WEINER BRODSKY KIDER PC

Financial Services Update
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WBK News

Mitch Kider will join a panel to discuss Enforcement Actions and Legal Trends at the Western States Loan Servicing Conference on August 3 in San Diego, CA. **MORE INFO**

Jack Konyk will speak about state inconsistencies in NMLS administration at the AARMR Regulatory Conference on August 6 in New Orleans, LA. **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

DOD Finalizes Rule Expanding Credit Protections for Servicemembers

The Department of Defense (DOD) issued a final rule on July 21, 2015, to add provisions to protect U.S. men and women in uniform from predatory lending practices. After nearly three years of study, the DOD issued the final Military Lending Act (MLA) rule that expands the protections of the Military Lending Act to a range of credit products that previously were not covered by the regulation. The effective date is October 1, 2015, and compliance is required by October 3, 2016 (with certain exceptions for credit extended in a credit card account under an open-end, not home-secured, consumer credit plan).

The new rule covers all forms of payday loans, vehicle title loans, refund anticipation loans, deposit advance loans, installment loans, unsecured open-end lines of credit and credit cards. The final rule amends the definition of "consumer credit" covered by the regulation to more closely align with the traditional definition of credit covered by TILA. The rule generally covers consumer credit offered or extended to active-duty servicemembers or their dependents, as long as the credit is subject to a finance charge or payable by written agreement in more than four installments. The MLA rule will continue to exclude residential mortgages and credit extended to finance the purchase of, and secured by, personal property, such as vehicle purchase loans.

Among the protections expanded to cover those previously uncovered credit products is a 36 percent annual percentage rate limit, or Military Annual Percentage Rate (MAPR), which covers all interest and fees associated with a loan. Under the final rule, the MAPR will include charges for most add-on products such as credit default insurance and debt suspension plans.

Additionally, the rule prohibits creditors from requiring service members to submit to mandatory arbitration and onerous legal notice requirements, waive their rights under the Servicemembers Civil Relief Act, or provide a payroll allotment as a condition of obtaining credit (other than from relief societies).

The final rule also requires creditors to provide disclosures in written and oral form to covered borrowers. In this regard, the final rule streamlines the information that a creditor must provide to a covered borrower when consummating a consumer credit and provides a safe harbor mechanism for a creditor to determine whether a consumer-applicant is a covered borrower.

The MLA is implemented by the DOD, and is enforced by the CFPB and other federal regulators. There are significant risks related to noncompliance, including potential civil liability. In addition, the final rule provides that any credit agreement that fails to comply with the rules is "void from inception" of the contract.

A copy of the final rule is available here: https://federalregister.gov/a/2015-17480.

CFPB Issues First Monthly Complaint Report

On July 16, 2015, the CFPB published their initial *Monthly Complaint Report*. This is the first in a series of monthly reports that are intended to highlight key trends from consumer complaints.

The monthly report includes complaint data on company performance and product trends, along with state and local information. Additionally, each monthly report will focus on a specific geographic location and particular product. The initial report examines debt collection complaints and complaints from consumers in Milwaukee, WI.

The *Monthly Complaint Report* uses a three-month rolling average, comparing the current average to the same period in the prior year where appropriate, to account for monthly and seasonal fluctuations. In some cases, the CFPB uses month-to-month comparisons to highlight more immediate trends. For the company-level complaint data, the CFPB uses a three-month rolling average of complaints sent to companies for response. This company-level complaint data lags other complaint data in the report by two months to reflect the 60 days companies have to respond to complaints.

CFPB Issues a $735 Million Penalty for Alleged UDAAP and Telemarketing Sales Rule Violations in Connection with Credit Card Add-On Product Practices

The CFPB recently took action against Citibank, N.A., and its subsidiaries Department Stores National Bank and Citicorp Credit Services, Inc. (USA) (collectively "Citibank") for alleged unfair, deceptive, or abusive acts or practices ("UDAAP") and Telemarketing Sales Rule ("TSR") violations including deceptive marketing, billing and administration of various debt protection and credit monitoring add-on products. As a result, the collective fines totaled $735 million to be paid out in consumer refunds and in penalties and payments to the CFPB. Also as a result of a separate, related action, the OCC assessed a $35 million civil money penalty against and ordered consumer restitution from Citibank, N.A., and Department Stores National Bank.

