Financial Services Update
July 22, 2015

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WBK News

Mitch Kider will present a session titled "Regulation Through Enforcement for Political Gain – Are They Making It Up as They Go Along?" at the Interthinx Risk Forum on July 23 in Nashville, TN. **MORE INFO**

Jim Milano will participate on a panel addressing the CFPB's use of UDAAP provisions in regulatory enforcement actions at the American Conference Institute's 23rd National Conference on Consumer Finance Class Actions & Litigation in Chicago, IL from July 27-28. **MORE INFO**

Michael Kieval and **Jason McElroy** will present a webinar in conjunction with the National Business Institute titled "Detangling RESPA Section 8: New Interpretations on Lender/Real Estate Agent Unearned Fees" on July 28. **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

FHA Proposes Maximum Time Period for Filing Insurance Claims and Changes Relating to Curtailment of Interest and Disallowance of Expenses

On July 6, 2015, FHA published a proposed rule that would establish a maximum time period within which an FHA-approved mortgagee must file a claim for insurance benefits ("Proposed Rule"). The Proposed Rule would also revise FHA's policies for curtailment of interest and the disallowance of expenses where deadlines are missed in the claim submission timeline.

Under FHA's current regulations, a mortgagee may file an insurance claim at any time provided that it complies with all applicable requirements for claim insurance. According to FHA, although mortgagees generally file claims within two months of a foreclosure sale, in recent years, some have opted to wait and file multiple claims with FHA at a single point in time, in some instances delaying filing claims for two years or more after foreclosures. The FHA also noted that the uncertainty regarding the timing of the filing of claims and the high number of claims filed all at once strain FHA resources and have negative implications for the FHA Mutual Mortgage Insurance Fund.

In response to these issues, FHA proposes to terminate the contract of insurance if the mortgagee fails to file a claim within certain maximum allowable time periods. Generally, a mortgagee would be prohibited from filing any claim more than 12 months after the expiration of a period of time from the date of default that is equal to the amount of time provided in the reasonable diligence timeframe established under §203.356(b). The Proposed Rule also provides that no foreclosure, pre-foreclosure sale, or deed-in-lieu of foreclosure claims may be filed outside of certain time periods established for each of these categories.

The Proposed Rule would disallow expenses (such as taxes, special assessments, hazard insurance, force placed insurance, flood insurance, homeowner association and condominium association fees or dues, utilities, inspections, debris removal, and property preservation and protection expenses) that were paid or incurred by a mortgagee during any period of delay or as a result of any delay by the mortgagee in taking any action under the required time periods. The Proposed Rule also would revise the existing provisions for the curtailment of interest to provide for curtailment based on the number of days late rather than complete curtailment after a missed deadline.

The changes imposed by the Proposed Rule would only apply prospectively and would take effect for mortgages endorsed for insurance on or after the effective date of the final rule. Comments on the Proposed Rule are due on or before September 4, 2015.

The Proposed Rule can be found at:
http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-16479.pdf

CFPB, 47 States, and DC Issue a $186 Million Penalty for Alleged UDAAP Violations for Selling Bad Credit Card Debt and Robo-Signing

The CFPB and Attorneys General in 47 states and the District of Columbia recently took action against Chase Bank, USA N.A. and its subsidiary Chase BankCard Services, Inc. ("Chase") for alleged unfair, deceptive, or abusive acts or practices ("UDAAP") violations including selling bad credit card debt and robo-signing. As a result, the collective fines totaled $186 million to be paid out in consumer refunds and in penalties and payments to the CFPB and the states. Also, as a result of a separate, related consent cease and desist order from 2013, the OCC recently assessed a $30 million civil money penalty against JPMorgan Chase Bank, N.A.; JPMorgan Bank and Trust Company, N.A.; and Chase Bank USA, N.A.

According to the CFPB consent order issued on July 8, 2015, Chase allegedly sold debt that it knew or should have known was uncollectable and unenforceable to third parties, because they failed to maintain and update their various databases with accurate consumer account information. Among the issues noted in the consent order, Chase allegedly sold to third parties accounts that were already pending in litigation, had previously agreed upon payment plans or were paid in full, were subject to bankruptcy stays, were pending settlement or already settled by agreement, were for deceased individuals, included inaccurate amounts owed, or were fraudulently opened or subject

to fraudulent charges or otherwise not owed by the identified debtor, which led some consumers to face collections activity or lawsuits from third parties for uncollectable debts, incorrect amounts, or amounts not due.

