Financial Services Update
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HIGHLIGHTS

Federal Regulatory Developments

CFPB Report Finds Electronic Closings Can Benefit Consumers

FTC Publishes CAN-SPAM Act Q&A

CFPB Publishes Guide for Real Estate Professionals Regarding TRID

FHA Implements Supplemental Performance Metric in Neighborhood Watch Early Warning System

State Regulatory Developments

Illinois Enacts Reverse Mortgage Act

Litigation Developments

Ninth Circuit Rules CFPB Interpretation of RESPA's Statutory Safe Harbor Provision Not Entitled to Judicial Deference

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

CFPB Report Finds Electronic Closings Can Benefit Consumers

The CFPB recently published a report on the results of its pilot eClosing project, where the CFPB found that borrowers can benefit from electronic closings when navigating the mortgage closing process. The electronic mortgage closing process allows borrowers to view and sign closing documents electronically, and the benefits can include faster delivery of the documents and embedded links to help consumers understand specific terms. According to the CFPB, borrowers that closed their mortgage using an electronic platform were generally better off on measures of understanding, efficiency, and feelings of empowerment than borrowers who used paper forms.

The CFPB launched its eClosing pilot program last year in an effort to better understand the consumer experience. The pilot program took place over a four-month period and involved seven lenders, more than 3,000 consumers, four technology companies, and several settlement agents and real estate professionals. Throughout the program, some consumers used traditional paper documents, others used a complete eClosing process, and others used a hybrid of both electronic resources and paper documents.

About 1,200 borrowers completed surveys following their participation in the pilot program, where the CFPB asked questions about the consumer's actual knowledge and understanding of the process, as well as general feelings about the process. Based on the difference between the percentage of those who responded positively and the percentage of those who responded negatively, the CFPB states that eClosings generally were associated with better consumer understanding, a more efficient process, and greater feelings of consumer empowerment. Specifically, the CFPB found a 7% positive difference in perceived understanding scores for borrowers using eClosings compared to borrowers using paper documents. When asked about perceptions of how efficient the overall process was, including perceptions about delays, errors, and timing, the study found a 17% positive difference for borrowers using eClosings.

Notably, the CFPB also states that consumers showed the best results when they had access to CFPB educational materials and received and reviewed their closing documents in advance of the closing meeting, regardless of whether the documents were received electronically or through paper copies. While this finding aligns with the Integrated Disclosure Rule requirement that consumers receive the Closing Disclosure no later than three business days before closing, the CFPB believes using an eClosing process provides the ability to embed educational resources and can facilitate faster

document delivery, noting that the early delivery of documents occurred much more consistently in eClosings.

The report was initiated to promote best practices in the marketplace, and as a result of the study, the CFPB states it generally supports the increased use of technology in the industry and it will continue to work collaboratively with all stakeholders to improve the mortgage closing experience for consumers.

The CFPB's report, "Leveraging technology to empower mortgage consumers at closing," is available at: http://files.consumerfinance.gov/f/201508_cfpb_leveraging-technology-to-empower-mortgage-consumers-at-closing.pdf.

FTC Publishes CAN-SPAM Act Q&A

The FTC recently published responses to some common questions from businesses about how to comply with the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the CAN-SPAM Act) and the FTC's CAN-SPAM Rule (16 C.F.R. Part 316), which generally establish requirements for persons who send unsolicited commercial emails. The questions address a range of issues, such as: (i) what information must be included in email subject lines; (ii) what requirements apply if a company purchases a list of email addresses for likely potential consumers; (iii) how to handle social media marketing; (iv) treatment of cell phone spam; and (v) treatment of emails sent to online group members.

For example, the FTC provides that the Act does not require senders to identify a commercial email message as an advertisement in the subject line. Rather, the requirement generally is to identify the email as an advertisement in a way that is "clear and conspicuous" but without use of deceptive subject lines. To the extent that, before passage of the Act, certain states required specific language to be included in subject lines of unsolicited commercial emails, the Act preempts any such state requirements. Therefore, a sender has flexibility in how to accomplish this requirement under the Act.

