Financial Services Update
September 23, 2015

HIGHLIGHTS

Federal Regulatory Developments

Banks to Pay Nearly $64 Million for Alleged Deceptive Practices Related to Credit Card Add-On Products

Department of Justice Settles Alleged False Claims Submission Related to Reverse Mortgage Loan Servicing

Litigation Developments

11TH Circuit Revives Discrimination Claims

CFPB Obtains Asset Freeze and Halts Operations of Debt-Relief Provider

WBK News

Jim Milano presented his paper titled "Reverse Mortgages: An Idea Whose Time Has Come" at the 49th Annual William W. Gibson, Jr. Mortgage Lending Institute, hosted by the University of Texas, in Austin, TX on September 17. MORE INFO

WBK was well represented at MBA's Regulatory Compliance Conference held September 20-22 in Washington, DC. **Leslie Sowers** joined the "Special TRID Workshop"; **Michael Kieval** spoke on the Essentials Panel titled "Dodd Frank Rules 1"; and **Jason McElroy** joined the litigation panel "CFPB Enforcement". **Jim Milano** spoke on "Updates: Government Housing Requirements and the FHA Handbook" and **Jack Konyk** joined the panel "Shaping Up Your Compliance Management System". MORE INFO

Mitch Kider spoke on TRID related issues during the Michigan MLA Annual Lending Conference on September 21 in Thompsonville, MI. MORE INFO

Jack Konyk will present an overview of a variety of regulatory topics at the North East Regional Brokers Conference on September 29 in Atlantic City, NJ. Jack also will present a session titled "Live, Survive, Thrive in this New Regulatory Environment" at the 60th Annual Conference of the MBA of the Carolinas on October 2 on Hilton Head Island, NC. MORE INFO

Mitch Kider and **Jason McElroy** will speak on several panels regarding CFPB enforcement and administrative litigation at the Annual Consumer Financial Services Conference sponsored by the Conference on Consumer Finance Law and held at Loyola University Chicago School of Law on November 19-20. For more information go to http://www.ccflonline.org/attachments/ccfl_annual_cfs_conf_2015.pdf.

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

Banks to Pay Nearly $64 Million for Alleged Deceptive Practices Related to Credit Card Add-On Products

On September 8, 2015, the FDIC announced a settlement with two state nonmember banks—Comenity Bank, Wilmington, Delaware and Comenity Capital Bank, Salt Lake City, Utah—in connection with alleged violations of Section 5 of the FTC Act, which generally prohibits engaging in unfair or deceptive acts or practices in or affecting commerce. The allegations stem from the banks' marketing and servicing of their credit card add-on products. As a result of the settlement, Comenity Bank is ordered to pay a civil money penalty of $2 million and consumer restitution of approximately $53 million, while Comenity Capital Bank is ordered to pay a civil money penalty of $450,000 and consumer restitution of approximately $8.5 million.

The FDIC orders the banks to not make, or allow to be made, any deceptive representations, statements, or omissions in the banks' marketing materials, telemarketing scripts, and/or sales presentations to solicit current or prospective card members to enroll in credit card add-on products. Specifically, the order prohibits the use of untrue representations regarding the eligibility for refunds if card members call to cancel coverage within a 30-day review period, non-assessment of fees if card

members pay their credit card balances on or before the due dates, or eligibility to receive account credits or gift cards as incentives for enrolling in the add-on product without clear and conspicuous disclosure of all the requirements to receive the account credits or gift cards.

In addition to the civil money penalties and consumer restitution, the FDIC orders the banks to take a number of actions in connection with their compliance management systems (CMS), such as enhanced participation of the Board of Directors, development of the CMS framework to ensure it constitutes a CMS that is comprehensive, written, sound, and risk-based, adoption of adequate compliance monitoring procedures, and implementation of an effective third-party oversight program. The banks must also take all appropriate steps, consistent with FCRA and Regulation V, to amend and correct negative incident reports previously made regarding consumers whose accounts would not have generated a negative incident report but for the fees charged by the banks in connection with the add-on products. They must also amend and correct reports of credit card account balances of consumers whose account balances are revised as a result of the restitution amounts required by the order.

The orders and the FDIC's press release regarding the orders can be found at: https://www.fdic.gov/news/news/press/2015/pr15073.html.

Department of Justice Settles Alleged False Claims Submission Related to Reverse Mortgage Loan Servicing

On September 4, 2015, the Department of Justice announced that it entered into a settlement with a financial institution to resolve alleged violations of the False Claims Act in connection with the FHA Home Equity Conversion Mortgage (HECM) program. According to the press release issued by the Department of Justice, the company agreed to pay $29.63 million to resolve the false claim allegations. The claims resolved by this settlement were allegations only and no determination of liability has been made by the settlement.

The Department of Justice alleged that the company, through its subsidiaries, failed to comply with certain requirements of the HECM program. In particular, the press release issued by the Department of Justice indicates that the alleged violations included the failure to order appraisals within 30 days of the loan becoming due and payable, in accordance with HUD's requirements. Under the HECM program, the failure to meet certain requirements and deadlines could result in curtailment of a mortgagee's insurance claim for the loan. The Department of Justice alleged that the company submitted false claims for debenture interest by failing to properly disclose that it had not met such deadlines and, therefore, was not entitled to such interest payments.