From 2009 to 2011, Chase allegedly provided over 150,000 sworn statements and documents to support collection lawsuits brought by the third party debt buyers, and brought over 500,000 lawsuits to collect delinquent credit card accounts. The consent order alleges that Chase prepared these sworn statements in bulk using stock templates, and then sent them out to be signed in a centralized location. Chase representatives allegedly may have, among other actions, signed sworn statements without having any personal knowledge of the facts; sworn to having reviewed contents of records when in fact they had not; signed complaint verification forms for complaints they had never seen; and notarized documents without witnessing the signature or administering an oath.

Along with the large monetary fines, the consent order requires Chase to cease collection of over 528,000 accounts sent to collections litigation from January 1, 2009 to June 30, 2014; to notify affected consumers that they will not try to collect, enforce, or sell the judgment; and to contact the three major credit reporting agencies to request that the judgments not be reported against consumers. Chase also is required to withdraw, dismiss, or terminate all pre-judgment collection litigation pending during that timeframe.

Chase must also: (1) prohibit debt buyers from reselling accounts other than to resell debt back to Chase; (2) notify customers when their debt has been sold; (3) confirm debt before selling it; (4) not sell zombie debts or other specified debts (e.g., debts that do not have required documentation, have been charged off for over three years or where the consumer has not paid for three years, are in litigation, are owned by a servicemember, are owned by a deceased person, or where there is a payment plan with the debtor); and (5) verify debt before pursuing a lawsuit. Furthermore, Chase must not engage or incentivize robo-signing.

CFPB's press release, which includes a link to the consent order, can be found here: http://www.consumerfinance.gov/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/.

CFPB and DOJ Announce $24 Million Settlement to Address Discriminatory Auto Loan Pricing

The CFPB and DOJ recently resolved an action with American Honda Finance Corporation to address discretionary auto loan pricing and compensation practices. According to the CFPB, these practices resulted in minority borrowers paying higher interest rates than white borrowers for auto loans, regardless of their creditworthiness, in violation of ECOA. The action is part of a larger joint effort between the CFPB and

DOJ to address discrimination in the indirect auto lending market resulting from lenders giving auto dealerships discretion to charge consumers different rates.

Auto dealers facilitate indirect financing for consumers through third-party lenders such as American Honda Finance Corporation. As the indirect auto lender, Honda allegedly set a risk-based interest rate (or "buy rate") that it conveyed to the auto dealers based on the borrower's objective credit-related factors, and then permitted the auto dealers to charge a higher interest rate to the consumer. This "dealer markup" generated more compensation for the dealer while giving the dealer the discretion to charge consumers different rates regardless of creditworthiness.

According to the CFPB and DOJ, Honda permitted dealers to mark-up consumers' interest rates as much as 2.25% for contracts with terms of 5 years or less, and 2% for contracts with longer terms. The agencies alleged this pricing discretion and compensation structure resulted in thousands of minority borrowers paying higher dealer markups in violation of ECOA—by an average of 36 basis points for African American borrowers, and by an average of 28 basis points for Hispanic borrowers. The agencies hold Honda, as the indirect auto lender, accountable for the unlawful discriminatory pricing.

Under the terms of the settlement, Honda agreed to, among other things, pay $24 million in damages for consumer harm that will go to affected minority borrowers, administer and distribute funds to ensure affected borrowers receive compensation, and substantially reduce or eliminate entirely dealer discretion. Specifically, Honda agreed to impose dealer markup rate caps to reduce dealer discretion, and Honda has the option to move to non-discretionary dealer compensation.

The CFPB notably did not assess a civil money penalty against Honda because of its responsible conduct, including the proactive steps the company is taking to directly address the fair lending risk of discretionary pricing and compensation systems by substantially reducing or eliminating the discretion altogether.

The CFPB's consent order is available at:
http://files.consumerfinance.gov/f/201507_cfpb_consent-order_honda.pdf.

HUD Issues Final Rule Regarding Affirmatively Furthering Fair Housing

HUD recently issued a final rule, effective August 17, 2015, to provide HUD program participants with an approach to develop an effective fair housing strategy as part of the duty to affirmatively further the purposes and policies of the Fair Housing Act. The final rule was issued in response to a 2010 GAO report's recommendations and requests from stakeholders and HUD program participants for clearer guidance, more technical assistance, better compliance, and more meaningful outcomes. According to its press release, HUD intended for this rule to clarify and simplify existing obligations with regard to fair housing and to create a streamlined Assessment of Fair Housing (AFH) planning process. The AFH replaces the Analysis of Impediments (AI) and is a tool to help

program participants meet the statutory requirements of affirmatively furthering fair housing (AFFH).

