Financial Services Update

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WBK News

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

Federal Regulatory Agencies Issue Final Flood Insurance Rule

On June 22, 2015, five federal regulatory agencies (the Board of Governors of the Federal Reserve System, the Farm Credit Administration, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency ("Agencies")) announced that they had approved a joint final flood insurance rule that requires the escrowing of flood insurance premiums and fees, exempts certain detached structures from the mandatory flood insurance purchase requirements, and addresses the force placement of flood insurance.

The final rule implements the proposed rule issued by the Agencies in October 2014 related to escrow and detached structures, and the force-placed insurance provisions proposed by the Agencies in October 2013.

As mandated by the Homeowners Flood Insurance Affordability Act of 2014 ("HFIAA"), the final rule requires regulated lending institutions ("Lenders") and their servicers to escrow flood insurance premiums and fees in connection with required flood insurance for loans secured by residential improved real estate or mobile homes that are made, increased, extended or renewed on or after January 1, 2016, unless the loan qualifies for a statutory exemption or the institution meets the small lender exception. For loans outstanding as of January 1, 2016, the Lender or servicer must provide borrowers with the option to escrow flood insurance premiums and fees.

To implement these new requirements, the final rule also amends certain model flood insurance disclosures. In particular, the rule amends the Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance (published in Appendix A to the rule) and adds an additional sample clause, Sample Clause for Option to Escrow for Outstanding Loans (published in Appendix B to the rule). The escrow provisions and revised appendixes become effective January 1, 2016.

Also pursuant to the HIFAA, the rule provides a statutory exemption from the requirement to purchase flood insurance for a structure that is part of a residential property if that structure is detached from the primary residence and does not also serve as a residence. The final rule contains definitions for the key terms in this exemption, including "a structure that is part of a residential property," "detached," and "serve as a residence." However, Lenders are permitted to require flood insurance on the detached structure, even though the statute does not require it, to protect the Lender's and borrower's collateral securing the mortgage. This provision becomes effective on October 1, 2015.

The final rule also includes certain changes related to force-placed flood insurance required under the Biggert-Waters Flood Insurance Reform Act of 2012 ("Biggert-

Waters"). A Lender or servicer may charge the borrower for the cost of force-placed insurance beginning on the date on which the borrower's coverage lapsed or became insufficient. The final rule also stipulates when a Lender or servicer must terminate force-placed insurance and issue a refund to the borrower. These force-placed insurance provisions take effect on October 1, 2015. The private flood insurance provisions under Biggert-Waters will be addressed in a separate rulemaking.

The final rule is available at:
http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20150622a1.pdf

HUD Publishes Loan Defect Taxonomy

HUD recently published a detailed description of its future loan quality assessment methodology, known as the "Defect Taxonomy." The Defect Taxonomy is a mechanism that HUD intends to use to categorize loan defects in single family FHA-insured loans. The Taxonomy is part of the overall effort by HUD to provide greater clarity and transparency to lenders and to encourage FHA lending. However, HUD has not yet determined the effective date or the schedule for the implementation of the Taxonomy.

When implemented, the Taxonomy will focus on three core concepts: (1) identifying a defect, (2) capturing the sources and causes of a defect, and (3) assessing the severity of a defect. HUD currently uses 99 codes to describe loan defects. The Taxonomy will bring this down to nine specific and distinct defects, each with codes for the source and cause of the defect. A severity level will be assigned to each individual defect based on the size and nature of the deviation from FHA's requirements and the impact on loan insurability.

The defects fall in the areas of underwriting, valuation, borrower and loan eligibility and lender operations. The nine specific defect categories are: (1) borrower income, (2) borrower credit and liabilities, (3) loan to value and maximum mortgage amount, (4) borrower assets, (5) property eligibility, (6) property appraisal, (7) borrower eligibility and qualification, (8) mortgage eligibility, and (9) lender operations. Each category will have several possible sources and causes. For example, the source of a defect in lender operations may be based on incorrect or missing NMLS information or misuse of escrow, and the cause of such defect may be violation of FHA policy or misrepresentation and fraud.

There will be four different severity tiers for any given defect. HUD will use the tiers to communicate the severity of the defect, rather than relying on the current terms "unacceptable" or "deficient." HUD will notify lenders of the severity level and any consequences relating to the defect. For example, Tier 1, the highest severity level, might be assigned to a misrepresentation in closing escrow funds or closing fees.

The Defect Taxonomy, when implemented, will allow HUD to capture the severity, source and cause of a defect in a single code. This, in turn, should help lenders better

identify areas of concern in their FHA originations and develop appropriate corrective action.

HUD's presentation providing an overview of the Defect Taxonomy is available at: http://portal.hud.gov/hudportal/documents/huddoc?id=SFH_LQA_Methodology.pdf.

