WEINER BRODSKY KIDER PC

# Financial Services Update

**August 5, 2015**

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Spanish Version of Toolkit Now Available

FDIC and CA DBO Assess $140 Million Penalty Against Bank for BSA/AML Violations

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### WBK News

**Jack Konyk** will participate in a panel discussion on TRID and other regulatory issues at the Mortgage Collaborative Summer Conference on August 10 in San Diego, CA. **MORE INFO**

**Mitch Kider** will discuss Regulation Through Enforcement during the Regional Lenders Roundtable Meeting on August 12 in Dallas, TX. **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

### Spanish Version of Toolkit Now Available

The CFPB released the Spanish version of the "Your Home Loan Toolkit," which replaces the special information booklet under TRID. Creditors must provide consumers with a copy of the Toolkit within three business days of receiving an application on or after October 3, 2015 for closed-end, federally-related mortgage loans secured by a first lien, other than refinances and reverse mortgages. If a consumer uses a mortgage broker, the mortgage broker must provide the Toolkit to the consumer.

Both the English and Spanish version of the Toolkit, as well as instructions for adding your company's logo, are available here: http://www.consumerfinance.gov/learnmore/?utm_source=newsletter&utm_medium=email&utm_term=07282015_a2&utm_campaign=regimp_kbyo#respa.

### FDIC and CA DBO Assess $140 Million Penalty Against Bank for BSA/AML Violations

On July 22, 2015, the FDIC and California Department of Business Oversight (DBO) announced a joint order assessing a $140 million penalty against Banamex USA for violations of the Bank Secrecy Act (BSA) and anti-money laundering (AML) laws and regulations.

The bank previously entered a consent order with the agencies in 2012, which required the bank to address weaknesses and correct deficiencies in its BSA and AML program. According to the CA DBO, the bank has since failed to implement the corrective actions required by the consent order, and new, substantial violations of the BSA and AML requirements have since been discovered.

As a result, the FDIC and CA DBO state that the bank failed to implement an effective BSA and AML compliance program over an extended period of time. Specifically, the bank allegedly failed to retain a qualified and knowledgeable BSA officer and sufficient staff, maintain adequate internal controls reasonably designed to detect and report illicit

financial transactions and other suspicious activities, provide sufficient BSA training, and conduct effective independent testing.

Under the terms of the joint order, the bank will pay $40 million to the CA DBO, and the FDIC's $100 million penalty will be paid to the Department of the Treasury. The joint order is available at: https://www.fdic.gov/news/news/press/2015/pr15061.html.

**CFPB Announces Consent Order with Discover Bank over Student Loan Servicing Practices**

On July 22, 2015, the CFPB announced a Consent Order with Discover Bank and certain of its affiliates (collectively, "Discover") over allegations that Discover's student loan servicing activities violated federal consumer financial law. The Consent Order requires Discover to pay $18.15 million in consumer refunds and penalties.

Discover acquired a portfolio of student loans beginning in 2010 and serviced these loans, along with its own preexisting student loans. The CFPB alleges in its Complaint that several of Discover's student loan servicing practices violated the Consumer Financial Protection Act of 2010 (CFPA) and the Fair Debt Collection Practices Act (FDCPA). According to the CFPB, Discover engaged in unfair and deceptive acts and practices in violation of the CFPA by denying consumers information they needed to obtain certain federal income tax benefits associated with student loan interest. The CFPB also alleges that Discover engaged in deceptive practices in violation of the CFPA by overstating the minimum amounts due on consumers' billing statements.

According to the CFPB, Discover called consumers early in the morning and late at night, often excessively, in violation of the FDCPA. Discover also allegedly violated the FDCPA by failing to provide required consumer notices when it acquired student loans that were in default.

The Consent Order requires Discover to refund a total of $16 million to over 100,000 borrowers and pay a $2.5 million civil money penalty. It also requires Discover to improve its billing, student loan interest reporting, and collection practices.

The Consent Order comes in the wake of various efforts by the CFPB to monitor and enforce student loan servicing practices. In the last year, the CFPB expanded its examination program to supervise the largest nonbank participants in the student loan servicing market. It also highlighted illegal student loan servicing practices in Fall 2014 Supervisory Highlights. In May 2014, the CFPB, with the support of the Department of Education and Department of the Treasury, launched a public inquiry into student loan servicing practices.

The CFPB's announcement and a link to the Consent Order can be found at: http://www.consumerfinance.gov/newsroom/cfpb-orders-discover-bank-to-pay-18-5-million-for-illegal-student-loan-servicing-practices/

## Litigation Developments

### CFPB Issues a $38.5 Million Penalty for Alleged UDAAP Violations in Connection with Equity Accelerator Advertisements

In two separate consent orders, the CFPB took action against Paymap Inc. ("Paymap"), a wholly owned subsidiary of The Western Union Company, and LoanCare, LLC ("LoanCare") for alleged unfair, deceptive, or abusive acts or practices ("UDAAP") violations for deceptive marketing of the product Equity Accelerator. As a result, the collective fines totaled $38.5 million which will be paid out in redress to affected customers and CFPB penalties.

