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

FFIEC Introduces New Cybersecurity Assessment Tool

The Federal Financial Institutions Examination Council (FFIEC) released a Cybersecurity Assessment Tool (the "Assessment") in an effort to help institutions identify their risks and determine their cybersecurity preparedness. According to the FFIEC, the Assessment provides a repeatable and measurable process for institutions to monitor and assess their cybersecurity preparedness over time.

The Assessment focuses on enhancing oversight and management of an institution's cybersecurity at the executive level. The Assessment provides an instructional overview specifically geared to CEOs and Boards of Directors for this purpose. There are two components to the Assessment: (1) Inherent Risk Profile; and (2) Cybersecurity Maturity. First, the Inherent Risk Profile organizes the company's different activities, services, and products into easily identifiable categories to assess the level of risk before the implementation of controls. The categories include: (1) Technologies and Connection Types; (2) Delivery Channels; (3) Online/Mobile Products and Technology Services; (4) Organizational Characteristics; (5) and External Threats. The risk levels range from least inherent risk where the company has very little cyber activity to most inherent risk where the company has sophisticated and substantial cyber activity.

Second, the Cybersecurity Maturity portion is designed for management to evaluate the company's maturity level in each of the following domains: (1) Cyber Risk Management and Oversight; (2) Threat Intelligence and Collaboration; (3) Cybersecurity Controls; (4) External Dependency Management; (5) Cyber Incident Management and Resilience. Each domain is further broken down into assessment factors. The tool provides declarative statements within each assessment factor that provides insight on which maturity level (i.e., baseline, evolving, intermediate, advanced, and innovative) the company fits into at that moment in time. In order to maintain a higher level of maturity, the company must satisfy all declarative statements within a given maturity level and all previous level statements as well.

The results of the Inherent Risk Profile and the Cybersecurity Maturity examinations are intended to complement each other and provide insight on potential weaknesses in a company's cybersecurity profile. As the inherent risk rises, the company should implement steps to ensure that their maturity level rises in accordance with the risk. The Cybersecurity Assessment Tool was intended to be used periodically at an enterprise wide level and when introducing new products and services. It is designed to complement, but not to replace, an institution's risk management process and cybersecurity program.

In connection with the Assessment, FFIEC members (which are principals of the Federal Reserve Board of Governors, the Federal Deposit Insurance Corporation, the

National Credit Union Administration, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau) are reviewing and updating their current guidance and examination assessments to align with changing cybersecurity risk. FFIEC's press release on the Cybersecurity Assessment Tool, which includes a link to the Assessment and guidance regarding using the Assessment, can be found here: https://www.ffiec.gov/cybersecurity.htm

CFPB Begins Publishing Narrative Complaints

On June 25, 2015, the CFPB went live with an enhanced public-facing consumer complaint database which now includes over 7,700 narrative complaints. The CFPB is also publishing a Request for Information ("RFI") seeking input on whether there are ways to enable the public to more easily understand and make comparisons of the complaint information.

As soon as the CFPB was established in July of 2011, they began accepting complaints from consumers. In June of 2012, the complaint database was launched. The database includes basic, anonymous, individual-level information about the complaints received, including the date of submission, the consumer's zip code, the relevant company, the product type, the issue about which the consumer is complaining, the date the consumer submitted the complaint and how the company handled the complaint. In March of 2015, the CFPB finalized a policy that would allow consumers to publically share their narratives when submitting complaints.

The CFPB complaint database is designed to allow users to highlight specific company practices and problems, search for specific product names or features and break down information a number of ways. The CFPB consumer complaint narrative policy lays out the specific procedures and safeguards the Bureau has put in place to publish the narratives in the database.

The CFPB consumer complaint narrative policy lays out the specific procedures and safeguards the Bureau has put in place to publish narratives in the database. The policy includes important safeguards for removing a consumer's personal information and ensuring the informed consent of any consumer who participates. Under the CFPB policy, companies also have 180 days to select an optional public-facing response to be included in the public database. These company responses are now included in the database.

Complaints are listed in the database after the identified company responds to the complaint or after it has had the complaint for 15 days, whichever comes first. The CFPB will disclose the consumer narrative when the company provides its public-facing response, or after the company has had the complaint for 60 calendar days, whichever comes first.

