Financial Services Update
October 22, 2015

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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 Finalizes Expansion of HMDA Reporting

On October 15, the CFPB issued a final 800-page rule that will greatly expand the scope of collecting and reporting requirements under the Home Mortgage Disclosure Act (HMDA). The final rule also revises the scope of the financial institutions that are required to collect and report HMDA data. Although the Dodd-Frank Act would have allowed the CFPB to implement the new rule in 2017, the expanded data collection requirements will take effect on January 1, 2018. Covered institutions will need to begin collecting the new information in 2018 and report the data by March 1, 2019.

The final rule adopts a uniform loan volume threshold for depository and non-depository institutions that determines which lenders must collect and report HMDA data. In general, an institution will be required to report data if it made at least 25 covered closed-end or reverse mortgages, or at least 100 covered open-end lines of credit, in each of the two preceding calendar years, and meets other applicable coverage requirements. Notably, institutions that meet only the 25 closed-end mortgage loan threshold are not required to report their open-end lending, and vice-versa for institutions that meet only the 100 open-end line of credit threshold.

As a result of the loan-volume threshold, low-volume depository institutions that originate fewer than 25 closed-end loans will be exempt from HMDA collection and reporting requirements. The low volume depository exclusion will go into effect on January 1, 2017, one year earlier than the effective date for most of the other regulatory requirements.

With respect to the type of transactions that must be reported, the final rule adopts a dwelling-secured standard for all loans or lines of credit that are for personal, family, or household purposes. Accordingly, most consumer-purpose transactions such as closed-end home-equity loans, home-equity lines of credit, and reverse mortgages, are subject to HMDA reporting requirements. In contrast to the proposed rule, the final rule excludes from collection and reporting requirements dwelling-secured transactions made for business or commercial purposes unless they are for the purpose of home purchase, home improvement, or refinancing. The proposed rule would have covered all consumer and business or commercial dwelling-secured loans regardless of purpose. In addition, the final rule does not require reporting for home improvement loans that are not secured by a dwelling and all agricultural-purpose loans and lines of credit.

The final rule significantly expands HMDA reporting requirements to include new data points prescribed by the Dodd-Frank Act, as well as data points added by the CFPB pursuant to the Bureau's own discretionary regulatory authority. Specifically, the final rule adds new data fields for (a) borrower and underwriting data, such as the borrower's age, credit score, debt-to-income ratio, combined loan-to-value ratio, the application channel, and the name of the automated underwriting system (AUS) used to evaluate the application, (b) property data such as the property's postal address, the property value, the number of dwelling units in the property, the property's construction method, and certain manufactured and multifamily housing information, (c) loan-level pricing information, such as borrower-paid loan costs, borrower paid-origination charges, discount points, interest rate, loan term, introductory period, any non-amortizing feature, and any prepayment penalty, and (d) loan identifiers relating to the loan number and mortgage loan originator. The final rule also modifies a number of existing data points.

The final rule does eliminate several of the data points that were included in the original proposal, including the proposal to require lenders to report the qualified mortgage status, the initial draw on an open-end line of credit, information about the metropolitan statistical area, and the risk-adjusted, pre-discounted interest rate.

Starting on January 1, 2020, the CFPB will require quarterly reporting for covered institutions that reported for the preceding calendar year at least 60,000 covered loans and applications, excluding purchased covered loans. This is in addition to the current requirement that covered institutions submit their annual HMDA reports by March 1. The final rule provides a safe harbor for errors and omissions in quarterly data, as long as the institution makes a good faith effort to report and corrects the data prior to submitting its annual HMDA submission.

Finally, under the final rule, covered institutions will no longer be required to maintain and provide modified Loan/Application Registers (LARs) to the public. Instead, a covered institution will provide upon request, a disclosure statement and a notice that clearly conveys that its modified LAR can be found on the CFPB's website. This approach relieves all institutions of the responsibility to disclose HMDA data to the public.

