Financial Services Update
June 24, 2015

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WBK News

Jim Milano will participate on a panel addressing regulatory approvals for mortgage servicers at the American Conference Institute Mortgage Servicing Compliance Conference being held June 25-26 in Dallas, TX. **MORE INFO**

Mitch Kider will join the Lykken on Lending radio program to discuss the CFPB, DOJ, RESPA, and False Claims actions on June 29 at 1:00 pm EDT. **MORE INFO**

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

CFPB Issues Proposed Rule to Delay TRID Until October 3

The CFPB issued a proposed rule today to delay the effective date of its TRID rule from August 1 to October 3, 2015. The proposed rule does not include substantive changes, and only proposes to make non-substantive technical amendments to reflect the new proposed effective date. The proposal will be open for public comment until July 7 so that a final rule may be published on an expedited schedule. The CFPB also proposes that the final rule delaying the effective date take effect immediately upon the final rule's publication in the Federal Register, in order to reduce confusion and market disruption.

The CFPB recently discovered an administrative error in its compliance with a Congressional Review Act required report for the rule and, as a result, the TRID rule cannot legally go into effect until at the earliest August 15, 2015. Because some delay in the effective date is now required, the CFPB believes an additional delay may benefit both consumers and industry. The CFPB also learned in recent weeks that delays in the delivery of system updates have left creditors and others with limited time to fully test their systems, further warranting a delay in the effective date.

As a result, the CFPB proposes to delay the effective date of TRID until October 3, which is slightly later than the originally announced October 1 date in order to provide for a Saturday effective date. Notably, the CFPB does not propose to allow lenders to begin compliance with the rule earlier than the finalized effective date.

The CFPB solicits comment on all aspects of the proposal, including alternative or more limited extension dates. However, the CFPB believes a longer delay would impose

unnecessary costs on both the industry and consumers, and would be inconsistent with the underlying intent to aid consumer understanding of mortgage loan transactions.

A copy of the proposed rule is available at:
http://files.consumerfinance.gov/f/201506_cfpb_2013-integrated-mortgage-disclosures-rule-under-the-real-estate-settlement-procedures-act-regulation-x-and-the-truth-in-lending-act-regulation-z-and-amendments-delay-of-effective-date.pdf.

CFPB Extends Oversight to Nonbank Auto Finance Companies

On June 10, 2015, the CFPB issued a final rule that will allow it to oversee larger nonbank auto finance companies. The CFPB estimates that under the final rule, it will supervise about 34 of the largest nonbank auto finance companies and their affiliated companies that engage in auto financing, which collectively originate about 90 percent of nonbank auto loans and leases.

The Dodd-Frank Act authorizes the CFPB to supervise nonbanks that are "larger participants" of markets for consumer financial products or services. Under the final rule, which was originally proposed in September 2014, the CFPB expands the definition of "larger participants" to include a nonbank covered person that makes, acquires, or refinances 10,000 or more loans or leases in a year. The final rule gives the CFPB authority to supervise such companies for compliance with various federal consumer financial laws including the Equal Credit Opportunity Act (ECOA), the Truth in Lending Act (TILA), the Consumer Leasing Act (CLA), and the Dodd-Frank Act's prohibition on unfair, deceptive, or abusive acts or practices. The final rule becomes effective 60 days after being published in the Federal Register.

In connection with the final rule, the CFPB also released its Automobile Finance Examination Procedures to provide guidance as to how it will examine both bank and nonbank auto finance companies. Among other issues, the CFPB plans to focus its examinations on whether auto finance companies are: 1) using deceptive tactics to market and disclose of auto finance terms; 2) providing accurate information to credit bureaus; 3) using proper debt collection tactics; and 4) complying with ECOA and related consumer protection laws.

The final rule can be found at:
http://files.consumerfinance.gov/f/201506_cfpb_defining-larger-participants-of-the-automobile-financing-market-and-defining-certain-automobile-leasing-activity-as-a-financial-product-or-service.pdf.

The examination procedures for auto finance can be found at:
http://files.consumerfinance.gov/f/201506_cfpb_automobile-finance-examination-procedures.pdf.

