Financial Services Update
June 17, 2015

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WBK News

Mitch Kider will conduct a webinar entitled "TRID: Your Competitive Advantage", hosted by Mortgage Coach, on June 23 at 1:00 pm EDT. To register go to http://mcedge.tv/mktrid.

Weiner Brodsky Kider PC conducted 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 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

HUD Releases Modified Mortgagee Optional Election (MOE) Assignment Option

On June 12, 2015, HUD released Mortgagee Letter 2015-15 (ML 2015-15), which amends regulations for HECMs with a FHA Case Number assigned prior to August 4, 2014, to provide an alternative option for claim payment for an eligible HECM with an Eligible Surviving Non-Borrowing Spouse. Specifically, ML 2015-15 provides mortgagees with the new modified Mortgagee Optional Election (MOE) Assignment option.

HUD previously issued Mortgagee Letter 2015-03 (ML 2015-03) providing for a MOE Assignment that required a HECM to comply with certain requirements and either the Factor Test or the Principal Limit Test in order to be eligible for a MOE Assignment. Under the "original" MOE Assignment option, as provided in ML 2015-03, the Eligible Surviving Non-Borrowing Spouse must have had a Principal Limit Factor (PLF) greater than or equal to the PLF of the HECM borrower spouse (Factor Test), or the Eligible Surviving Non-Borrowing Spouse's PLF must have resulted in a current principal limit that is greater than or equal to the HECM's current unpaid principal balance (Principal Limit Test). Note that on April 30, 2015, HUD released Mortgagee Letter 2015-12, which rescinded ML 2015-03 and the "original" MOE Assignment option.

HUD stated in ML 2015-15 that it determined that it is possible for HUD to make the MOE Assignment claim option available to mortgagees without requiring satisfaction of either the Factor Test or the Principal Limit Test. However, HUD explained that it will still continue to impose the other requirements and conditions set forth for the MOE Assignment, as originally published in ML 2015-03. In addition, HUD stated in ML 2015-15 that the new modified MOE Assignment claim will be the only alternative path to claim payment for existing HECMs with Eligible Serving Non-Borrowing Spouses that were issued FHA Case Numbers prior to August 4, 2014. Note that a mortgagee must notify HUD of its election to pursue the MOE Assignment option within 120 days after the death of the last surviving HECM borrower or 120 days after the effective date of ML 2015-15 (June, 12, 2015), whichever is later.

The requirements of the modified MOE Assignment are provided in ML 2015-15. The full text of ML 2015-15 can be found at: http://portal.hud.gov/hudportal/documents/huddoc?id=15-15ml.pdf.

CFPB Issues Study and Advisory on Reverse Mortgage Advertising

The CFPB recently released a study on reverse mortgage advertising along with an advisory for senior borrowers considering a reverse mortgage. For purposes of the study, the CFPB reviewed 97 advertisements from several lenders that appeared in five large urban markets between March 2013 and March 2014. The ads included direct mail, online, radio, print and TV advertisements. The CFPB also conducted focus groups and one-on-one interviews with 59 homeowners potentially eligible for a reverse mortgage.

The CFPB concluded that some reverse mortgage advertisements confused consumers. Although the CFPB did not make the actual advertisements used in the study publically available, the CFPB stated that after reviewing the ads, consumers often misunderstood the key features and potential risks of reverse mortgages, including the following:

- Advertisements implied that reverse mortgages are affiliated with the federal government causing consumers to misunderstand the role of the government.
- Consumers did not understand that reverse mortgage proceeds must be repaid in the future.
- Consumers had difficulty understanding that reverse mortgages are loans with fees and compounding interest since most ads reviewed either did not include interest rates or included them in the fine print.
- Advertisements used language implying or stating that borrowers cannot lose their homes.
- Advertisements claiming that reverse mortgage proceeds are “tax free” made consumers believe they would not have to pay property taxes.
- Consumers misunderstood the ability to remain in their homes as long as they want.
- Advertisements promoted reverse mortgages as a “lifestyle enhancement” product but depleting home equity early could jeopardize financial security later in life.
- Consumers could not read the fine print.

The CFPB’s study shows that the CFPB continues to pay close attention to reverse mortgage advertising. The CFPB previously participated in a joint sweep with the FTC that resulted in an enforcement action by the CFPB against a mortgage lender for alleged false reverse mortgage ads. In this study, the CFPB has focused on perceived incompleteness and inaccuracies in reverse mortgage advertising. The CFPB noted that because reverse mortgages are complex transactions and are used by older and

often financially vulnerable consumers, incomplete or inaccurate statements in reverse mortgage advertisements can pose serious risks to consumers.

The CFPB also released an advisory warning consumers about the possibility of misleading and confusing reverse mortgage advertisements. The advisory also highlights facts that consumers should keep in mind when viewing reverse mortgage ads.