The final rule is available at:
http://files.consumerfinance.gov/f/201510_cfpb_final-rule_home-mortgage-disclosure_regulation-c.pdf

CFPB Issues Guidance Regarding Marketing Services Agreements

On October 8, 2015, the CFPB issued Bulletin 2015-05 providing guidance on RESPA compliance in the area of Marketing Services Agreements (MSA). Bulletin 2015-05 starts by reminding lenders and other industry participants of the RESPA prohibition against referral fees and then goes on to describe what the CFPB indicates are "substantial risks" posed by MSAs. The CFPB indicates that its experience in this area gives rise to "grave concerns" about the use of MSAs in ways that may evade the requirements of RESPA. However, Bulletin 2015-05 provides very little legal analysis and appears to offer no guidance on structuring arrangements that, in the CFPB's view, could sufficiently reduce the risk of perceived violations.

At the outset, Bulletin 2015-05 appears to balance consumer harm against potential benefits by indicating that the CFPB received numerous inquiries and whistleblower tips describing the harm from the use of MSAs, but has not received comparable input suggesting that MSAs benefit consumers or the industry. The CFPB further asserts that its investigative efforts revealed that many MSAs are designed to evade the RESPA prohibition on the payment and acceptance of kickbacks and referral fees.

Bulletin 2015-05 refers to MSAs as arrangements that are usually structured as payments for advertising or promotional services and often involve providers of settlement services, such as lenders, real estate agents or brokers, or title companies. However, the CFPB also asserts that in some cases, payments under MSAs are actually disguised compensation for referrals. The CFPB explains that the determination of whether an MSA violates RESPA requires a review of the facts and circumstances surrounding the creation and implementation of each agreement. Bulletin 2015-05 also describes various CFPB enforcement actions relating to RESPA compliance. However, the CFPB also acknowledges that this is a fact-intensive inquiry and the outcome of one matter is not necessarily dispositive to the outcome of another.

Importantly, the CFPB makes only a passing reference in the introductory parts of Bulletin 2015-05 to Section 8(c)(2) of RESPA, which generally permits bona fide compensation for services actually performed. However, the CFPB does not further address this provision in its comments regarding compliance and MSAs. Instead, Bulletin 2015-05 asserts that "any agreement that entails exchanging a thing of value for referrals of settlement service business involving a federally related mortgage loan likely violates RESPA, whether or not an MSA or some related arrangement is part of the transaction."

Moreover, according to Bulletin 2015-05, the risks of RESPA violations are likely to remain significant even if the terms of the MSA are carefully drafted and are technically compliant with RESPA. In this regard, the Bureau states that because MSAs may create incentives and opportunities for illegal compensation for referrals, many MSAs *necessarily* involve substantial legal and regulatory risks that the parties may not be able to control even by careful monitoring.

Bulletin 2015-05 reiterates that a more careful consideration of legal and compliance risk arising from MSAs is in order for mortgage industry participants. The Bureau also warns that it will actively scrutinize MSAs and related arrangements as part of its enforcement and supervision activities, and also pay attention to whistleblower complaints about MSAs.

The CFPB Compliance Bulletin 2015-05 can be found at: http://files.consumerfinance.gov/f/201510_cfpb_compliance-bulletin-2015-05-respa-compliance-and-marketing-services-agreements.pdf.

Fannie Mae Set to Launch a New Portal

Fannie plans to launch its new "Fannie Mae Connect" portal on November 20, 2015.The portal is intended to streamline and centralize key Fannie information and data by consolidating applications that provide reports to lenders and business partners.

Fannie plans to migrate its reports onto Fannie Mae Connect in phases, with Phase 1 to take effect on November 20, 2015. Only certain users will gain immediate access during Phase 1.

To ensure continuity during the transition period, users will be able to temporarily access the reports on both Fannie Mae Connect and the applications through which they are currently accessed. Certain applications currently providing reports will be retired beginning on February 20, 2016, with additional applications to be retired at later intervals.

See Fannie's announcement for further details on which applications will be immediately affected by the new portal's launch.

The announcement is available at: https://www.fanniemae.com/content/release_notes/fm-connect-release-notes-11202015.pdf

Fannie Mae and Freddie Mac Assist Lenders with TRID Compliance

On October 6, 2015, Fannie Mae and Freddie Mac announced that in light of the difficulties in adapting to the new Know Before You Owe TILA-RESPA Integrated

Disclosure (TRID) rule, they will be lenient with lenders adapting to the new requirements.

Specifically, Fannie and Freddie will not currently conduct routine post-purchase loan file reviews for technical compliance with TRID. They will, however, ensure that proper TRID forms are used in mortgage origination, and failure to use the proper forms will be deemed a violation of the good faith efforts standard. They will consider beginning reviews after a transitional period, but they will announce those measures beforehand.