Offices of the Inspector General Issue Findings on Interagency Cooperation

On June 1, 2015, the Offices of Inspector General (the "OIGs") for the Consumer Financial Protection Bureau ("CFPB"), the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the National Credit Union Administration (collectively, the "Agencies") issued a report (the "Report") describing the results of the OIGs' limited-scope review of the coordination of responsibilities among the Agencies. The OIGs conducted this review in order to assess the extent to which the CFPB and the other Agencies were coordinating their supervisory activities and avoiding duplication of regulatory oversight responsibilities.

The Report was prompted initially by concerns raised by the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Financial Services in 2013, due to potential regulatory overlap between the CFPB and the other Agencies. For example, with respect to institutions with assets over $10 billion (referred to in the Report as "Very Large institutions"), the CFPB has exclusive authority to examine them for compliance with Federal consumer financial laws, as well as issue reports and conduct periodic examinations. However, the other Agencies retain authority to examine Very Large institutions for compliance with other laws. Conversely, with respect to institutions with assets of $10 billion or less (referred to in the Report as "Other institutions"), the other Agencies (not including the CFPB) retain examination and enforcement authority over these institutions, but the CFPB at its discretion can include its examiners on a sampling basis of examinations performed by the other Agencies.

As noted above, the scope of review for the Report was limited. From March through October 2014, the OIGs interviewed various officials, reviewed memoranda of understanding, conducted research on complaints pertaining to regulatory overlap, coordinated with the Government Accountability Office to review its work in this area, and reviewed relevant sections of the Dodd-Frank Act.

While the Report did not identify regulatory duplication of oversight responsibilities, it did identify opportunities for enhanced coordination. These opportunities include:

- Conducting additional simultaneous examinations;
- Better communicating matters identified in draft supervisory letters among the Agencies;
- Establishing a framework to address the potential for conflicting supervisory determinations;
- Developing a standard CFPB process for notifying the prudential regulators of Federal consumer financial law violations by Other institutions; and
- The CFPB timely notifying the other Agencies of CFPB information requests to their regulated institutions.

The Report can be found at:

http://oig.federalreserve.gov/reports/cfpb-responsibilities-coordination-review-jun2015.pdf.

State Regulatory Developments

Hawaii Revises Mortgage Servicer Requirements

On May 28, 2015, Hawaii Governor David Ige signed into law a bill, Senate Bill 1093 (SB 1093), which amends the mortgage servicer requirements under the Hawaii Mortgage Services Act (HMSA). Note that SB 1093 is a comprehensive bill that, in part:

(1) Requires mortgage servicers to pursue loss mitigation options, including loan modifications, to avoid foreclosures;

(2) Prohibits the transfer or assignment of mortgage servicer licenses;

(3) Makes mortgage servicers responsible for accurate and timely reporting information and actions that may affect their eligibility for licensure;

(4) Requires mortgage servicers to obtain and file with the Commissioner of the Division of Financial Institutions a $100,000 surety bond;

(5) For all mortgage servicers licensed or acting under the HMSA, it establishes a duty of good faith and fair dealing in communications, transactions and dealings with borrowers; and

(6) Clarifies the requirements under the HMSA for processing mortgage payments, responding to borrower complaints, providing payoff statements and maintaining loan files.

The bill's new mortgage servicer requirements went into effect on May 28, 2015. The full text of SB 1093 can be found at: http://www.capitol.hawaii.gov/session2015/bills/SB1093_HD1_.htm.

Indiana Passes Indiana Servicemembers Civil Relief Act

The Indiana General Assembly recently passed a state law extending the U.S. military's consumer protections to Indiana National Guard and Reserve members who are called up to active duty.

The new law, known as the Indiana Servicemembers Civil Relief Act, was enacted as House Enrolled Act No. 1456 (HEA 1456), and has a July 1, 2015 effective date.

HEA 1456, which adopts the provisions of the federal Servicemembers Civil Relief Act (SCRA), extends the same legal protections that federal military personnel now have to cover Indiana National Guard and Reservists who are activated for U.S. military mobilizations, or activated by the Governor for state duty for more than 30 consecutive days.