On the issue of purchasing lists of consumer email addresses, the FTC reiterated that initiators of commercial emails are not required to obtain email recipients' consent (i.e., an opt-in) under the Act before sending commercial emails to those recipients, though initiators still must comply with the applicable provisions of the Act. However, if engaging in this activity, initiators run the risk that some of the recipients included on the purchased list have already opted out of receiving email from the initiator or that the list was assembled by illegal means. Accordingly, the FTC notes that risk-averse companies have chosen to send such emails only to persons who have affirmatively requested them or with whom the company already has a business relationship.

The FTC also discussed some of the complications raised by cell phone spam, noting that even in instances where the Act does not apply to certain such messages, Section

5 of the FTC Act (e.g., prohibition on unfair or deceptive acts or practices) and provisions of the Telephone Consumer Protection Act (TCPA) may apply.

A full list of the questions and answers can be found at: https://www.ftc.gov/news-events/blogs/business-blog/2015/08/candid-answers-can-spam-questions.

The FTC's business guide entitled "CAN-SPAM Act: A Compliance Guide for Business" can be found at: https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business.

CFPB Publishes Guide for Real Estate Professionals Regarding TRID

On August 18, 2015, the CFPB launched a suite of web-based guidance materials meant to help real estate professionals understand the TRID Rule and related disclosures—the Loan Estimate (LE) and the Closing Disclosure (CD). Although the materials are geared toward real estate professionals, the CFPB encourages real estate professionals to share this information with anyone they think may benefit from such information. The CPFB also provides suggestions for certain CFPB resources that real estate professionals may share with their clients. The suite builds on the CFPB's Know Before You Owe initiative information and materials already published, and it includes plain language information and explanations regarding topics such as: (i) areas that realtors should focus on to have smooth, on-time closings; (ii) how to read and understand the new TRID disclosures; (iii) what has and has not changed about the mortgage process under TRID, including steps in the process that real estate professionals need to be vigilant about in order to guide their clients through to successful closings; and (iv) clarification that, according to the CFPB, three-day delays to closing will be unlikely in most instances.

We identify below some of the information shared by the CFPB in the new web-based guidance materials:

- The CFPB advises real estate professionals to encourage their clients to apply for LEs from multiple lenders once a property has been identified.
- The site links to the CFPB's existing "Owning a Home" materials, including an interactive LE called "Loan Estimate Explainer" (http://www.consumerfinance.gov/owning-a-home/loan-estimate/) and an interactive CD called "Closing Disclosure Explainer" (http://www.consumerfinance.gov/owning-a-home/closing-disclosure/).
- The site links to the CFPB's resource for answers to common questions about subject matters governed by the CFPB or questions related to such matters, called "Ask CFPB" (http://www.consumerfinance.gov/askcfpb/).
- The CFPB encourages open lines of communication, advising real estate professionals to be the source of accurate and timely information about the property and transaction and reminding them that they need to communicate to the lender information regarding the buyer's and seller's real estate brokerages' and agents' names, addresses, state license ID numbers, email addresses, and

phone numbers so that the CD can be completed in a timely fashion to include all of this information.

- The CFPB provided a list of what has and has not changed about the mortgage process and their potential effect on the real estate professionals and their clients (http://www.consumerfinance.gov/know-before-you-owe/real-estate-professionals/learn-what-changed-about-mortgage-process/). For example, according to the CFPB:
    - TRID does not make changes to preapprovals or prequalifications.
    - Lenders must provide LEs within three business days after receiving the six pieces of information from applicants, and applicants who describe the specific type of loan they are interested in will receive the most useful information on their LE.
    - The CD can be compared with the information contained in the initial or a revised LE (or, in the case of a revised CD, the initial CD).
    - While flexibility was built into TRID to accommodate small, last-minute changes typical of purchase transactions, a new three business-day review period is required for significant changes to the transaction. However, the CFPB provides that, since "large, last-minute changes should be rare, an additional review period should also be rare." The site provides a factsheet about the three types of changes that will cause this delay (http://files.consumerfinance.gov/f/201506_cfpb_factsheet_will-the-new-mortgage-disclosures-delay-my-closing.pdf).

The full suite of web-based guidance materials can be found at: http://www.consumerfinance.gov/know-before-you-owe/real-estate-professionals/.

