Financial Services Update
November 4, 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

OFAC Takes Action Against Two Banks for Alleged Violations of Sanctions Programs

The Office of Foreign Assets Control (OFAC) has entered a settlement with Crédit Agricole Corporate and Investment Bank (CA-CIB) and issued a Finding of Violation to BMO Harris Bank NA. CA-CIB agreed to pay $329,593,585 to settle the allegations.

On October 20, 2015, OFAC and CA-CIB entered a settlement, which is part of a global settlement with the Department of Justice, the New York County District Attorney's Office, the Federal Reserve Board of Governors, and the Department of Financial Services of the State of New York. The matter involved CA-CIB allegedly violating the Sudanese Sanctions Regulations, the Cuban Assets Control Regulations, the Burmese Sanctions Regulations, and the Iranian Transactions and Sanctions Regulations during the course of 4,297 transactions.

OFAC alleges that for a number of years between 2003 and 2008, CA-CIB improperly processed thousands of transactions involving countries and/or persons subject to sanctions regulation. OFAC alleges this was done knowingly, including by using cover payments and/or "special payment practices in a manner that omitted references to U.S.-sanctioned parties" which prevented U.S. financial institutions from properly complying with OFAC regulations.

CA-CIB has agreed to settle the matter for $329,593,585 in lieu of the $1,464,860,377 potential penalties facing CA-CIB.

The enforcement information regarding CA-CIB is available at http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20151020_cacib.pdf.

OFAC also filed a violation against Harris Bank (as the successor to Marshall and Ilsley (M&I) Bank) on October 21, 2015, for allegedly violating the Iranian Transactions and Sanctions Regulations in connection with processing six funds transfers on behalf of a company purchasing carpets from Iran. OFAC once permitted such transactions under a license, but OFAC changed its policy in 2010.

M&I Bank placed the carpet company on its False Hit List after OFAC interdiction software flagged the company, but it failed to remove the company from the False Hit List after OFAC revoked the general license for importation of Iranian-origin carpets. Subsequently, M&I Bank processed six transactions for a U.S. based customer making payments to an Iranian entity, even after a downstream financial institution flagged the first transaction. OFAC attributed the transactions to M&I Bank's failure to regularly review and update its False Hit List in light of changing sanctions regulations.

OFAC has published guidance regarding False Hit Lists which is available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/false_hit.pdf.

The enforcement information regarding Harris Bank is available at http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20151021_bmo_harris.pdf.

CFPB Releases its October 2015 Monthly Complaint Report

According to the October 2015 Monthly Complaint Report (Vol. 4), As of October 1, 2015, the CFPB has handled approximately 726,000 complaints, including approximately 23,400 complaints in September 2015. The CFPB noted that it saw the largest percentage increase in complaints over the last year under the heading of "Other financial services complaints" (which include complaints about debt settlement, credit repair, and check cashing, among others) — from July-September 2014 (92 complaints) to July-September 2015 (182 complaints) — representing nearly a 97 percent increase.

Prepaid complaints showed the greatest month-over-month percentage increase (4 percent). Despite seeing the largest increase in complaints over the past year, "other financial service complaints" "referred to above, showed the greatest month-over-month percentage decrease (-26 percent). For the 25th consecutive month, the CFPB handled more complaints about debt collection than any other type of complaint. Debt collection complaints represented about 29 percent of complaints submitted in September 2015. Debt collection, credit reporting, and mortgage complaints continue to be the top three most-complained-about consumer financial products and services, collectively representing about 70 percent of complaints submitted in September 2015.

For the September 2015 complaint report, the Chicago, Illinois metro area mortgage complaints and complaints from consumers was the geographical spotlight.

CFPB issues 2016 Rural or Underserved Counties Lists

The CFBP has issued its 2016 Rural or Underserved Counties Lists. Businesses that meet the standards set forth in the Truth in Lending Act with volume in rural or underserved counties that outweighs volume in other counties are exempt from certain

regulatory requirements in Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act and Escrow Requirements under the Truth in Lending Act.