The CFPB's Study and Consumer Advisory on reverse mortgage advertising can be found at: http://www.consumerfinance.gov/newsroom/cfpb-study-finds-reverse-mortgage-advertisements-can-create-false-impressions/.

CFPB and Florida Attorney General Obtain Default Judgment Against Fraudulent Mortgage Relief Scheme

On May 29, 2015, the United States District Court for the Southern District of Florida entered final judgments and orders against the defendants in a Florida-based mortgage modification relief scheme. In July 2014, the CFPB and the Florida Attorney General (AG) had obtained a temporary restraining order and an asset freeze against the defendants.

In their original complaint, the CFPB and Florida AG alleged that Hoffman Law Group (HLG), Nationwide Management Solutions, Legal Intake Solutions, File Intake Solutions, and BM Marketing Group (together, "Corporate Defendants"), along with three individual defendants, violated various federal and state consumer financial laws, including the Omnibus Appropriations Act, 2009, and its implementing regulation, the Mortgage Assistance Relief Services Rule (Regulation O), the Florida Unfair and Deceptive Trade Practices Act (FDUTPA), and other state laws.

According to the complaint, HLG would approach potential "clients" through direct and indirect advertisements, purporting to add consumers to a so-called "mass-joinder" suit against mortgage companies. In addition, Defendants allegedly promised mortgage assistance relief for those currently in foreclosure through reduction or forgiveness of their loans, reducing interests rates, and in some cases even stopping foreclosure altogether. As alleged in the complaint, to provide this service, HLG typically charged a $6,000 initial fee followed by a $495 monthly fee for every month they continued to "help" their customers. The CFPB and the Florida AG claimed that HLG pocketed well over $5 million dollars over the course of these activities.

Regulation O prohibits any mortgage assistance relief service from advising consumers against contacting or otherwise communicating with their lender and from charging or receiving a fee before any written agreement has been reached between the lender and the consumer. According to the judgment, the Corporate Defendants violated both provisions of Regulation O by charging fees before entering into a written agreement

with the consumer, and by counseling consumers against contacting their lenders directly, insisting they would handle all communications with the lenders/servicers. The court also entered a judgment against the Corporate Defendants for failing to provide proper disclosures regarding consumers' rights and misrepresenting the likelihood of success of the "mass-joinder" case. Additionally, the complaint alleged that the individual defendants also misused their positions as bar-admitted attorneys to convince the consumers that they were receiving actual legal advice.

With regard to the state law charges, the court entered a judgment against Corporate Defendants for FDUTPA violations, including the continued collection of illegal fees, deceptive statements and false advertising, and providing misleading information with respect to the progress of litigation.

The order set the monetary value of consumer damages to be paid by the Corporate Defendants at $11,730,579, although the court suspended all but $655,736.98, due to lack of assets, and deemed the rest uncollectable. Furthermore, the court ordered a civil penalty of $10,000,000 for violation of Regulation O and another $6,000,000 for state law violations. In addition to the monetary payments, the court directed all assets of the Corporate Defendants to be liquidated and dissolved all involved businesses. The court entered separate orders against three individual defendants; all were banned from offering or advertising mortgage assistance relief products, and one individual defendant's law license was revoked in the state of Florida.

The CFBP's press release, along with links to the initial complaint and the final judgment and orders can be found here:
http://www.consumerfinance.gov/newsroom/cfpb-and-florida-attorney-general-obtain-27-million-judgment-against-foreclosure-relief-scam-companies/

CFPB, Federal Agencies Issue Final Standards for Assessing Regulated Entities' Diversity Policies and Practices

Section 342 of the Dodd-Frank Act requires the CFPB, the Federal Reserve Board, the FDIC, the National Credit Union Administration, the OCC, and the SEC (the Agencies) to each create an Office of Minority and Women Inclusion (OMWI) and tasks those offices with developing standards for the evaluation of diversity policies and practices of entities regulated by the Agencies. The Agencies consulted with various regulated entities and other parties knowledgeable about the subject matter (such as financial professionals, consumer advocates, and community representatives) and published proposed standards on October 25, 2013, with a comment period extending to February 7, 2014. The Agencies issued a final interagency policy statement, effective on June 10, 2015, announcing their joint standards.