FHA Implements Supplemental Performance Metric in Neighborhood Watch Early Warning System

On August 17, 2015, FHA announced that it implemented its Supplemental Performance Metric which is a component of FHA's Blueprint for Access to Credit Initiative. It is available for view on FHA's Neighborhood Watch Early Warning System. This metric is designed to help mitigate adverse selection away from borrowers with certain credit profiles and encourage the extension of homeownership opportunities to underserved segments of the market.

FHA presently calculates a Compare Ratio for all FHA approved lenders, that compares the rate of early defaults and claims for single family loans originated or underwritten by the lender in an area with the rates for other lenders in the same area.

The Compare Ratio is used by FHA for its Credit Watch Termination Initiative, in which lenders with excessive default and claim rates compared to their peers may have their authority to originate and/or underwrite FHA loans terminated. The Compare Ratio is also used to evaluate lender performance in determining eligibility for FHA's Lender Insurance (LI) program.

The Supplemental Performance Metric implemented by FHA responds to lender concerns about the Compare Ratio being a comparison to one's peers rather than to FHA's risk tolerance. This new metric is intended to address the difficulty of sub-680 credit score borrower's ability to access credit- especially for those below 640. The new metric provides more nuanced insight into a lender's specific performance and encourages lenders to serve credit worthy underserved borrowers.

The Supplemental Performance Metric compares lender performance to a targeted risk mix and default rate within three different credit bands. It compares a lender's actual rate against its mix adjusted default rate using FHA's benchmark seriously delinquent rate. It will be used by FHA in its Credit Watch Termination Initiative as an additional compensating factor in evaluating a lender's performance after FHA calculates the Lender's Compare Ratio in accordance with FHA's current policy.

Additional information about the Supplemental Performance Metric can be found on the Lender Performance web page on hud.gov.

State Regulatory Developments

Illinois Enacts Reverse Mortgage Act

The State of Illinois has enacted Senate Bill 1440, referred to as the Reverse Mortgage Act, which establishes certain requirements for lenders of reverse mortgages. The Act becomes effective on January 1, 2016. Among the new requirements created by the Act is a 3-day "cooling-off" period from the time a lender makes a written commitment to originate a reverse mortgage, during which time the borrower cannot be required to close or proceed with the loan. Also, the Act imposes restrictions on the cross-selling of insurance products, creates new borrower disclosures, and places limitations on the distribution of reverse mortgage proceeds.

Two new disclosure requirements are created by the Act. The Office of the Attorney General of Illinois is required to develop the content and format of the first new disclosure, which will be an education document containing background information on reverse mortgages, listing potential alternatives to reverse mortgages, and discussing the availability of independent counseling services.

The second new required disclosure outlines the availability of counseling services, and lenders must include in this disclosure the contact information for reverse mortgage counseling agencies approved by the U.S. Department of Housing and Urban Development. Specific statements set forth in the Act must be included in this counseling disclosure. These new disclosures must be provided to the borrower at the time of the initial inquiry regarding a reverse mortgage or, if not practically feasible, after the borrower makes a request to apply for a reverse mortgage.

The Act prohibits a lender from requiring the purchase of an annuity, investment, life insurance, or long-term care insurance product as a condition for obtaining a reverse mortgage loan, or from being compensated from the loan proceeds for providing information about such products. However, the Act does not preclude a lender from requiring the purchase of property and casualty insurance, title insurance, flood insurance, or other products meant to insure or protect the value of the home and are customary for a residential mortgage or reverse mortgage.

Under the Act, any funds borrowed under a reverse mortgage can only be distributed to the borrower or the borrower's spouse or partner, other than amounts for bona fide fees necessary for the origination of the loan or for mandatory obligations, including required home repairs.