2016 Rural counties list

Access the updated final list for use in 2016 in any of these formats: **CSV | XLS | PDF**

2016 Rural or underserved counties list

Access the final list for use in 2016 in any of these formats: **CSV | XLS | PDF**

State Regulatory Developments

Georgia Adopts Provisions Regarding Disclosure Requirements

On October 27, 2015, the Georgia Department of Banking and Finance ("Department") adopted provisions in a purported attempt to align Georgia requirements with recent changes to Federal law including, but not limited to, the TILA-RESPA Integrated Disclosure Rule. The amended provisions are effective on November 16, 2015.

Prior to adopting the rules, the proposed rules along with a synopsis were distributed on September 24, 2015. The Department received two (2) written comments regarding the proposed rules. The Department believes that the rules as adopted encourage safety and soundness, encourage safe and fair mortgage lending, and conform to the law.

Notably, the rule requires that every mortgage lender or mortgage broker make the following disclosures in writing to applicants for residential mortgage loans:

> (a) within three business days of receipt of the application but no later than seven days before consummation of the loan, a Loan Estimate, as required by federal law, including but not limited to 12 CFR § 1026.19 and 12 CFR § 1026.37;
> (b) no later than three business days before consummation of the loan, a Closing Agreement, as required by federal law, including but not limited to 12 CFR § 1026.19 and 12 CFR § 1026.38;
> (c) prior to the acceptance of any fees, the amounts of all other third-party fees, including but not limited to credit report fees;
> (d) prior to the acceptance of any fees, whether all or any part of any fees or charges is refundable prior to settlement of the mortgage loan, and the terms and conditions for obtaining a refund if all or any part of any fees or charges is refundable;
> (e) prior to the acceptance of any fees, the specific services which will be provided or performed for the application fee; and
> (f) in cases where the fees are being accepted by a mortgage lender or mortgage broker that such lender or broker cannot guarantee approval of the loan application or acceptance into a particular loan program. Further, lender or broker may not use the terms "closing" or "settlement" to refer to a transaction unless the transaction meets the definition of settlement in the rule.

While not clear, presumably a “business day” and an “application” under the Georgia regulation are the same as those terms are defined under the federal TILA-RESPA Integrated Disclosure Rule.

The regulation provides that prior to the acceptance of any fees, mortgage lenders shall provide applicants for a home equity line of credit or a residential mortgage loan not secured by real property, such as a mobile home, the Good Faith Estimate (“GFE”), HUD-1 disclosures, and all other disclosures required by federal law. However, the Georgia regulation does not specify that under federal RESPA and Regulation X home equity lines of credit are not subject to the GFE and HUD-1 requirements.

Moreover, the Georgia regulation provides that prior to the acceptance of any fees, mortgage brokers and mortgage lenders shall provide applicants for residential mortgage loans related to reverse mortgages the GFE and HUD-1. However, the Georgia regulations do not specify that some reverse mortgages are structured as open end lines of credit.

For non-real estate secured loans and reverse mortgages, the Georgia regulation does not clearly specify a timing requirement for the disclosure of the GFE or the HUD-1 other than to say the disclosures shall be provided prior to the acceptance of any fees.

In addition, the rule maintains the Georgia requirement that the disclosures, including the Loan Estimate and Closing Disclosure, be acknowledged in writing by the applicant and a copy of the acknowledgement be given to the applicant and maintained by the mortgage lender or mortgage broker required to make the disclosure.

The new provisions also require that in a residential mortgage loan for which an escrow account was established in connection with the transaction and will be cancelled, the mortgage lender shall provide the borrower an Escrow Closing Notice no later than three business days before the borrower’s escrow account is cancelled, as required by federal law, which includes but is not limited to 12 CFR § 1026.20.

The new provisions also require that in the event that the residential mortgage loan is transferred, the transferee mortgage lender shall provide the borrower with a Mortgage Transfer Disclosure on or before the thirtieth calendar day following the date of the transfer, as required by federal law, which includes but is not limited to 12 CFR § 1026.39.