CFPB Supervisory Report Outlines Violations

The CFPB released its latest Supervisory Highlights Report on June 23, 2015 addressing issues uncovered from supervisory examinations generally completed between January and April 2015. The report highlights compliance issues and identifies compliance problems regarding consumer reporting, debt collection, student loan servicing, mortgage origination, mortgage servicing and fair lending. According to the report, the failure of companies to maintain updated policies and procedures, conduct effective training, correct system errors and monitor compliance played a significant role in the identified violations.

The CFPB's report highlights examination findings in the following areas:

- **Fair Lending**. Examiners identified problematic practices regarding the treatment of applicants with income derived from public assistance. They indicated that companies were excluding or refusing to consider income derived from HUD's Section 8 Housing Choice Voucher (HCV) Homeownership Program and restricting the use of the program's vouchers to only certain home mortgage loan products or delivery channels.

- **Mortgage Origination**. The CFPB has begun reviewing companies for compliance with the January 2014 mortgage rules and found several areas of non-compliance with respect to those and the current Regulation X GFE and HUD-1 disclosure requirements. For example, companies failed to establish and maintain written policies and procedures pursuant to Regulation Z's Loan Originator Rule and to comply with disclosure requirements concerning the RESPA list of homeownership counseling organizations.

  In addition, examiners cited failures to comply with several GFE requirements, including providing a GFE within three business days of receipt of a complete application, providing the consumer a timely revised GFE within three business days of receiving information to establish a changed circumstance, and including all fees on a GFE. The report also indicates that companies failed to ensure that the HUD-1 accurately reflected the actual settlement charges paid by the borrower.

The CFPB also found overly broad releases in home equity installment loan agreements in violation of section 1026.36(h) of Regulation Z which prohibits waivers of federal statutory causes of action. Language in the "General Waiver Provisions" of agreements provided that consumers who signed the agreements waived all other notices or demands in connection with the delivery, acceptance, performance, default or enforcement of the agreement. Such a general waiver provision was viewed as being a deceptive practice because it implied that the borrower was agreeing to a waiver that is unenforceable as to any claims based upon a federal statute.

- **Mortgage Servicing**. The report mentions numerous errors in connection with loss mitigation acknowledgment notices, including failure to notify borrowers in writing timely, or in some cases at all, after receiving a loss mitigation application acknowledging receipt of the application and stating whether it is complete or incomplete, sending notices requesting documents that borrowers had previously submitted or that were inapplicable to the borrower's circumstances; and failure to send loss mitigation acknowledgment notices to borrowers who requested payment relief on their mortgage payments.

  The report also cites deceptive practices connected with disclosure of the terms of a payment plan by making representations about how deferments for a daily simple interest mortgage loan worked, incorrectly suggesting that deferred interest would be repayable at the end of the loan term when, in fact, it would be collected from the consumer immediately after the deferment ended. Examiners also found servicers failing to honor the terms of some trial modifications after a loan was transferred to them.

  Additionally, the CFPB found multiple problems with periodic statements, including failing to send periodic statements because of a sustained system error or because it was incorrectly believed the loans were exempt for Regulation Z, indicating an incomplete number of past transactions on the statements because of a software limitation, and listed the same fee twice in the transaction history section of the periodic statement.

- **Homeowners Protection Act**. For borrowers delinquent when their mortgage balance reached 78% of the original value of the property, examiners found that servicers failed to automatically cancel the borrower's PMI when the loan became current, thus collecting unearned premiums.

- **Debt Collection**. The report notes weaknesses in compliance management systems that created high risk of consumer harm and the lack of reasonable

written policies and procedures regarding the furnishing of information to consumer reporting agencies. Moreover, companies failed to conduct investigations of dispute notices from consumers and consumer reporting agencies in violation of FCRA, Regulation V, and the FDCPA.

- **Consumer Reporting**. The CFPB also notes its findings in connection with examinations of consumer reporting agencies (CRAs). Examiners found that the CRAs' policies and procedures were outdated, not reflective of actual practices, and failed to assure maximum accuracy in consumer reports. Specifically, the report references failures to conduct regular monitoring to ensure that furnishers adhere to the CRAs' vetting requirements, a lack of systematic or consistent policies and procedures that provide feedback to furnishers regarding the quality of the data furnished, weak oversight and corrective action of providers of public records, and non-existent quality control policies and procedures relating to post-compilation report reviews or sampling to test consumer reports for accuracy.

- **Student Loan Servicing**. The report also outlines various errors made by student loan servicers. For instance, examiners found cases where servicers were making deceptive statements about the deductibility of student loan interest. Examiners also found deficient FCRA adverse action notices and a lack of reasonable written policies and procedures regarding information furnished to consumer reporting agencies.

