



Financial Services Update

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WBK News

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

CFPB Amends Small Creditor and Rural and Underserved Area Definitions

On September 21, 2015, the CFPB issued a Final Rule that revises the definition of a small creditor and rural and underserved areas, as currently provided in the CFPB's mortgage rules. These changes impact various requirements and exemptions under the CFPB's mortgage rules related to small creditors. The Final Rule becomes effective on January 1, 2016.

In particular, the Final Rule expands the definition of a small creditor. Under the Final Rule, the loan limit for the small-creditor status is raised from 500 originations of covered transactions secured by a first lien to 2,000 originations. In addition, the Final Rule excludes loans held in portfolio by the creditor or its affiliates from the origination limit. However, the Final Rule also shortens the time period for determining whether a creditor is operating predominantly in rural or underserved areas from any of the three preceding calendar years to the preceding calendar year.

The Final Rule establishes a grace period for the above thresholds (i.e., the origination limit and the one-year qualifying period) for small creditors or creditors that operate predominantly in rural or underserved areas. Under the Final Rule, an otherwise eligible creditor that exceeds the origination limit or fails to meet the time period threshold in the preceding calendar year may continue to operate as a small creditor with respect to loans with applications received before April 1 of the current calendar year.

The Final Rule also amends the annual asset limit for the small-creditor status. Under the Final Rule, the calculation of the \$2 billion asset limit for small creditors includes the assets of the creditor's affiliates that regularly extended covered transactions. The grace period for the annual asset limit allows a creditor that exceeds the limit in the preceding calendar year to operate as a small creditor with respect to transactions with applications received before April 1 of the current calendar year.

The Final Rule also expands the definition of the term "rural" by adding census blocks that are not in an urban area as defined by the U.S. Census Bureau to the current county-based test. Two new safe harbors were also added related to the rural or underserved definition for creditors that rely on automated tools provided on: (a) the CFPB's website to determine whether the property is located in a rural or underserved area, or (b) the Census Bureau's website to assess whether a particular property is located in an urban area.

In addition, the Final Rule extends the current 2-year temporary exemption for certain small creditors to make balloon-payment qualified mortgages and balloon-payment high cost mortgages, regardless of whether they operate predominantly in rural or

underserved areas. The temporary exemption will include transactions for which the application was received before April 1, 2016, rather than transactions consummated on or before January 10, 2016.

The Final Rule is available at:

http://files.consumerfinance.gov/f/201509_cfpb_amendments-relating-to-small-creditors-and-rural-or-underserved-areas-under-the-truth-in-lending-act-regulation-z.pdf.

CFPB Enters Into Consent Orders with Two Largest Debt Buyers Regarding Use of Deceptive Collection Tactics

The CFPB recently took action against Encore Capital Group, Inc. and several of its wholly-owned subsidiaries (Encore) and Portfolio Recovery Associates, LLC (Portfolio) for alleged violations of the Consumer Financial Protection Act (CFPA), the federal Fair Debt Collection Practices Act (FDCPA), and the federal Fair Credit Reporting Act (FCRA). Portfolio and Encore regularly purchase delinquent or charged-off accounts for a portion of the value of the debt, then attempt to collect on the full amount of the outstanding debt. The recent actions stem largely from purchased debts that were potentially inaccurate, missing documentation, or unenforceable, as well as alleged activity taken in connection with the unverified debts, such as collections based on false statements and lawsuits involving robo-signed documents. As a result, the CFPB required the parties to pay up to \$61 million in consumer refunds, to pay \$18 million in penalties, and to stop collection on debts totaling over \$128 million.

The consent orders allege the following violations by Encore, Portfolio, or both, among others:

- Improper collection practices, such as:
 - Attempts to collect on debts that were inaccurate (e.g., approximated balances, incorrect balances, non-updated balance information), unsubstantiated (e.g., lacking documentation, lack of investigation by debt buyer as to whether the debts were accurate and enforceable), or otherwise unreliable;
 - Repeated or continuous calls to consumers with the intent to annoy, abuse, or harass the consumers into making payments;
 - Telling consumers that the only way to prevent collection calls to their cell phones before 9 a.m. was to consent to receive collection calls on their cell phones from a computer dialing system.
- Improper litigation practices, such as:
 - Filing lawsuits with no ability or intention of proving the debt (i.e., relying on victory by default if the consumers did not file a defense);
 - Misleading court filings (e.g., affidavits stating that affiants had reviewed documentation that confirmed the debt at issue or attaching consumer-specific supporting documentation, neither of which were the case);
 - Filing lawsuits beyond the applicable statute of limitations;

- Misrepresenting to consumers that lawsuits were planned, imminent, or underway when attorneys may not have yet decided to file suit;
- Placing thousands of debts with law firms staffed with only a handful of attorneys to file and handle the lawsuits.