One important federal SCRA provision HEA 1456 makes applicable to these Indiana National Guard and Reserve members is the federal SCRA provision limiting the amount of interest a lender can charge on an obligation or liability incurred by a servicemember or by the servicemember and the servicemember's spouse jointly, before the servicemember enters military service, to a rate of 6%.

HEA 1456 also protects Indiana National Guard and Reserve members who are activated for U.S. military mobilization or activated by the Governor for state duty for more than 30 consecutive days from home foreclosures or evictions while they are serving. Specifically, HEA 1456 postpones legal proceedings in foreclosures and evictions until a servicemember returns from active duty.

Persons that violate HEA 1456 can be sued by the Indiana Attorney General's Office and enjoined from continuing to act in violation of a provision of HEA 1456, be required to pay penalties of $5,000 per violation and investigative costs, and be required to repay money found to have been unlawfully received from a servicemember.

A copy of HEA 1456 is available here:
http://iga.in.gov/static-documents/9/3/d/3/93d33626/HB1456.06.ENRH.pdf

Nevada Adds Mortgage Servicer License Requirement

Nevada Governor Brian Sandoval recently signed into law Assembly Bill 480 (AB 480) which, among other things, imposes a licensing requirement on mortgage servicers beginning January 1, 2016. Currently, servicers of Nevada mortgage loans are only required to file a Nevada Loan Servicer Registration.

Under AB 480, a license will be required for a person to engage in the business of a mortgage servicer or hold himself or herself out as a mortgage servicer. "Mortgage servicer" will be defined as a person who directly services a mortgage loan, or who is responsible for interacting with a borrower, managing a loan account on a daily basis, including, without limitation, collecting and crediting periodic loan payments, managing any escrow account or enforcing the note and security instrument, either as the current owner of the promissory note or as the authorized agent of the current owner of the promissory note. The term will include a person providing such services by contract as a subservicing agent to a master servicer by contract.

Among those that will be exempt from the mortgage servicer license requirement under AB 480 are: (1) a depository financial institution, or any subsidiary or holding company

of a depository financial institution if such entity maintains its principal place of business or a branch office in Nevada; (2) real estate investment trusts, unless the business conducted by the trust in Nevada is not subject to supervision by the appropriate regulatory body of a jurisdiction outside of Nevada; (3) a nonprofit organization that is recognized as exempt under section 501(c)(3) of the Internal Revenue Code; (4) a mortgage servicer that, in the aggregate with any affiliates, services not more than 10 residential mortgage loans in Nevada during a calendar year; and (5) a person who holds a Nevada Mortgage Banker License or Mortgage Broker License and is collecting payments on a mortgage loan or servicing one or more mortgage loans made or arranged by the person under his or her license.

Therefore, it appears that the Nevada mortgage servicer license will generally be required for companies that service Nevada mortgage loans, either for their own account or for third parties. However, it appears that companies that are licensed as a mortgage banker or a mortgage broker in Nevada and that only service loans they originate will be exempt from the new license requirement. Also of note, it appears that persons who hold mortgage servicing rights (MSRs) for Nevada loans may be required to obtain a mortgage servicer license, even if they do not directly engage in servicing activities, because such persons may be deemed to be “responsible for” interacting with the borrower and managing a loan account on a daily basis under the new definition of “mortgage servicer.”

AB 480 does not provide any specific application requirements for obtaining licensure as a mortgage servicer, but rather directs the Nevada Division of Mortgage Lending (Division) to adopt regulations establishing such requirements. WBK will monitor future regulations and the Nationwide Mortgage Licensing System for additional information regarding such requirements and will provide further updates as the licensing requirement’s effect date draws nearer.

In addition to the above mortgage servicer licensing requirements, AB 480 also exempts out-of-state wholesale lenders from the Nevada in-state office requirement in connection with obtaining a mortgage banker or mortgage broker license, amends certain provisions related to licensing and regulation of escrow agencies and agents, and increases certain licensing fees for mortgage bankers and mortgage brokers.

The majority of AB 480’s requirements, including the mortgage servicer licensing requirement, take effect on January 1, 2016.

An enrolled copy of AB 480 can be found at:
http://www.leg.state.nv.us/Session/78th2015/Bills/AB/AB480_EN.pdf.