The following parties are required to develop and submit an AFH to HUD: (i) jurisdictions and insular areas (as defined by the rule) that are required to submit consolidated plans for the following programs: (a) the Community Development Block Grant (CDBG) program; (b) the Emergency Solutions Grants (ESG) program; (c) the HOME Investment Partnerships (HOME) program; and (d) the Housing Opportunities for Persons With AIDS (HOPWA) program; and (ii) public housing agencies (PHAs) receiving assistance under sections 8 or 9 of the United States Housing Act of 1937 (42 U.S.C. § 1437f or 42 U.S.C. § 1437g).

The AFH process, using the assessment tool prescribed by HUD, will require program participants to examine their programs, jurisdiction, and region, and identify goals to affirmatively further fair housing and to inform fair housing strategies in the various plans (e.g., consolidated, annual action, PHA, and community (such as education, transportation, or environmental related plans)). The process is meant to identify the following types of situations: (i) patterns of integration and segregation; (ii) racially or ethnically concentrated areas of poverty; (iii) disparities in access to opportunity; and (iv) disproportionate housing needs.

Each AFH generally will include at least the following elements: (i) a summary of fair housing issues and capacity; (ii) analysis of data (from HUD, local data and knowledge, and the assessment tool); (iii) assessment of fair housing issues to identify contributing factors for the above situations; (iv) identification of fair housing priorities and goals; (v) strategies and actions to implement those goals and priorities; (vi) a summary of community participation; and (vii) a review of progress achieved since submission of the prior AFH, including identification of any barriers that impeded or prevented the achievement of goals. The required dates for submission of the AFH vary for different types of participants (e.g., consolidated plan participants with fiscal year CDBG grant of $500,000 or less, PHAs, qualified PHAs, etc.). HUD must review and accept the AFHs of its program participants.

Additional information on the final rule can be found at: http://www.huduser.org/portal/affht_pt.html#final-rule.

DOL Proposes to Increase Salary Level Requirement for Overtime Exemptions

The Department of Labor issued a proposed rule on July 6, 2015, to update the minimum salary compensation requirements for certain exempt employees. The rule proposes to increase the salary level required to qualify for all executive, administrative and professional overtime exemptions; to increase the total compensation required to meet the highly compensated employee exemption; and new methods of automatically updating these levels. Comments must be received by September 4, 2015.

The current executive, administrative, and professional exemptions have generally required three tests to be met for the exemption to apply: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the “salary basis test”); (2) the amount of salary paid must meet a minimum specified amount (the “salary level test”); and (3) the employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the “duties test”).

The rule proposes to update the current salary level test for these exemptions from $455 a week ($23,660 annually) to the 40th percentile of weekly earnings of all full-time salaried positions, which is projected to be $970 a week ($50,440 annually) by 2016. In addition, the proposal seeks comments on whether 10% of an exempt employee’s salary could come from nondiscretionary monthly bonuses. While the Department is not inclined to include commissions as a part of this bonus structure due to the nature of sales, it is seeking comments on the appropriateness of such an inclusion as well.

Next, the proposed rule seeks to increase the total annual compensation requirement for highly compensated employees (“HCEs”) from $100,000 to the 90th percentile ($122,148 annually). Employers would still be required to give HCEs salaries that meet the salary level test for the other exemptions (i.e., the 40th percentile), and could continue to include commissions, nondiscretionary bonuses, other nondiscretionary compensation, and year-end bonuses to meet the 90th percentile requirement.

The Department also requests comments on the proper method of automatically updating the salary levels and how often these updates should occur. The Department is considering either maintaining the salary level at the 40th percentile or automatically updating the salary level test based on changes to the CPI-U.

The Department noted that the salary exemption is the best one factor to determine if an employee fits within the overtime exemption. Moreover, increasing the salary to the 40th percentile (and 90th percentile for HCEs) will result in a smaller pool of exempt individuals, facilitating the Department’s ability to ensure that specific duties already required are being performed. Therefore, they did not change the duties test for any of the exemptions.
Notably, because the Department is focusing only on the salary levels and not the required duties of exemptions, the rule does not propose any changes to the outside sale exemption.

A copy of the proposed rule and a link for written comments can be found here: http://www.dol.gov/whd/overtime/NPRM2015/.