Once the Act takes effect, no reverse mortgage commitment can be made in Illinois unless all lenders involved in brokering and making the reverse mortgage loan certify in writing that they have complied with seven specific pre-commitment conditions outlined in the Act. The lender must maintain the certification in an accurate, reproducible, and accessible format for the term of the reverse mortgage. The seven pre-commitment conditions are as follows:

(1) the borrower has received from the lender the required educational document prepared by the Office of the Attorney General and the required document regarding the availability of counseling services on reverse mortgages;

(2) the borrower has received from the lender, at the time a written commitment was made to the applicant to provide a reverse mortgage loan, the disclosure document regarding the 3-day cooling-off period and that at least 3 business days have passed since the document was provided; the certification shall also include the date the cooling-off period disclosure was provided;

(3) the reverse mortgage loan does not include any current or future requirement for the applicant to purchase an annuity, investment, life insurance, or long-term care insurance product however, nothing in this requirement shall preclude a lender from requiring the borrower to purchase property and casualty insurance, title insurance, flood insurance, or other such products meant to insure or protect the value of the home or the lender's lien and that are customary for residential mortgage or reverse mortgage transactions;

(4) no offer an annuity was made to the borrower before the closing of the reverse mortgage or will be before the expiration of the right of the borrower to rescind the reverse mortgage loan;

(5) the borrower was not referred to anyone for the purchase of an annuity before the closing of the reverse mortgage or will be before the expiration of the right of the borrower to rescind the reverse mortgage loan;

(6) the borrower was not provided marketing information or annuity sales leads to anyone regarding the prospective borrower or borrower before the closing of the reverse mortgage or will be before the expiration of the right of the borrower to rescind the reverse mortgage loan; and

(7) to their knowledge, no person, other than a borrower's spouse or partner, who directly or indirectly facilitates, processes, negotiates, assists, encourages, arranges, or otherwise induces consumers to take out a reverse mortgage with a lender has received or will receive any portion of the loan proceeds for any service or product, including for services that fall under the Home Repair and Remodeling Act, other than that for bona fide fees for origination of the loan. This requirement shall not prohibit disbursements of loan proceeds in compliance with guidelines under the FHA HECM Program, including uses defined as mandatory obligations nor shall it prohibit a borrower from using the loan proceeds to purchase products or services from a lender that is a financial institution in the ordinary course of the financial institution's business.

SB 1440 also amends the Consumer Fraud and Deceptive Business Practices Act to establish that any person who knowingly violates the Reverse Mortgage Act commits an unlawful practice within the meaning of the Consumer Fraud and Deceptive Business Practices Act.

As noted above, the Reverse Mortgage Act will take effect in Illinois on January 1, 2016.

Litigation Developments

Ninth Circuit Rules CFPB Interpretation of RESPA's Statutory Safe Harbor Provision Not Entitled to Judicial Deference

The U.S. Court of Appeals for the Ninth Circuit recently ruled that the Consumer Financial Protection Bureau's (CFPB) informal interpretation of the statutory safe harbor provision in the Real Estate Settlement Procedures Act (RESPA) was not entitled to deference.

In *Edwards v. The First Am. Corp* (No. 13-55542), plaintiffs filed a putative class action against First American, alleging that the transactions between First American and its captive title agencies violated RESPA's anti-kickback provision 12 U.S.C. § 2607(a). On appeal of the district court's denial of class certification, the Ninth Circuit considered whether First American's ownership interests in captive title agencies fall within the meaning of RESPA's safe harbor provision, § 2607(c)(2). The Court explained that "[n]otwithstanding the general prohibition of exchanging any thing of value for a referral, a statutory safe harbor exempts a payment from RESPA violation if the payment—despite being made simultaneously with a referral—was 'for goods or facilities actually furnished or for services actually performed.'" (quoting 12 U.S.C. 2607 (c)(2)).

In an amicus brief, the CFPB (which inherited regulatory authority over RESPA) contended that RESPA's safe harbor "does not apply to the [subject] transactions because First American's payment for ownership interests is not a payment for goods, facilities, or services." The CFPB urged the Court to give deference to its interpretation of the statute. The Court, however, decided that the "agency's interpretation of the statute—when presented in an amicus brief—is not promulgated in the exercise of its formal rule-making authority, so no *Chevron* deference is warranted." The Ninth Circuit further concluded that no deference was merited because "the statutory terms at issue are not ambiguous."

The Court ultimately concluded that RESPA's safe harbor did not apply, as the "ownership interests purchased by First American are equity shares, not goods, services, or facilities." Finding that "the district court erred in relying on § 2607(c)(2) to determine the propriety of class certification," the Ninth Circuit vacated the district court's denial of class certification in part, and remanded for further proceedings.

The attorneys at Weiner Brodsky Kider PC regularly advise clients on RESPA compliance and putative class actions nationwide.