The CFPB has also issued a Request for information (RFI) seeking input on ways to make the data more useful to the public. One option is to provide more information about a company's complaint handling such as highlighting the quality of responses to consumers. The second option is to collect and provide consumer compliments – independent of the complaint process. The RFI seeks input on these options and welcomes other ideas.

CFPB Issues Consent Order For Allegedly Deceptive Credit Card Add-On Products

On July 1, 2015, the CFPB issued consent orders against Affinion Group Holdings, Inc. (and a number of affiliated companies), and Intersections, Inc., for alleged violations of Unfair, Deceptive, and Abusive Acts and Practices (UDAAP) for certain credit card add-on products. The two consent orders totaled nearly $10 million in restitution and civil penalties.

The CFPB alleged in separate complaints that Affinion utilized incentives that caused its employees to mischaracterize and misrepresent the nature of identity theft products being offered. Specifically, the CFPB alleged that the company failed to disclose material limitations in coverage while overstating the applicability and utility of other coverages, including failing to disclose that federal law limits liability for identity theft losses. The CFPB alleged that incentives provided to employees for "saving" customers who called in to cancel contributed to the presence of these unfair activities.

The CFPB alleged that Intersections authorized billing customers' depository accounts despite knowing that fraud alerts and other credit reporting safeguards prevented many of the offered identify theft services from actually being accomplished – thereby knowingly charging consumers for a product the company knew the consumers could not receive any benefit from.

The Affinion Complaint can be found here:
http://files.consumerfinance.gov/f/201507_cfpb_complaint_affinion.pdf

The Affinion Consent Order can be found here:
http://files.consumerfinance.gov/f/201507_cfpb_stipulated-final-judgment-and-order_affinion.pdf

The Intersections Complaint can be found here:
http://files.consumerfinance.gov/f/201507_cfpb_complaint-INTX.pdf

The Intersections Consent Order can be found here:
http://files.consumerfinance.gov/f/201507_cfpb_stipulated-consent-order-INTX.pdf

The CFPB's press release regarding the consent orders can be found here: http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-companies-for-unfair-billing-of-credit-card-add-on-products-and-services/

State Regulatory Developments

Rhode Island Amends Its Reverse Mortgage Statute

Rhode Island has amended its statute regulating reverse mortgage loans. As amended, the statute allows a reverse mortgage lender to perform certain actions in processing a reverse mortgage loan application prior to the applicant's completion of a required counseling program. These changes went into effect upon enactment of the amendment on June 25, 2015.

Rhode Island Senate Bill 0918 and House Bill 6157 amended Rhode Island's General Laws to provide that the following actions may be taken by a reverse mortgage lender before the loan applicant has completed the required counseling program and provided a certificate of counseling to the lender:

- Ordering a credit report,
- Obtaining information required for inclusion in a loan application,
- Documenting and verifying credit, income, assets and property charges,
- Evaluating extenuating circumstances and compensating factors,
- Evaluating the results of the financial assessment in determining eligibility for a home equity conversion mortgage,
- Determining whether a life expectancy set-aside will be required and whether the set-aside must be fully or partially funded, and
- Completing a home equity conversion mortgage financial assessment worksheet.

These changes appear to provide flexibility for reverse mortgage lenders to obtain information and begin the process of financial assessment, which is required by the U.S. Department of Housing and Urban Development (HUD) in connection with all home equity conversion mortgage (HECM) loans with case numbers assigned on or after April 27, 2015.

While these Rhode Island reverse mortgage amendments generally apply to all types of reverse mortgage loans originated in Rhode Island, FHA-approved mortgagees originating HECM loans also must comply with all applicable HUD rules and regulations for the HECM program, including with respect to the limitation on activities that permissibly may occur prior to the HECM applicant obtaining the required counseling.

Along with these changes, Rhode Island also amended its reverse mortgage statute to provide that the Rhode Island Department of Elderly Affairs must maintain an updated list of counseling programs that have been approved by HUD for reverse mortgage counseling.

Maine Amends Its Debt Collection Requirements

On June 30, 2015, Maine enacted a bill, House Paper 753 (H.P. 753), which amends the debt collection practice requirements under Maine law. These new requirements will go into effect on October 13, 2015.