HUD OIG Audit Report Finds Downpayment Assistance Programs Violated FHA Guidelines and Holds Originating Lender Responsible

On July 9, 2015, the HUD Office of Inspector General (OIG) issued an audit report finding that NOVA Financial & Investment Corporation originated FHA-insured loans that included ineligible downpayment assistance gift funds provided by programs administered through two housing development authorities in Arizona. In addition, the lender was cited for inappropriately charging borrowers misrepresented discount fees and fees that were not customary or reasonable to close FHA mortgage loans.

According to the report, to receive downpayment assistance in connection with the programs, the borrowers were charged premium interest rates above the prevailing interest rates for mortgages without downpayment assistance. The OIG maintains the premium rates were used to fund the downpayment programs, so that the downpayment assistance gifts were indirectly repaid by the borrowers through the premium rate. As a result, such programs did not comply with the downpayment assistance and premium pricing requirements in HUD Handbook 4155.1, which provide that for funds to be considered a gift there must be no expected or implied repayment of the funds to the donor by the borrower, and that funds derived from a premium priced mortgage may never be used to pay any portion of the borrower's downpayment.

The report also alleges that in some cases NOVA failed to properly disclose that the downpayment assistance program required a premium rate. Borrowers were not always fully aware of the premium rate or how receiving the downpayment assistance impacted their loan terms and resulted in higher mortgage payments compared to qualified FHA borrowers that did not receive downpayment assistance.

The report further asserts that NOVA charged and collected $376,102 in discount fees in violation of FHA requirements. The OIG believes that such misrepresented discount fees were not intended to reduce the interest rate of the loans, but were used as lender compensation for originating loans under the downpayment assistance programs. In addition, NOVA allegedly charged and collected $7,110 in fees that were not customary or reasonable to close FHA mortgage loans, including fees listed as bond program fees, bond transfer fees, and tax and service fees on the settlement statements.

Notably, the OIG holds NOVA responsible for ensuring FHA-insured loans comply with all HUD FHA rules and regulations, rejecting the argument that the premium interest rate was set by the housing finance agencies. The OIG states that NOVA did not do proper due diligence to ensure compliance with HUD FHA requirements, instead relying on the development authorities' program guidelines and assuming downpayment assistance eligibility based on the reputation of the participating master loan servicer.

The report recommends that HUD determine legal sufficiency to pursue civil and administrative remedies against NOVA for incorrectly certifying that the mortgages were eligible for FHA mortgage insurance, and require NOVA to:

- Stop originating FHA loans with ineligible gifts as part of downpayment assistance programs that result in a premium interest rate for the borrower;
- Indemnify HUD for 709 FHA loans that were originated with ineligible downpayment assistance gifts, resulting in $48.5 million in funds to be put to better use;
- Reimburse FHA borrowers $376,102 for the unallowable, misrepresented discount fees and $7,110 for fees that were not customary or reasonable;
- Reduce the interest rates for FHA borrowers who received downpayment assistance, were charged a premium interest rate, and have not refinanced or terminated their original FHA loan;
- Reimburse borrowers for overpaid interest as a result of the premium interest rate; and
- Update all internal control checklists to include specific FHA rules and regulations governing downpayment assistance, premium interest rates, and allowable fees.

While the report focuses on the ineligible downpayment assistance gifts made primarily in connection with two Arizona development authorities, the report identifies additional loans originated using similar programs administered by other development authorities.

In response to the audit findings, acting FHA Commissioner Ed Golding issued a memo on July 20 reaffirming FHA's support of "certain downpayment assistance programs, like those run by State Housing Finance Agencies." He explained that the "intent of our rules regarding down payment assistance is clear and allows HFAs the discretion necessary to fund these programs appropriately." He further advised that HUD is taking "active steps to completely resolve the issues raised in the audit and to provide proper clarity and guidance to the market."

In addition, the MBA has stated that it believes the OIG's interpretation does not comport with HUD's rules and prior guidance, and urges quick action by HUD to resolve the uncertainty created by the OIG's recommendations. MBA also provided that it has initiated discussions with the associations representing the state and local housing finance agencies as well as HUD to ensure that lenders participating in these programs can be confident the programs comply with FHA's rules.

The HUD OIG audit report is available at:
https://www.hudoig.gov/sites/default/files/documents/2015-LA-1005.pdf.