Paymap in connection with LoanCare, a servicer, marketed the Equity Accelerator Program. Loancare allegedly provided borrower's loan information to Paymap, and Paymap customized its marketing materials using the borrower's actual mortgage terms. Through these targeted solicitations and an Equity Accelerator website, the parties allegedly advertised that borrowers who enroll in the program can pay off their mortgage principal at an accelerated rate by making weekly, biweekly, semi-monthly or monthly payments. However, Paymap allegedly held all payments made within the month in a custodial account, and did not provide servicers the borrower's loan payment until the original first of the month due date. Paymap charged borrowers an initial $295 enrollment fee for Equity Accelerator and a $2.50 transaction fee for each payment, and LoanCare received a portion of these fees.

In addition, Paymap maintained an Equity Accelerator website which stated an average borrower can expect $33,000 in interest savings, but Paymap allegedly did not have, collect, or maintain any data to verify these savings. The CFPB alleges that these savings are inaccurate, and only a tiny percentage of borrowers can expect these larger types of savings.

The consent order requires Paymap to pay out $33.4 million in borrower redress, and Paymap must also pay the CFPB a $5 million civil penalty. The CFPB issued a $100,000 civil penalty against LoanCare for its participation in the alleged deceptive advertisements.

The CFPB's press release, which includes a link to the consent order, can be found here:http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-mortgage-payment-company-and-servicer-for-deceptive-ads/

### Fourth Circuit Found Virginia Court's Decision to Remove to Federal Court Proper because Non-Diverse Party was Fraudulently Joined

The Fourth Circuit upheld a Virginia Court's decision to remove to federal court even though Julie Borden Hughes ("Plaintiff") and a defendant, Samuel I. White P.C. ("SIWPC") were both Virginia citizens. The appeals court found that Plaintiff fraudulently

joined SIWPC, and, therefore, the district court rightfully disregarded the citizenship link between SIWPC and Plaintiff.

Plaintiff filed a civil action against Wells Fargo Bank, N.A., Wells Fargo Home Mortgage, and SIWPC asserting claims related to Plaintiff's home. The case was removed to federal court by the Defendants, and the District Court dismissed the case for failure to state a claim. However, the Court granted Plaintiff leave to amend. Plaintiff's amended complaint sought remand back to state court, because she and SIWPC were Virginia citizens. The District Court denied remand.

The Fourth Circuit upheld this decision not to remand, because Plaintiff fraudulently joined SIWPC. The amended complaint failed to specify any misconduct by SIWPC and she sought no damages from it. SIWPC, as trustee, was a relevant party only to Plaintiff's quiet title and rescission claims, and the Circuit Court concluded that both of these claims had no legal foundation. The rescission claim failed to "establish a colorable right to the equitable remedy of rescission." Furthermore, Plaintiff's claim that she held superior title due to the Defendants inability to name a trustee at the time of the deed execution failed, because Virginia law allows a deed of trust with no named trustee. Finally, the amount of controversy far exceeded $75,000, because a quiet title action seeks the "value of the whole real estate to which the claim extends."

The Fourth Circuit's decision can be found here:
http://www.ca4.uscourts.gov/Opinions/Unpublished/142400.U.pdf

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

**Controversial Opinion By Third Circuit Affirms Equitable Tolling for RESPA Claims, as well as Certification of RESPA and TILA Classes**

In an opinion at odds with many other court decisions, the U.S. Court of Appeals for the Third Circuit recently affirmed a district court's certification of various subclasses of borrowers under RESPA and TILA. The ruling is based in part on a broad reading of when claims for violation of RESPA are appropriate for class certification, as well as the type of "concealment" that may give rise to equitable tolling of statutes of limitations.

*In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation* concerns a scheme whereby a non-depository lender allegedly disguised its own loan origination fees as fees to banks in order to avoid state-law limits on those fees, because banks were exempt from the state-law limits. These fees allegedly included unearned kickbacks to the lender, who purportedly did not provide any services in exchange for those fees, in violation of the Real Estate Settlement Procedures Act (RESPA).

The Third Circuit affirmed the district court's order certifying a class with five subclasses of borrowers. The Court rejected PNC Bank's arguments that: (1) there was a class

conflict between borrowers with time-barred claims and borrowers with timely claims, which undermined the adequacy of class counsel's representation of the class as a whole; (2) the district court impermissibly "conditionally" certified the class by permitting further discovery on class certification related issues; and (3) the putative class did not satisfy Federal Rule of Civil Procedure 23's ascertainability, commonality, predominance, superiority and manageability requirements.

In affirming the district court, the Court of Appeals made several significant and controversial rulings. On the issue of equitable tolling, the Court stated "transmission of a HUD-1 impliedly warrants compliance with [Regulation X's] specific requirements," such that "inclusion of misleading information in a HUD-1 can constitute an independent act of concealment" sufficient for equitable tolling of the statute of limitations.

On the underlying RESPA claims, the Court stated that the issue of whether services had been provided could plausibly be tried on a class-wide basis simply because the Complaint alleged that no services were *ever* performed in exchange for the fees at issue. Most courts, however, have ruled to the contrary, because the determination of whether any services at all had been provided in connection with the closing of any loan necessarily involves an inquiry into the circumstances of each loan.

Further, the Court held that where the "principal violations" alleged under RESPA, the Truth in Lending Act (TILA), and the Home Ownership and Equity Protection Act (HOEPA) are susceptible to common proof, the class should be certified, even though other acts alleged to have violated the same statutes would require individualized proof.

*The WBK Firm regularly represents mortgage lenders and servicers throughout the United States in individual and class action litigation under RESPA, as well as other state and federal statutes.*