According to the CFPB consent order issued on July 21, 2015, Citibank allegedly engaged in deceptive activity through a variety of means, including: (1) telemarketing that resulted in material misrepresentations regarding add-on products' costs, terms, and benefits (including allegations that the third party service provider making telemarketing calls for Citibank knew what calls would be reviewed during quality assurance in their entirety and encouraged telemarketing agents to use their own solicitation scripts with knowingly material misrepresentations regarding the product benefits on the non-fully monitored calls); (2) online marketing that resulted in misrepresentations regarding the terms of add-on products (e.g., representing that the add-on product credit scores were from the three leading credit reporting bureaus when in fact the credit scores were generated by a third party vendor); (3) point-of-sale marketing that resulted in improper representations, omissions, and practices; and (4) retaining add-on membership by improper means (e.g., downselling the add-on product while falsely stating that the member's benefits would not change or omitting that it resulted in reduced benefits in addition to reduced price).

The telemarketing activity conducted by Citicorp Credit Services, Inc. (USA), as a telemarketer, also allegedly constituted a violation of the TSR with regard to failures to properly disclose, or misrepresentations of, various aspects of the goods and services subject to the sales offer, as well as causing submission for payment of billing information during the telemarketing efforts without the customer's express informed consent.

Moreover, the CFPB alleges that Citibank engaged in unfair acts or practices in violation of UDAAP in connection with its billing practices, in which it allegedly billed customers the full fee for credit monitoring products, including credit report retrieval services, without providing all of the credit monitoring or credit report retrieval services.

Along with the large monetary fines, the consent order requires Citibank to discontinue the marketing and sale of the add-on products by telephone or at point of sale, and the engaging in telephone-based membership retention for consumers enrolled in the add-on products, until it submits a comprehensive Add-On Product Compliance Plan to, and secures a determination of non-objection from, the CFPB Regional Director. The plan must include policies regarding vendor management, UDAAP, and internal audits.

The CFPB's press release, which includes a link to the consent order, can be found here: http://www.consumerfinance.gov/newsroom/cfpb-orders-citibank-to-pay-700-million-in-consumer-relief-for-illegal-credit-card-practices/.

State Regulatory Developments

Iowa Division of Banking Issues New Guidance for State-Chartered Banks Establishing and Operating an LPO in Iowa

On June 8, 2015, the Superintendent of the Iowa Division of Banking (Superintendent) replaced Superintendent Interpretive Bulletin #3, dated April 7, 1988 (Old Guidance) with Superintendent Guidance #2015-01 (New Guidance). The New Guidance updates permissible and prohibited activities at a state-bank chartered loan production office (LPO) as well as the requirements a state-chartered bank must follow to establish an LPO in Iowa.

The New Guidance updates the requirements a state-chartered bank must follow to establish an LPO in Iowa. The Old Guidance allowed a state-chartered bank to establish an LPO so long as notification was submitted to the Superintendent 30 days prior to establishment, and did not specify what information the notification should contain. The New Guidance retains the 30-day notification requirement, but now specifies the information the notification should address and consider. The information includes:

> (1) the condition of the bank – a bank must be in satisfactory condition to open an LPO;
> (2) the location of the proposed LPO – as a reminder, the Superintendent must approve any lease or purchase of real property to be used in bank operations;
> (3) a brief description of personnel and expected volume of business;
> (4) a description of future plans for the location; and
> (5) confirmation that the bank will comply with the New Guidance regarding LPOs and the limitations on activities that can be conducted therein.

Additionally, the New Guidance updates the permissible activities for an LPO established by a state-chartered bank in Iowa. While the New Guidance no longer explicitly includes the preparing of loan applications as a permissible activity and, instead, now states that "loan applications may be solicited or processed," the Iowa Division of Banking has informally advised us that the Division considers the term "processed" to encompass preparing loan applications and that, therefore, preparing loan applications is still a permissible activity for a state-bank chartered LPO under the New Guidance.