CFPB Finalizes TRID October 3 Effective Date

The CFPB issued a final rule on July 21, 2015 delaying the effective date of the TILA-RESPA Integrated Disclosure Rule from August 1 to October 3, 2015, consistent with the proposed rule issued last month.

In response to comments, the CFPB notably denied to include a dual compliance period that would have permitted creditors to voluntarily comply with TRID early, stating that such a structure would be too confusing to consumers and complicated for the industry.

The final rule also does not provide for a formal enforcement grace period following the effective date. Instead, the CFPB continues to believe the approach expressed by Director Cordray on June 3, 2015, providing that the CFPB will be sensitive to industry's good-faith efforts to comply, remains appropriate.

In addition to finalizing the delay, the final rule includes technical corrections to the requirements governing the Calculating Cash to Close and Summaries of Transactions tables in the Closing Disclosure to account for certain personal property sales and to conform the disclosure of the borrower's cash to close to account for general lender credits applied at closing. The CFPB advised that these technical corrections are in line with existing industry expectations and informal CFPB guidance.

The final rule can be found at: http://www.consumerfinance.gov/newsroom/cfpb-finalizes-two-month-extension-of-know-before-you-owe-effective-date/.

State Regulatory Developments

Montana Revises Rule for Initial Licenses

The Montana Department of Administration recently implemented changes to Mont. Admin. R. 2.59.1753, which addresses the treatment of applications for an initial license submitted near year-end and when an application for an initial mortgage lending license is deemed to be abandoned.

Under these revisions, an application for an initial license submitted through NMLS from November 1 through December 31 is deemed an application for licensure for the next calendar year unless the following conditions are met:

- The applicant requests expedited processing of the application and issuance of a license for the remainder of the calendar year in which the application is submitted;
- The application is complete and contains no deficiencies; and
- The Nebraska Department of Banking and Finance (the "Department") has sufficient time and staff resources to accommodate the applicant's request during the period from November 1 through December 31, which coincides with the renewal period for current licensees. Current licensee renewals applications are given administrative priority over applications for initial licensure.

The rule changes further note that all licenses expire on December 31 regardless of issuance date.

Additionally, the rule changes provide that an application for an initial license shall be deemed abandoned if the applicant fails to provide the documents or information

requested by the Department within 60 days of notification to the applicant of the deficiencies. If this 60-day period has not elapsed by December 31, the application is deemed an application for the next calendar year and will be processed without submission of a new application and fee. However, the application shall be deemed abandoned if the requested documents or information are not provided within the remainder of the 60-day period in the new year. This 60-day period for providing documents or information only applies to persons applying for initial licensure and not to renewal applicants.

Finally, the rule changes provide that upon abandonment, the licensing process may be started anew with the submission of a new license application and fee.

These revisions took effect on July 6, 2015.

Litigation Developments

D.C. Circuit Holds SEC Can't Retroactively Apply Dodd-Frank Sanction

The D.C. Circuit recently ruled that the SEC cannot bar an investment advisor from associating with municipal advisors and rating organizations for misconduct that predates the passage of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). To do so, the Court held, would amount to impermissible retroactive application of the sanction.

In *Koch v. S.E.C.*, an investment advisor appealed the SEC's finding that he "marked the close" in violation of securities laws—meaning he bought or sold stock at the end of the day to artificially inflate its value. The investment advisor also challenged the SEC's remedial sanction barring him from certain industry sectors. Although the SEC has long had the power to bar individuals from the securities industries, Dodd-Frank created new industry bars in 2010, including bars from participating in the municipal advisory and credit-rating sectors. The D.C. Circuit affirmed the SEC's finding that the investment advisor "marked the close," but vacated the sanction barring him from the advisory and credit-rating sectors because his alleged misconduct took place in 2009, before Dodd-Frank's passage.

The Court emphasized that although the "presumption against retroactive legislation is deeply rooted in our jurisprudence," it is not *per se* unlawful in all cases. Sometimes retroactive application serves benign and legitimate purposes. However, courts should not enforce a statute retroactively unless Congress explicitly authorizes retroactive application. The Court found nothing in the Dodd-Frank provision at issue that allowed for retroactive application of the new industry bars. Accordingly, the Court explained, allowing the new industry bar sanction to be applied to the investment advisor would create and attach new legal consequences to past conduct. Although the Court's opinion is limited to the particular Dodd-Frank provision at issue in the *Koch* case, its

rationale could be applied to other Dodd-Frank provisions that do not contain explicit Congressional authorization of retroactivity.