The Department of Justice also alleged that the company submitted false claims for the reimbursement of amounts in connection with the liquidation of foreclosed properties. According to the press release, although HUD will reimburse mortgagees or servicers

as part of an insurance claim for sales commissions paid to real estate agents as part of the liquidation of foreclosed properties, HUD will not reimburse for fees paid for the referral of liquidation business.

The settlement resolved allegations filed in a lawsuit by a former executive of the company, under the *qui tam*—or whistleblower—provisions of the False Claims Act. These provisions permit private individuals to sue on behalf of the government for false claims, and to share in the recovery.

The press release by the Department of Justice for this settlement is available at: http://www.justice.gov/opa/pr/walter-investment-management-corp-pays-more-29-million-alleged-submission-false-claims.

Litigation Developments

11TH Circuit Revives Discrimination Claims

In a recent opinion, the Eleventh Circuit Court of Appeals reversed and remanded the dismissal of race discrimination claims asserted by the City of Miami against Bank of America. The district court had found the City: (a) lacked statutory standing for its claims; (b), could not show causation; (c) was barred by the two year statute of limitations; and (d) had not alleged a viable claim for unjust enrichment. The Eleventh Circuit affirmed the dismissal of the unjust enrichment claim, but reversed the rulings on standing and causation. The Court also ruled that the City should be given an opportunity to amend its pleadings to state a viable claim for continuing violation of the FHA, as a way to get around the 2 year statute of limitations.

The City's Complaint alleged that Bank of America violated the FHA by: (1) refusing to make loans to some minorities; (2) making loans to other minorities on terms significantly more unfavorable than with comparably placed whites; and (3) targeting still other minorities with "predatory" loans. The unfavorable and predatory loans caused avoidable and premature foreclosures, which caused damage to the City from reduced property tax revenues and increased municipal services.

On appeal, Bank of America challenged the City's Constitutional standing under Article III, in addition to the bases upon which the district court dismissed the City's Complaint. The Eleventh Circuit, though, rejected that argument along with every basis under the FHA where the district court had ruled for the Bank.

On the Constitutional standing issue, the Court explained that the City had alleged enough "injury in fact" under controlling Supreme Court opinions, such as *Gladstone, Realtors v. Village of Bellwood*. Additionally, the City had alleged enough to show that the City's alleged injury was traceable to the Bank's conduct, though the Court acknowledged that the City may not ultimately be able to carry its burden of proving which foreclosures were caused by discriminatory lending.

On the statutory standing issue, the Court explained that the concept is misleading, as explained by the Supreme Court in *Lexmark Int'l, Inc. v Static Control Components, Inc.* Instead, statutory standing is really a matter of statutory interpretation, and whether a valid claim has been stated within the meaning of Rule 12(b)(6), Fed. R. Civ. P. The Court found that a valid claim had been stated, because the "zone of interests" protected by the FHA was as broad as Article III of the Constitution permits.

On the causation issue, the Court explained that the Supreme Court had not directly addressed the causation requirements of the FHA, but had observed it was very much like the "proximate cause" of a tort action, which is based on foreseeability. Consequently, proximate cause can differ with different statutes, and defendants could be liable for the foreseeable effects of discrimination.

On the statute of limitations issue, the Court agreed that the City's Complaint was barred as pled, because the FHA has a 2 year limitations period, and no discriminatory loan had been allegedly closed within two years of the filing of the lawsuit, December 13, 2013. The Court ruled, however, that the City should be given an opportunity to make such allegations, if it could. Further, if the City could make such allegations, those allegations could support a "continuing violation" theory, which would allow the City to rely on loan closings prior to the 2 year limitations period.

Weiner Brodsky Kider regularly represents mortgage lenders and servicers nationwide against discrimination claims.

CFPB Obtains Asset Freeze and Halts Operations of Debt-Relief Provider

On September 15, 2015, the CFPB announced it obtained a preliminary injunction against World Law Group, a debt-relief provider accused of charging illegal up-front fees, and failing to follow-through with promises to negotiate and settle consumers' debt. The CFPB's complaint, which was filed in federal court in Florida, alleged that World Law Group and other related companies operated an illegal scheme that took $67 million from over 21,000 consumers. According to the CFPB, World Law Group told consumers that if they stopped paying their debts and instead payed the company, then a team of lawyers (including local counsel) would negotiate affordable debt repayment plans with the consumers' creditors. But, as the Complaint explains, World Law Group failed to provide the legal representation promised, and often failed to negotiate or settle consumers' debts at all. As a result, not only did consumers lose millions in illegal fees, they also were subjected to other harms such as lowered credit scores, collection calls, lawsuits, and late fees.

The order granting the preliminary injunction is notable for its scope and effect on World Law Group—it effectively put the company out of business overnight. Not only did the order freeze World Law Group's assets, it completely prohibits the company from providing any debt relief products or services, and even goes as far as ordering all of

the company's websites be taken down. While the order is not a finding of ultimate wrongdoing, it did require the court find that the CFPB was "likely to prevail on the merits of the action"—which in this case means the court agreed the CFPB is likely to show that World Law Group's practices violated Dodd-Frank's prohibition on unfair, deceptive or abusive practices, and also the Telemarketing and Consumer Fraud and Abuse Prevention Act.