Importantly, in addition to the public enforcement actions, the CFPB reports that recent non-public supervisory resolutions reached in the areas of mortgage origination, fair lending, mortgage servicing, deposits, payday lending, and debt collection have resulted in remediation of approximately $11.6 million to more than 80,000 consumers.

The report also highlights some supervision program developments, including the publication of new mortgage origination examination procedures to reflect the new TRID requirements. Additionally, the CFPB explains its risk-based prioritization approach to supervision which assesses risks to the consumer at two levels: the market level and then the institution level.

The use of Potential Action and Request for Response (PARR) letters and the CFPB's Action Review Committee (ARC) as part of the examination process is also explained in the report. A PARR letter notifies a company of preliminary findings of violation(s) of federal consumer financial law and that the CFPB is considering taking supervisory action. A company has the option to respond to the PARR letter within 14 days to provide information as to why the company believes the CFPB should not take action. When examiners find evidence of significant violations, the matter is referred to the

ARC, which determines whether matters will be resolved through confidential supervisory action or through a public enforcement action.

The CFPB's Supervisory Highlights report is available at:
http://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf.

CFPB Publishes Semiannual Regulatory Agenda

The CFPB's most recent regulatory agenda was published in the Federal Register on June 18, 2015, and it identifies the regulatory matters the CFPB reasonably anticipates it will consider from May 1, 2015 to April 30, 2016. Consistent with previous guidance, the agenda provides that a final rule on HMDA is expected in the summer of 2015. The agenda also discusses the CFPB's work to support implementation of TRID, and to facilitate compliance with the other mortgage-related rules that became effective in January 2014.

The agenda briefly discusses the CFPB's proposed rule to amend the servicing requirements in Regulation X and Regulation Z regarding certain bankruptcy, loss mitigation, and other servicing issues, which was published on December 15, 2014. While the agenda states the CFPB is developing a final rule, it does not indicate when such final rule may be expected. Similarly, the agenda briefly addresses the CFPB's February 11, 2015 proposed rule to modify certain requirements for small creditors but does not provide any further information regarding that proposal.

The CFPB continues to engage in research initiatives in preparation of a rulemaking on debt collection activities, which the agenda states are the single largest source of complaints to the federal government of any industry. Specifically, it is conducting a survey to obtain information from consumers about their experiences with debt collection and undertaking consumer testing initiatives to determine what information would be useful for consumers to have about debt collection and their debts and how that information should be provided.

In addition, the CFPB is considering whether rules governing pre-dispute arbitration agreements are warranted. The agenda also discusses the CFPB's regulatory efforts in other consumer markets, including prepaid financial products, payday loans, and overdraft programs.

The published agenda can be found at:
http://www.gpo.gov/fdsys/pkg/FR-2015-06-18/pdf/2015-14373.pdf.

CFPB Issues Report on Student Loan Complaints

On June 18, 2015, the CFPB released their mid-year update on student loan complaints ("Update"). Between October 1, 2014 and March 31, 2015, the Bureau received more

than 3,100 private student loan complaints, an increase of 34% over the previous reporting period, and around 1,100 debt collection complaints related to student loans.

Between 2008 and 2011, the CFPB reports that the number of private student loans that have used a co-signer increased 23%. Many market participants advertise the ability of co-signers to be released from their obligations if the principle borrower meets certain conditions.

However, around 90% of borrower requests for co-signer release were rejected, mainly because the applicants did not meet certain pre-qualification criteria. Less than half of companies made their policies on release available on their website and even when such policies were available, they were “opaque” and often not comprehensive. Many Borrowers complained that they were disqualified from release for factors they were not even aware of, including offers to enter forbearance by the loan-holder without a disclaimer that such action would disqualify them.

The other major complaint related to co-signers involved the use of “auto-default” clauses that kick in, even if the loan is otherwise in good standing, because of some action by the co-signer, such as death or a bankruptcy filing. Although many participants have said they do not use these clauses, the same could not be said for entities that buy the loans containing these clauses from the original loan holder.

In addition to complaints related to co-signers, the Update specified certain roadblocks to refinancing student loan products. The Update also focused on complaints about requests for payoff balances not being fulfilled in a timely manner and the practice of some student loan servicers of not re-calculating payoff balances after a pre-payment has been made.

Although not binding, the CFPB suggested several “opportunities” for improvement by market participants. Recommendations include increasing the transparency of communications regarding criteria to qualify for co-signer release, warnings when a borrower takes actions that could disqualify them, proactive notifications when they have fulfilled certain qualifications, and the appropriateness and legality of certain auto-default provisions. The recommendations over the refinancing process suggested adding an electronic means to request/receive accurate payoff information and enhanced payment allocation methodologies for payments made by third parties.