Fannie and Freddie also noted that they do not intend to exercise contractual remedies, including their ability to require a lender's repurchase of the property, except in two circumstances: the lender fails to use the proper TRID forms; or the lender's action impairs their ability to enforce the note or mortgage or would result in assignee liability, and a court of law, regulator, or other authoritative body has determined the practice violates TRID.

The announcements are available at:
https://www.fanniemae.com/content/announcement/ll1506.pdf
http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/iltr100615.pdf

FHA Withdraws Part of Proposed Rule Regarding Claims for Insurance

FHA announced in the Federal Register (Volume 80, Number 200, October 16, 2015) that it has withdrawn part of a proposed rule, published in the Federal Register on July 6, 2015 regarding the filing of insurance claims by FHA lenders. The proposed rule established a maximum time period in which a lender must file a claim for insurance benefits. The proposed rule also revised FHA policies concerning the curtailment of interest and disallowance of certain expenses resulting from the failure to timely initiate foreclosure, or timely take actions required in filing a claim.

In response to public comments expressing concern over the implementation of the proposed provisions of the rule regarding the maximum time period in which a lender must file a claim, or the contract of insurance would be terminated, FHA has withdrawn this part of the proposed rule. FHA will publish in the Federal Register any revised maximum time period for filing a claim in a new proposed rule and solicit public comments.

https://www.federalregister.gov/articles/2015/10/16/2015-26379/federal-housing-administration-fha-single-family-mortgage-insurance-maximum-time-period-for-filing

VA Announces New Servicer Handbook

The VA recently released its new Servicer Handbook M26-4. VA Home Loan Program participants must ensure compliance with its policy and guidance by November 1, 2015.

The Servicer Handbook provides operational policies and procedures for servicers who participate in the VA Home Loan program and service VA-guaranteed loans through the VA Loan Electronic Reporting Interface (VALERI), as well as VA Loan Administration staff and servicers. While this Handbook is designed as a guide to assist servicers, it does not change or supersede any existing laws or regulations.

Revisions to the Handbook include new sections discussing “Incentive Payments,” “Indemnified Loan Agreements,” and “Regulatory Infractions.” For example, the Regulatory Infractions section discusses the various types of automatic system-generated infractions as well as technician-added infractions, such as late loss mitigation letters, failure to order an appraisal timely, and failure to complete property inspections. Other modifications have been made as well, such as two new chapters discussing “Property Acquisitions” and “Reconveyance of Property” that were previously summarized in a single chapter.

Servicers may submit comments on the updated Handbook to the VALERI helpdesk at valeriheldesk.vbaco@va.gov.

The updated Servicer Handbook is available at:
http://www.benefits.va.gov/WARMS/M26_4.asp.

Fannie Mae and Freddie Mac Issue Selling Representation and Warranty Framework for Origination Defects

On October 7, 2015, Fannie Mae and Freddie Mac jointly announced revised selling representation and warranty framework relating to origination defects and remedies. The framework, revised by Fannie Mae and Freddie Mac at the direction of FHFA, is intended to provide clarity to categorizing origination defects, correcting defaults, and available remedies.

Under the revised framework, Freddie Mac and Fannie Mae will categorize defects in one of three ways: 1) Findings; 2) Price-Adjusted Loans; and 3) Significant Defects. Loans categorized as “Findings” will not require a correction or remedy from the lender. For loan categorized as “Price Adjusted Loans,” the lender must pay the applicable post-settlement delivery fee (for Freddie Mac loans) or loan-level price adjustment fee (for Fannie Mae loans) that should have been paid when the mortgage was delivered. Finally, a lender will be required to repurchase loans with one or more Significant Defects, or the lender may be offered a repurchase alternative by Fannie Mae or Freddie Mac.

During the appeals process, a lender will have the right to correct any Significant Defect in the specified timeframe and in the manner required by the Lender Contract (for Fannie Mae loans) or the Purchase Documents (for Freddie Mac loans). If the

correction is properly made, Fannie Mae or Freddie Mac (as applicable) will rescind the related remedy request.

For Freddie Mac, the new framework is effective for mortgages with Freddie Mac Settlement Dates on or after January 1, 2016. For Fannie Mae, the new framework is effective for whole loans purchased, and mortgage loans delivered into MBS with pool issue dates, on or after January 1, 2016.