The rule carries forward the requirement that mortgage lenders and table funded mortgage brokers must provide borrowers with a pre-closing notice that if the borrower fails to meet loan conditions, the borrower may lose the home through foreclosure.

The full text of the provisions is available at the following link:
http://dbf.georgia.gov/sites/dbf.georgia.gov/files/related_files/document/DBFFinalRules_10-27-2015.pdf

Litigation Developments

Fourth Circuit Holds State-Established Student Loan Provider Can Be Sued Under False Claims Act

The U.S. Court of Appeals for the Fourth Circuit recently examined whether one of the nation's largest student loan providers could be held liable under the False Claims Act, 31 U.S.C. § 3729 *et seq.* (FCA), or whether its status as a state-created entity rendered it immune from FCA liability.

The FCA imposes liability on "any person" who knowingly submits a false claim for payment of government funds. 31 U.S.C. § 3729(a)(1). While states and state agencies are not considered "persons" under the FCA, corporations, including municipal corporations such as cities and counties, are "persons" for purposes of the FCA. The FCA is commonly enforced through a *qui tam* or whistleblower case in which an individual or "relator," typically an employee of a business participating in a government program, approaches the federal government with allegations that his or her employer is submitting false claims to the government.

In *United States ex rel. Jon H. Oberg v. Pennsylvania Higher Education Assistance Agency*, the relator alleged that the Pennsylvania Higher Education Assistance Agency (PHEAA) violated the FCA by claiming hundreds of millions of dollars in federal student-loan interest subsidy payments to which it was not entitled. PHEAA was created by the Commonwealth of Pennsylvania in 1963 "to improve access to higher education by originating, financing, and guaranteeing student loans." PHEAA can exercise only the powers granted to it by the Commonwealth and is subject to dissolution by the Commonwealth. Following the district court's grant of summary judgment to PHEAA, the relator appealed. The question before the Fourth Circuit was whether PHEAA was an "arm" or "alter ego" of Pennsylvania, thereby shielding it from liability under the FCA.

Among the factors examined by the Court were: (1) whether Pennsylvania would be responsible for paying any judgment against PHEAA; (2) PHEAA's autonomy; (3) the degree of PHEAA's involvement in state-related concerns; and (4) how PHEAA is treated under state law and whether its relationship with Pennsylvania is close enough to make it an "arm" of the state.

On the first issue, PHEAA argued that Pennsylvania should be considered "functionally liable" because PHEAA's funds are deposited with the state Treasury and are commingled with other state funds and invested by the Treasurer. The Court was unpersuaded, however, emphasizing that PHEAA is statutorily vested with the power to control its own funds and that "PHEAA's own 'moneys,' generated through PHEAA's commercial activities and held in a segregated account, are not transformed into 'moneys' of the Commonwealth simply because they are commingled with other state funds for investment purposes."

On the issue of autonomy, the Court recognized the fact that PHEAA's Board was comprised of gubernatorial appointees and state legislators and officials and that Pennsylvania had veto power over the actions of PHEAA. Nevertheless, the Court concluded that PHEAA enjoys both financial and operational independence as evidenced by its "substantial, independently generated revenues" and its broad range of statutorily-granted powers, including "the power to enter into contracts, sue and be sued, and purchase and sell property in its own name."

The degree to which PHEAA is involved in state-related concerns was a closer call for the Court. While the evidence showed that PHEAA derived the majority of its revenue from purchasing, servicing, and guaranteeing loans to out-of-state borrowers during the relevant time period, PHEAA unquestionably was established to, and continues to, primarily benefit Pennsylvania citizens through its grant and scholarship programs. Thus, the Court found that this factor leaned towards "arm-of-state status, but just barely."

With respect to the final factor, treatment under state law, the Fourth Circuit generally agreed with the district court's finding that PHEAA is treated as a state agency under state law, but refused to accord much weight to this factor given the fairly even balance of evidence presented on this issue.

Ultimately, the Court concluded that PHEAA is an independent political subdivision, not an arm of Pennsylvania and, thus, constitutes a "person" subject to liability under the FCA.

Weiner Brodsky Kider PC defends clients nationwide against FCA claims and investigations.