 7 Bankruptcy

The Supreme Court on Monday held unanimously that a debtor in bankruptcy proceedings under Chapter 7 cannot void or "strip" a wholly-underwater junior mortgage lien. Resolving a circuit split, the Court rejected debtors' arguments to allow such stripping, even though the entire amount of the junior lien was effectively unsecured. In *Dewsnup v. Timm*, the Court had previously rejected stripping partially-underwater senior liens down to the value of the collateral under the same statutory provision, and now extends that holding to wholly-underwater liens.

*Dewsnup* rejected the argument that an "allowed secured claim" must also literally be a "secured claim" within the meaning of § 506(a). Section 506(a) distinguishes for bankruptcy purposes between the portion of a claim that does not exceed the value of the collateral – "a secured claim" – and any portion that exceeds the value of the collateral – "an unsecured claim." Section 506(d) of the Bankruptcy Code voids liens that "secure[ ] a claim against the debtor that is not an ***allowed secured claim***." (emphasis added) So long as the secured claim is allowed under § 506(a), the effectively unsecured portion of the "allowed secured claim" is not voided under § 506(d), even if the collateral for the secured claim has insufficient value to cover any part of the secured claim.

In the case decided Monday, *Bank of America, N.A. v. Caulkett*, the Court held that there is no valid basis to distinguish between partially-underwater claims and wholly-underwater claims for purposes of the § 506(d). The holding of *Dewsnup* precludes lien stripping in either case. The Court rejected the debtors' "historical and policy" arguments and refused to give the term "allowed secured claim" a different meaning in the very same statutory provision, depending on whether the lien was partially or wholly underwater.

The Court's ruling in *Caulkett* does not directly affect the practice of stripping underwater liens in proceedings under Chapter 13 of the Bankruptcy Code, especially liens on principal residences, which are governed by a different statutory provision.

The opinion is available here: http://www.supremecourt.gov/opinions/14pdf/13-1421_p8k0.pdf

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