The remedies framework does not affect any Servicing representations and warranties.

Freddie Mac Bulletin 2015-17 can be found at:
http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1517.pdf

Fannie Mae Selling Guide Announcement SEL 2015-11 can be found at:
https://www.fanniemae.com/content/announcement/sel1511.pdf

State Regulatory Developments

Oklahoma Revises its Consumer Credit Code

On May 12, 2015, Oklahoma Governor Mary Fallin signed into law a bill, Senate Bill 376 (SB 376), which amends Oklahoma's Uniform Consumer Credit Code. Specifically, SB 376 provides that the Uniform Consumer Credit Code is applicable to sales, leases and loans transactions occurring between a resident of Oklahoma while in Oklahoma and a seller, lessor, lender or assignee of a seller, lessor or lender via the Internet or any other electronic means.

SB 376 also allows persons aggrieved by a final agency order of the Department of Consumer Credit (Department) to request judicial review in Oklahoma County. In addition, this bill further revises the role of the Consumer Credit Advisory Committee by removing the committee's authority to review licensee fees of the Department and adding the authority to advise and make recommendations to the Commission of Consumer Credit regarding matters pertaining to the Department.

SB 376 goes into effect on November 1, 2015. The full text of the bill is available at:
http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20ENR/SB/SB376%20ENR.PDF.

Oklahoma Revises Its SAFE Act

Oklahoma has enacted amendments to its Secure and Fair Enforcement for Mortgage Licensing Act ("SAFE Act"), Okla Stat. tit. 59, § 2095.1 *et seq*. Under these amendments, the Oklahoma SAFE Act now explicitly applies to mortgage lenders as well as mortgage brokers and mortgage loan originators. The provisions of this statute also now apply to entities that service mortgage loans, as well as entities that originate such loans.

Additionally, the amendments have eliminated the ability of a licensee to request inactive status for the following license year, together with the provision describing how an inactive licensee may reactivate its license status.

Finally, the prelicensing education requirements for a mortgage loan originator now include one hour of education in Oklahoma law and regulations. However, the amendments have eliminated the requirement that licensed loan originators complete annual continuing education requirements in a classroom setting at least every two years.

These revisions will become effective on November 1, 2015.

Litigation Developments

In False Claims Act Case, Government's Failure to Adhere to Tolling Agreement Entitles Defendant to Dismissal of Barred Claims

In *United States v. Bertie Ambulance Services, Inc.*, the United States alleged violations of the False Claims Act (FCA) against an ambulance transportation provider based on allegedly improper Medicare and Medicaid claims for payment. Prior to filing the complaint, the parties had entered into a series of tolling agreements, each of which provided for tolling of the six-year statute of limitations, and also stated that the Government would provide Bertie thirty days' advance notice of its intent to file any action alleging FCA claims. The day before the most recent tolling agreement was set to expire, the Government filed a complaint against Bertie. Bertie filed a motion for summary judgment based on the statute of limitations, alleging the Government failed to provide the proper notice before filing suit, and therefore that the tolling agreements were invalidated.

The Government alleged that an email and a phone call prior to filing suit provided Bertie the requisite notice. The Government's email to Bertie purportedly said it was "now preparing to move forward in this case." In its phone call to Bertie, the Government purportedly stated it "had a complaint prepared for filing."

The District Court for the Eastern District of North Carolina, Northern Division, however, found these statements to be "vague," stating that "[t]here is nothing definitive about any of the Government's statements." The Court relied in part upon the factual background of the case, which included several years of False Claims Act investigations and settlement discussions between the parties. The Court also rejected the Government's argument that even if it breached the agreement, Bertie benefitted from the Government's delay in filing suit, and therefore should be held to its terms. According to the Court, "[i]t is unclear how, or if, Bertie benefitted from the Government's delay in filing. What is clear is that the delay is not the benefit for which Bertie bargained."

According to the Court, the United States' failure to provide Bertie definitive notice of the Government's intent to file suit was a "breach of its [tolling agreement] with Bertie—a breach that goes to the very heart of the agreement, entitling Bertie to rescission." Consequently, the Court refused to enforce the tolling agreement and dismissed the Government's time-barred FCA claims.

Weiner Brodsky Kider regularly represents mortgage lenders and servicers throughout the United States against alleged violations of federal and state laws.