Litigation Developments

Multi-District Class Certified for Deceptive Practices in Overdraft Fee Policies

On June 15, the Southern District of Florida certified a class in the Multi-District Litigation proceedings of *In Re: Checking Account Overdraft Litigation*. This ruling has the potential to encompass hundreds of thousands of individuals regarding overdraft fee policies. Judge King issued his decision in two separate orders -- one related to two putative class actions in Florida and California, and the other related to three cases in New Mexico, Oregon, and Washington.

According to Plaintiffs, Wachovia Bank, now known as Wells Fargo, allegedly re-sequenced transactions from high-to-low at posting as to charge overdraft fees on more items. Moreover, the bank allegedly kept a "ghost line of credit" for customers in order to allow over-drafted debit transactions. Plaintiffs allege this practice was unfair and deceptive, and that the bank actively misrepresented its practices in this regard to the detriment of the plaintiffs.

While admitting that the proposed class could include millions of bank customers, the bank argued that Plaintiffs failed to meet the numerosity requirement in Fed. R. Civ. P. 23(a) because the absent Class members were subject to arbitration, leaving only the named Plaintiffs in their respective cases. However, the Court determined Wells Fargo's arbitration clause was permissive, not mandatory. Because no class had been certified yet, those plaintiffs were not subject to a request from the bank to arbitrate yet, and the court found the bank's arbitration argument to be premature.

The Court ruled that class members could easily be identified from Wells Fargo's own records, class members' claims arose from the same course of conduct, and all claims were based on the same legal theories. Furthermore, the Court found that Wells Fargo's corporate policies were at the heart of all the different claims for which Plaintiff sought certification; therefore, "common issues will predominate."

In order to accommodate slight variations in state law, the Court assigned thirteen different subclasses. The Court found that subclasses can make these cases manageable and suitable for class treatment.

WBK assists clients nationwide with defense of state and federal class actions.

Fourth Circuit Relies on Lanham Act For Deceptive Advertising Pleading Standard Under Consumer Protection Acts of Several States

The U.S. Court of Appeals for the Fourth Circuit recently relied on the federal Lanham Act to ascertain whether deceptive advertising claims had been validly stated under the consumer protection acts of several states. Noting that the provisions of seven different consumer protection acts were functionally similar in the context of deceptive

advertising, the Court explained a plaintiff bringing a false advertising claim must allege the challenged representation is literally false.

In *Brown v. General Nutrition Co.*, Plaintiffs alleged that GNC and Rite Aid had violated various state consumer protection, deceptive advertising, and express warranty statutes by falsely advertising the effectiveness of certain supplements in treating osteoarthritis. The labels of the products in question stated the supplements promoted joint mobility and flexibility, and had been "clinically studied" pursuant to industry-approved standards.

Relying on several scientific studies of their own, Plaintiffs alleged that many, but not all, specialists in the field agreed the products were incapable of providing the advertised joint health benefits. GNC and Rite Aid moved to dismiss the complaint, arguing Plaintiffs had failed to plead the *falsity* of the marketing representations.

Granting the defendants' motions, the district court ruled that a manufacturer cannot be liable for false advertising so long as *at least one* qualified (a conspicuously undefined term) expert opines that the representations are truthful, *even if* the overwhelming weight of scientific evidence is to the contrary.

On appeal, the Court of Appeals agreed. In order to state a valid claim for false advertising, Plaintiffs must allege *all reasonable* (again, a conspicuously undefined term) *experts* in the field agreed that the representations are literally false. Acknowledging some disagreement amongst experts was not enough. Since the advertising had accurately described the findings of some experts, Plaintiffs had not established that the representations were false.

In passing the Court also observed that Plaintiffs had also not adequately stated a misleading claim. To do so, Plaintiffs must present "extrinsic evidence" of actual consumer confusion. On this point, the Court explained "it is not enough for a court to determine after the fact that a representation *could have misled hypothetical consumers."* Actual confusion must be alleged.

The attorneys at Weiner Brodsky Kider PC regularly defend clients against putative class actions under state consumer protection acts throughout the United States.