The joint standards announced in the policy statement are comprised of five (5) general categories, each including a list of particularized standards and intended to provide a framework for a regulated entity to create and strengthen its diversity policies and

practices. The standards, which address matters regarding diversity in management, employment, and business activities, should be implemented so that they reflect each individual regulated entity's size and unique characteristics. Certain elements in the standards are briefly noted below:

- Standard 1: ***Organizational Commitment to Diversity and Inclusion***: This standard focuses on leadership and corporate culture regarding these initiatives, addressing both the governing body of the entity as well as its senior officers and day-to-day managers. For example, the standards provide for an appointment of a senior executive with experience in diversity programs to oversee an entity's diversity and inclusion efforts, who has dedicated resources to support these efforts.
- Standard 2: ***Workforce Profile and Employment Practices***: This standard focuses on outreach, recruiting, retention, and performance evaluation efforts, including the use of analytics in evaluating business objectives. While both quantitative and qualitative data are important when reviewing the policies and practices of institutions, data gathering cannot be used in such a way as to constitute unlawful employment discrimination. Current tools (e.g., EEO-1 Reports and Affirmative Action Plans), which should be used only as baseline information, as well other helpful analytical tools, may be appropriate tools for gauging the profile of a workforce and its employment practices.
- Standard 3: ***Procurement and Business Practices – Supplier Diversity***: This standard notes that available business options may be increased by expanded outreach to minority-owned and women-owned businesses, both as prime contractors and as subcontractors, and includes guidance for metrics to assist in that effort.
- Standard 4: ***Practices to Promote Transparency of Organizational Diversity and Inclusion***: This standard encourages a regulated entity to make its diversity and inclusion efforts publicly known, such as by publication of this information on its website.
- Standard 5: ***Entities' Self-Assessment***: This standard asserts that successful diversity policies and procedures include focusing company energies on periodic monitoring and evaluation of its own performance and sharing these policies, procedures, and self-assessments with the public and with the Agencies. However, the policy statement provides that the information submitted may be designated as confidential commercial information as appropriate and that the Agencies will comply with FOIA in the event of requests for particular submissions.

Note that the policy statement indicates that it does not create new legal requirements, that the Agencies will not use their examination or supervisory processes with the standards, and that a regulated entity's use of the standards is voluntary. However, while Section 342 of the Dodd-Frank Act does not confer enforcement authority for civil rights laws on the OMWI, each OMWI Director is directed to coordinate with the applicable agency administrator regarding the design and implementation of any remedies resulting from civil rights violations.

As required in connection with collection of information not contained in a proposed rule, the Agencies concurrently published a notice regarding such collection of information and is allowing 60 days for public comment. Comments must be submitted on or before August 10, 2015.

The CFPB's publication of the joint release can be found at: http://www.consumerfinance.gov/newsroom/agencies-issue-final-standards-for-assessing-diversity-policies-and-practices-of-regulated-entities/.

The final policy statement can be found at: http://www.gpo.gov/fdsys/pkg/FR-2015-06-10/pdf/2015-14126.pdf.

CFPB Announces $20 Million Consent Order Against Mortgage Company and CEO for LO Compensation Violations

The CFPB entered a proposed consent order on June 4, 2015 with RPM Mortgage and its CEO to settle violations of the loan originator compensation provisions in Regulation Z. The CFPB's complaint alleges that the company illegally paid bonuses and higher commissions to loan originators to incentivize them to steer consumers into more expensive mortgages, and illegally used point banks to fund pricing concessions.

The order requires the mortgage company to pay $18 million in redress to affected consumers and a $1 million civil penalty. For his personal involvement in managing the design and implementation of the compensation plan, the CEO is individually ordered to pay a $1 million civil penalty.

The CFPB's complaint addresses conduct that occurred between April 2011, when the Federal Reserve Board's compensation rule became effective, and December 2013. Specifically, the CFPB alleges that the company compensated its loan originators through individual employee-expense accounts funded based on the profits from a loan officer's closed loans. According to the complaint, the company would fund a loan officer's expense account for a loan closed if the revenue exceeded the sum of the branch fees and the upfront commission the loan officer earned on the loan. Thus, loan officers could cause greater deposits to be made into their individual expense accounts by placing consumers into higher-interest rate loans.

Notably, the CFPB alleges the expense accounts served as point banks in violation of Regulation Z. While point banks are not directly addressed in the regulation, the CFPB discussed point banks in the preamble to its proposed and final loan originator compensation rule, where it stated that it believes there should be no circumstances under which point banks are permissible.

The complaint alleges the company used the employee-expense accounts to illegally compensate loan officers in the following ways:

- From April 2011 through January 2012, the company paid 511 bonuses to loan originators that were funded from the existing balances in the employee's expense account. The CFPB notably states that, for loan officers who received bonuses, the amount was "strongly correlated" with the balances in their individual employee-expense accounts, resulting in periodic bonuses that were based on the terms of the loan officer's transactions.

- Even after the company stopped paying periodic bonuses from the employee-expense accounts at the end of 2011, the company allowed loan officers to use the employee-expense accounts to supplement their commission on future transactions. According to the CFPB, loan officers were able to reset their commission rates on future loans, using the expense account funds from earlier high-interest loans to cover underages on less profitable loans.