Pursuant to H.P. 753, a debt collector may not enter into a payment schedule or settlement agreement regarding a debt unless the payment schedule or settlement agreement is either documented in open court, approved by the court and included in a court order or otherwise reduced to writing. If a payment schedule or settlement agreement is not included in a court order, the debt collector must provide a written copy of the payment schedule or settlement agreement to the consumer within ten (10) business days of entering into the payment schedule or settlement agreement and the consumer need not make a payment on the payment schedule or settlement agreement until the written copy has been provided in accordance with Me. Rev. Stat. Ann. tit. 32 § 11013(6).

In addition, a debt collector may not commence a collection action more than six (6) years after the date of the consumer's last activity on the debt. Note that this limitations period applies notwithstanding any other applicable statute of limitations, unless a shorter limitations period is provided under Maine law. Moreover, notwithstanding any other provision of law, when the applicable limitations period expires, any subsequent payment toward, written or oral affirmation of or other activity on the debt does not revive or extend this limitations period.

The full text of H.P. 753 can be found at: http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0753&item=3&snum=127.

Litigation Developments

Sixth Circuit Refuses To Decide Whether Subsequent Class Claims Are Viable

In the landmark decision of *Dukes v Wal-Mart Stores*, the U.S. Supreme Court reversed a class certified under Rule 23(b)(2) for equitable relief, because of insufficient common issues of facts and law under Rule 23(a)(2). In one of the many lawsuits filed subsequently by both named and unnamed plaintiffs from *Dukes*, the Sixth Circuit recently reversed the trial court's dismissal of class claims under Rule 23(b)(3) seeking monetary damages. The Sixth Circuit explicitly relied on the proposition that any individual with viable individual claims is entitled to pursue class claims "if the necessary class action prerequisites specified in Rule 23 are met." The Court also emphasized that it was not addressing the appropriateness of the alleged classes for certification.

The original plaintiffs in Dukes subsequently filed new, but narrowed class claims. Four other follow-on class actions followed in Texas, Tennessee, Florida, and Wisconsin. The Sixth Circuit had the Tennessee case before it, *Phipps v Wal-Mart Stores*.

Wal-Mart moved to dismiss the class claims in *Phipps*, relying on *Andrews v. Orr*. *Andrews* was an earlier Sixth Circuit case, which had affirmed the trial court's dismissal of the named plaintiffs' class claims in reliance on the Supreme Court's rulings in *American Pipe & Construction Co. v. Utah*, and *Crown, Cork & Seal Co. v. Parker*. According to *American Pipe* and *Crown Cork*, the filing of an action with class claims tolls the statutes of limitations for individual claims of putative class members, until class certification is denied. *Andrews* had been filed as a follow-on to a previous class action, where certification had been denied.

Wal-Mart argued that the class claims in *Phipps* were time-barred, because class certification had been denied in *Dukes*, within the meaning of *American Pipe, Crown Cork*, and *Andrews*. The trial court agreed and dismissed the class claims in *Phipps*, but certified the dismissal of the class claims for interlocutory appeal.

The Sixth Circuit explained that Wal-Mart was interpreting *Andrews* much too broadly. The individual claims of the named plaintiffs in *Andrews* were time-barred. The claims of the individual plaintiffs in *Phipps*, by contrast, were ***not*** time-barred.

Additionally, the class claims in *Phipps* were for money damages under Rule 26(b)(3), but the Supreme Court had not addressed certification of a class under Rule 23(b)(3) for monetary relief in Dukes. The *Dukes'* opinion was limited to the denial of class certification for equitable relief under Rule 26(b)(2). Though the *Phipps* opinion specifically disavowed addressing class certification, the Sixth Circuit stated that the Rule 23(b)(3) claims were tolled by *Dukes* and timely in *Phipps*, because the Rule 23(b)(3) claims had been filed but never addressed in *Dukes*.

Without being explicit, the Sixth Circuit also implies that motions to dismiss should not address the viability of follow-on class claims. Relying on the Supreme Court opinion in *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, the *Phipps* opinion states plaintiffs are ***entitled*** to pursue class claims, if the class claims also satisfy the requirements of Rule 23. Consequently, any individual's claims, which are timely filed, can be pursued as class claims, if the "prerequisites are satisfied."

The primary problem with this approach is that the case may proceed for quite a while, through lengthy and burdensome pre-certification discovery, before a court determines whether the prerequisites of Rule 23 are satisfied at the class certification stage of a lawsuit.

Weiner Brodsky Kider regularly represents clients nationwide against class action claims.

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