The New Guidance also adds new permissible activities including:

> (1) installing an Automated Teller Machine (ATM) or Intelligent Teller Machine (ITM) (so long as an informational statement regarding the installation is completed and sent to the Superintendent prior to installation); and
> (2) installing a computer terminal to allow customers to access online banking at the LPO. The New Guidance also notes that while an LPO may not perform remote deposit capture (RDC), RDC may be performed at a customer's location.

Finally, like the Old Guidance, the New Guidance authorizes the Superintendent to prohibit the establishment of an LPO on a case-by-case basis if it is determined that establishing the LPO would constitute an unsafe and unsound banking practice.

A copy of the New Guidance (Superintendent Guidance #2015-01) is available here: http://www.idob.state.ia.us/bank/docs/bulletin/guidances/SG-2015-01%20Loan%20Production%20Offices%20(LPOs).pdf

Litigation Developments

Filed Rate Doctrine Bars LPI Class Action

The U.S. Court of Appeals for the Second Circuit recently held that the filed rate doctrine bars challenges to the premiums charged for lender placed insurance (LPI), regardless of the plaintiffs' characterization of the claims or whether the premiums pass through an intermediary. In so holding, the Second Circuit becomes the highest court to specifically address the applicability of the filed rate doctrine to LPI.

In *Rothstein v. Balboa Ins. Co.*, one of many putative class actions challenging the purchase of LPI on behalf of borrowers who fail to maintain hazard insurance coverage, the plaintiffs alleged that their mortgage servicer overcharged them for costs not associated with LPI. Specifically, the plaintiffs contended that tracking services provided by an affiliate of the insurer to identify borrowers who fail to maintain coverage constituted unlawful "rebates" and "kickbacks" to the servicer in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Real Estate Settlement Procedures Act.

The filed rate doctrine prohibits a party from challenging as unreasonable a rate (or price) that is filed with and approved by a government regulator. The doctrine serves two purposes: First, because the regulators are in the best position to determine whether rates and the component parts are reasonable, the courts should not be "second guessing" the regulators' expertise. Second, the doctrine prevents rate discrimination whereby consumers who prevailed in their challenges would be paying discounted rates in comparison to other consumers purchasing the same product.

At the trial court level, the defendants moved to dismiss, but the court concluded that the filed rate doctrine did not apply because there was insufficient evidence that the servicer's purchase of LPI on behalf of the borrowers was approved by the regulator.

On interlocutory appeal, the Second Circuit reversed the trial court and held that the plaintiffs' claims were barred by both prongs of the filed rate doctrine. First, the claims required the court to determine whether or not the borrowers were overbilled for LPI premiums, which were approved by the insurance regulator. In essence, the plaintiffs were asking the court to make a determination as to what the reasonable rate should be absent the alleged fraudulent acts and kickbacks. Second, if the plaintiffs were to prevail at trial, any damages awarded would be an effective rebate or preference over other rate payers. That the plaintiffs brought the case on behalf of a putative class was immaterial.

The Second Circuit further explained that the specific nature of the LPI transaction does not render the filed rate doctrine inapplicable. While the trial court held that the filed rate doctrine did not apply because the borrowers were not "direct customers" of the insurer, the Second Circuit disagreed, holding that the two prongs of the filed rate doctrine are implicated regardless of whether the premium passes through an intermediary such as the servicer. Moreover, the record demonstrated that the insurance regulators knew the nature of the LPI transaction and that the premium would ultimately be charged to the borrowers.

Many district courts across the country have issued conflicting decisions for several years regarding whether the filed rate doctrine applies in the LPI context. It will be interesting to see whether other district courts outside the Second Circuit find the Court's reasoning persuasive.

Weiner Brodsky Kider PC represents mortgage lenders and servicers throughout the United States in nationwide and statewide class actions.