- From April 2011 through December 2013, the company allowed loan originators to use their expense accounts to finance pricing concessions to consumers, including more than 1,000 interest-rate discounts, as well as more than $1 million in credits for RESPA-tolerance cures and appraisal costs. The CFPB states this "point bank" arrangement violated Regulation Z because it allowed loan originators to close and earn commissions on loans they would otherwise have lost.

The consent order permanently enjoins the company and CEO from committing future violations of the compensation rule. The company also is required to create and retain, for at least 5 years from the date the order is entered, all documents and records necessary to demonstrate full compliance with the order, including documents detailing the amounts, dates, and components of all compensation paid to loan originators and how such compensation was calculated. Such documentation must be available to the CFPB upon its request.

The CFPB's press release announcing the order, which includes links to the complaint and proposed order, is available at: http://www.consumerfinance.gov/newsroom/cfpb-orders-rpm-mortgage-to-pay-19-million-for-steering-consumers-into-costlier-mortgages/.

Litigation Developments

"Preponderance of the Evidence" Sufficient to Show Violations of Virginia Consumer Protection Act

Claims brought under the Virginia Consumer Protection Act (VCPA) need only meet a "preponderance of the evidence" standard of proof. The "clear and convincing evidence" standard for common law fraud does not apply.

In *Ballagh v. Fauber Enterprises, Inc.*, the Supreme Court of Virginia reversed the lower court's decision on the standard of proof required for VCPA claims. In *Ballagh*, the

plaintiff claimed the seller its agent, from whom she purchased a home, concealed basement flooding problems. The lower court decided the VCPA claims should be governed by the more stringent "clear and convincing evidence." The court instructed the jury to apply the higher standard, and the jury found for the defendant. Plaintiff appealed to the Supreme Court of Virginia, which Court reversed the judgment of the lower court and remanded the case for a new trial.

In reaching its holding, the Court explained that the standard of proof in Virginia for statutory causes of action is ***normally*** the "preponderance of the evidence" standard. Nothing in the VCPA clearly and convincingly displaced that standard. The Court also observed that the VCPA, as a remedial statute, should be construed in favor of the consumer.

Defendants argued that the VCPA claims are similar to common law fraud claims, which require the "clear and convincing evidence" standard. The Court disagreed, explaining plaintiff could actually pursue claims for common law fraud and violation of the VCPA, simultaneously. "[A]lthough a plaintiff may not recover double damages by claiming both a VCPA violation and common law fraud, he or she may present both claims in the same action and elect between the damages awarded if both are proven."

The Virginia Supreme Court's opinion is available here:
http://www.courts.state.va.us/opinions/opnscvwp/1141248.pdf

Weiner Brodsky Kider regularly represents mortgage lenders and servicers throughout the United States against alleged violations of federal and state laws.

New York Court of Appeals rules for Originator in Statute of Limitations MBS Claim

On June 11, the New York Court of Appeals ruled that the statute of limitations barred a $250 million lawsuit in *ACE Securities Corp. v. DB Structured Products, Inc.* ("DBSP"), for failure to repurchase pursuant to a securitized loan pool agreement. Judge Read held that the Statute of Limitations began at the formation of the agreement and not at the request for repurchase.

The trustees for the certificate holders of ACE Securities filed the lawsuit on March 28, 2012, six years to the day of when the agreement was executed. A review of the securities allegedly found breaches of the agreement's representations and warranties.

In opposition to a motion that the lawsuit was untimely, the trustees argued that a claim did not arise until DBSP refused to cure or repurchase, at which point the trustees had six years to bring suit. The trustees also argued that the cure or repurchase obligation was a separate promise of future performance that continued for the life of the investment. However, the Court found that DBSP never guaranteed the future

performance of the loans, but only those representations and warranties at the point of contract.

Next, the trustees argued that the cure or repurchase obligation was a substantive condition precedent to suit, which delayed the accrual of the Statute of Limitations. In that same vein, they had no right to sue DBSP until it failed to repurchase or cure a loan within the requisite amount of time.

The Court ruled that the trustees confused a demand seeking relief from a pre-existing wrong, with a condition to a party's performance. When the only impediment to recovery is the discovery of the wrong, the claim accrues immediately. If DBSP breached the representations and warranties, they did so at the moment of signing the agreement, and the claim accrued at the moment of execution. The Court ruled that DBSP's failure to cure or repurchase was not a substantive condition precedent, but a procedural prerequisite to suit.

The New York Court of Appeal's decision can be found here:
http://www.nycourts.gov/ctapps/Decisions/2015/Jun15/85opn15-Decision.pdf

WBK assists clients nationwide with mortgage loan repurchase demands.