Portfolio and Encore are ordered to make consumer refunds and penalty payments, and to release or move to vacate all judgments and dismiss all lawsuits where Encore misrepresented that a debt was assumed valid or that Portfolio filed beyond the statute of limitations and to stop any attempts to enforce or collect on such judgments.

Moreover, the parties are ordered to, among other things: (i) not represent that a consumer owes a debt unless they can substantiate the representation at the time it is made; (ii) limit reselling the debt to the few specific parties named in the orders (e.g., generally not to other debt collectors); (iii) not file lawsuits to enforce debts unless they have specific documentation and information demonstrating that the debt is accurate and enforceable; (iv) provide proper information to consumers before filing a lawsuit; (v) use accurate affidavits when collecting debt; and (vi) with regard to debt beyond the statute of limitations, not sue or threaten to sue and not collect unless disclosing to the consumer that they cannot sue to collect on it.

The CFPB's summary regarding the actions, as well as links to the consent orders, can be found at: <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-baddebts/>.

Hudson Bank Accused of Racially Discriminating in Structuring its Lending Operations

On September 23, 2015, the CFPB and the DOJ jointly filed a proposed consent order against Hudson City Savings Bank. The agencies allege that Hudson conducted unlawful "redlining" practices by failing to locate its branches, loan officers, mortgage brokers, advertising efforts, and Community Reinvestment Act (CRA) assessments in predominately Black and Hispanic areas.

The CFPB and the DOJ based their initial complaint on maps drawn from 2010 census data showing geographic areas inhabited predominately by Black and Hispanic populations. The agencies then layered Hudson's branch locations, broker headquarters, CRA assessments, and loan application data onto these maps. The results show that areas such as Bronx, NY, Philadelphia, PA and Camden, NJ, among others, had substantially less access to Hudson's services, with the result that less borrowers in these areas submitted loan applications to Hudson.

The consent order alleges that Hudson's organizational structure violated the Equal Credit Opportunity Act and the Fair Housing Act by denying Black and Hispanic neighborhoods equal access to credit and fair housing. Further, the consent order alleges that under the Community Reinvestment Act, Hudson was required to meet the

credit needs of residents within a geographic area of its own selection and that Hudson avoided selecting predominately Black or Hispanic areas.

Hudson denies that it considered race in structuring its organizational activities, stating that it has submitted to the consent order so that it may allocate its resources to its lending operations. The proposed consent order imposes a \$5.5 million fine and requires Hudson to pay \$25 million to a loan subsidy program, finance \$1 million on targeted advertising and outreach to affected neighborhoods, as well as spend over \$1 million on local partnerships and consumer education, among other remedial measures.

This recent action demonstrates that lenders should use caution in structuring their organizational activities, including bank locations and advertising efforts. Failure to provide services in regions consisting predominately of racial minorities may subject the lender to federal scrutiny.

The CFPB's announcement is available at
<http://www.consumerfinance.gov/newsroom/cfpb-and-doj-order-hudson-city-savings-bank-to-pay-27-million-to-increase-mortgage-credit-access-in-communities-illegally-redlined/>

Litigation Developments

Fourth Circuit Accepts Appeal to Determine Viability of Statistical Sampling in False Claims Actions

The U.S. Court of Appeals for the Fourth Circuit recently agreed to hear an interlocutory appeal on the use of statistical sampling to prove violations of the False Claims Act. In doing so, the Fourth Circuit will be the first federal court of appeals to rule on this issue.

The appeal comes from a district court case in South Carolina, in which the court rejected the use of statistical sampling. The plaintiff is a private citizen bringing a *qui tam* action on behalf of the government, and the parties had reached a settlement. However, because the action was brought on behalf of the government, the government's approval for settlement was required. The government rejected the proposed settlement based on its own extrapolations using statistical sampling.

The use of statistical sampling has become a major concern in false claims act matters, including the highly publicized action Quicken Loans has brought against the government in the U.S. District Court for the Eastern District of Michigan, which is still ongoing. A hearing on the government's motion to dismiss in the Quicken Loans matter was held on September 3, 2015.

WBK regularly defends financial services companies throughout the United States against allegations of False Claims Act violations.

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