Sixth Circuit Ruling Allows Non-Natural Persons to Initiate FDCPA Suits

The Sixth Circuit Court of Appeals recently held that the term "any person" in the Fair Debt Collection Practices Act's (FDCPA) enforcement provision, 15 U.S.C. § 1692k, includes non-natural as well as natural persons. The 2-1 divided panel overturned the trial court's dismissal of a suit brought by a Limited Liability Company for failure to state a claim upon which relief could be granted.

The sole issue on appeal to the Sixth Circuit was the definition of the term "any person" in the FDCPA. The provision at issue states: "Any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person." 15 U.S.C. § 1692k. The court addressed the narrow question of "whether Anarion (the corporation asserting a claim under 15 U.S.C. § 1692k) is a 'person' under this provision and the Act generally." Answering in the affirmative, the majority found three points persuasive. First, the Dictionary Act (1 U.S.C. § 1) provides for the word person to include artificial entities unless otherwise indicated by the context. Second, the FDCPA refers to "persons" in numerous contexts where it is exclusively referring to artificial entities. Finally, there are certain places in the FDCPA where Congress explicitly mentions "natural persons" when it wanted to make the distinction clear and opted not to in this section.

The majority made the narrow nature of their holding very clear. The only thing they decided was that, as it appears in 15 U.S.C. § 1692k, the term "any person" refers to both natural and non-natural persons. It did not comment on the larger issue of whether Anarion, as a non-natural "person," could bring suit. The Court noted that businesses are normally precluded from bringing suit under 15 U.S.C. § 1692k because the definition of debt does not include attempts to collect a debt owned by a business. The instant case was unusual because the LLC brought suit on an attempt to collect a personal debt.

The entire Sixth Circuit's opinion, including dissent, may be found here: http://www.ca6.uscourts.gov/opinions.pdf/15a0159p-06.pdf

DC Circuit Court of Appeals Holds Regulated Entities Have Standing to Challenge Constitutionality of Regulators

In a recent decision, the DC Circuit Court of Appeals reversed a district court ruling that denied standing to a bank contesting the legality of the Consumer Financial Protection Bureau (CFPB) and the recess appointment of its current director, Richard Cordray. However, the court upheld a related decision of the district court denying standing to a bank wishing to challenge the Financial Stability Oversight Council and to States challenging the "orderly liquidation authority," both of which were established by the Dodd-Frank Act. It is important to note that the circuit court did not rule on the merits of the constitutional challenges brought here. The only question on appeal was a procedural one of whether the parties involved had the ability to bring the suit in the first place.

Abiding by a landmark Supreme Court ruling that "there is ordinarily little question that a regulated individual or entity has standing to challenge an allegedly illegal statute or rule under which it is regulated," the circuit court found the injury claimed by the bank – that the CFPB is unconstitutional and any regulations implemented by the Bureau are impermissible exercises of authority it does not possess – met the standing requirements. Because there was no doubt that the bank was regulated by the CFPB, then then bank had standing to challenge the constitutionality of its actions.

Normally, the party claiming injury must show a particular action caused the injury, commonly referred to as the question of "ripeness." However, a regulated entity need not violate the law to acquire the injury and may proceed with a "pre-enforcement" action. Accordingly, the trial court's ruling that the bank's complaint lacked ripeness was overturned.

The circuit court used the same reasoning to allow the bank's challenge to Director Cordray's recess appointment, in light of the Supreme Court's ruling in *NLRB v. Noel Canning*.

The court upheld the district court's holding that the bank and the States lacked standing to challenge the Financial Stability Oversight Council and the orderly liquidation authority. The purpose of the Council is to designate certain "too big to fail" financial institutions for additional regulations. The bank has not been given that designation, and the court would not allow the bank to rely on the designation of a competitor as an alternative theory of standing.

Separately, a challenge of the FDIC's orderly liquidation authority was deemed premature by the Court, noting that a "potential future" action was not enough to convince the court that standing had been established.

WBK regularly assists clients with matters before federal and state regulators.

The entire opinion may be found here:
http://www.cadc.uscourts.gov/internet/opinions.nsf/961BA5A070E7A5CF85257E8C0050F258/$file/13-5247.pdf