The entire Update may be found here:
http://files.consumerfinance.gov/f/201506_cfpb_mid-year-update-on-student-loan-complaints.pdf

Litigation Developments

Second Circuit Reaffirms Broad Reach of Term "Affecting A Financial Institution" Under FIRREA

In a recent opinion, the Second Circuit held that three UBS executives were subject to the ten year statute of limitations of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 18 USC § 3293(2), instead of the standard five or six year statute of limitations for wire fraud, because their actions "affect[ed] a financial institution." The Second Circuit explained that wire fraud can "affect a financial institution," even if the financial institution participated in, and benefited from the wire fraud.

The three UBS executives were convicted in connection with schemes to defraud municipalities and the Internal Revenue Service. The schemes consisted of manipulating the bidding process for municipal bond reinvestment agreements and other municipal finance contracts, while employed at UBS Financial Services, Inc.

The District Court decided the ten year statute of limitations should apply, because the Government's evidence was enough to find the Defendants' conduct "affected a financial institution." The evidence included settlement agreements between the Department of Justice and UBS and two other co-conspirator banks. In the settlement agreements, the financial institutions admitted wrongdoing, accepted responsibility, and agreed to pay upwards of $500 million in fines and restitution. Furthermore, testimony from bank representatives supported the proposition that the settlement agreements were a direct result of the defendants' actions.

On appeal, the Defendants argued that the longer 10 year statute of limitations should not apply because the banks were not victims of the wire fraud. To the contrary, the banks benefited from, and participated in the wire fraud.

The Second Circuit explained that the language of the statute was far broader and more flexible than argued by the Defendants. Even though the banks were co-conspirators with the defendants, the adverse consequences of the mail fraud to the banks, as documented in the settlement agreements, were foreseeable to the defendants. Consequentially, their actions "affected a financial institution," within the meaning of the longer 10 year statute of limitations in 18 USC § 3293(2).

WBK regularly defends clients nationwide against alleged civil violations of FIRREA.

Sixth Circuit Says Faxes Lack Pecuniary Purpose, So Do Not Violate TCPA

The Sixth Circuit recently held that unsolicited informational faxes about prescription drugs did not violate the Telephone Consumer Protection Act. The Act prohibits unsolicited faxes that pursue a sale or a sales relationship, but the information

conveyed by these faxes only served as an explanation of services offered; consequently, the faxes did not violate the TCPA.

In *Sandusky Wellness Center v. MedCo Health Solutions*, MedCo sent faxes to healthcare facilities whose patient pool contained a large portion of MedCo customers. These faxes included a list of drugs that were covered by MedCo's health plans, and asked the facilities "to consider prescribing plan-preferred drugs to help lower medication costs for [the facilities'] patients."

In opposition to MedCo's summary judgment motion, Sandusky argued that these faxes constituted unsolicited ***advertisements*** under the TCPA. The trial court ruled that these faxes contained information about which drugs Sandusky's patients might prefer without any specific connection to MedCo's financial interests; therefore, the faxes were not "unsolicited advertisements."

On appeal, Sandusky asked the Sixth Circuit: (1) to broaden the definition of advertisement; (2) to adopt the logic of the Seventh Circuit in a supposedly similar case; and (3) to consider MedCo's underlying motives beyond the literal language of the faxes. The Sixth Circuit rejected all 3 arguments.

First, the Court held that Sandusky's argument would expand the definition of advertisement beyond the meaning of the statute. Under Sandusky's approach, all faxes with information would be advertisements. The Court explained that providing information was not enough to constitute an ***advertisement***, within the meaning of the TCPA. The email must contain some sort of sales component.

Second, Sandusky's reliance on an opinion from the Seventh Circuit was misplaced. While the Seventh Circuit found a violation of the TCPA, the sender of the faxes conceded he sent them for sales purposes, and his lawyer called the fax "marketing."

Finally, the Court held that evidence outside the literal language of the faxes cannot convert non-advertisements into advertisements. Sandusky argued that no matter what these faxes said on their face, they may have a positive effect on MedCo's business, and thus MedCo used these faxes with sales in mind. However, the Court rejected the idea that future hypothetical benefit transforms a non-advertisement into an advertisement.

The Sixth Circuit's decision can be found here:
http://www.ca6.uscourts.gov/opinions.pdf/15a0110p-06.pdf

WBK regularly represents clients nationwide against alleged violations of the TCPA.

without seeking professional advice. No Person may rely on this information or its applicability to any specific circumstances. The information in this Financial Services Update is in no instance to be taken as an indication of completeness, applicability to a particular situation, or an indication of future developments or results.