Financial Services Update

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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

FTC Announces Crack Down on Abusive Debt Collectors

Federal and state regulators announced a new coordinated effort against debt-collection agencies as regulators say they are cracking down on deceptive and abusive collection practices against borrowers. The initiative has been dubbed “Operation Collection Protection.”

In announcing Operation Collection Protection, the regulators said 30 new law enforcement actions have been brought by federal, state and local law enforcement authorities against debt collectors, bringing the total number of actions brought this year to 115.

Debt collection has come under growing scrutiny by federal regulators. Specifically, regulators have been trying to reign in debt collectors that fail to give consumers legally required disclosures and notices, fail to follow state and local licensing requirements, or use tactics such as harassing phone calls or threats of litigation.

Illinois Attorney General Lisa Madigan said, "My office receives thousands of calls and complaints each year from consumers who are victims of illegal debt collection tactics. Through our partnership with the FTC and states across the country, we are putting scam operations out of business and protecting consumers from abusive practices by legitimate creditors."

As part of the announcement, the FTC highlighted five new enforcement actions against debt collectors engaged in allegedly illegal practices. Those named in the press release include BAM Financial, Delaware Solutions, K.I.P., LLC, and National Check Registry. Of the five companies involved, the FTC has asked federal courts to shut BAM Financial and Delaware Solutions’ collection operations down. K.I.P., LLC and National Check Registry have agreed to settle the FTC’s charges and to close down as a result. The fifth action has been filed under seal, so the FTC is unable at this time to disclose details regarding it.

The announcement is available at: https://www.ftc.gov/news-events/press-releases/2015/11/ftc-federal-state-local-law-enforcement-partners-announce

Owner of Connecticut Media Agency Sentenced in Mortgage Modification Scheme

The owner of a Connecticut media agency was recently sentenced to two years of probation, and ordered to pay a $100,000 fine and $75,794 in restitution, in connection with producing and disseminating false advertisements for mortgage modification services.

According to the Department of Justice, the individual used his media agency to produce and air television, radio, and internet ads for the National Mortgage Help Center, LLC (NMHC), which was a shell company set up by the individual. The advertisements falsely claimed that NMHC could help struggling homeowners obtain home loan modifications. By making references to government stimulus programs and an image of President Obama, ads falsely claimed that NMHC was affiliated with the federal government.

The ads instructed borrowers to call toll free phone numbers for help modifying their mortgages, but NMHC did not actually provide modification services for any homeowners. When homeowners called NMHC, they were routed to clients of the media agency. These clients paid the media agency for these leads. The clients then charged homeowners fees for helping them modify their mortgages, but actually provided no services to this effect.

The scam was investigated by the U.S. Postal Inspection Service, Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), U.S. Department of Housing and Urban Development – Office of Inspector General, and Federal Bureau of Investigation.

The Department of Justice's press release can be found at the following link: http://www.justice.gov/usao-ct/pr/owner-connecticut-media-agency-falsely-advertised-mortgage-modification-services

Agencies Issue Notice And Request For More Comments Regarding Diversity Standards Information Collection

On November 6, 2015, the OCC, FDIC, CFPB, SEC, and the Federal Reserve issued a joint notice and request for additional comment regarding the collection of information in connection with the Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies issued by those agencies and effective on June 10, 2015. This is a subsequent request in addition to the agencies' previous request for public comment on the collection of information issued with the Policy Statement on June 10, 2015.

This notice discusses the public comments received and the agencies' response to those comments. The discussion included commenters' concerns about the privacy of submitting confidential information, assertions that the actual burden of collecting and

publishing the requested information would far exceed the agencies' estimated 12 hours, and questions about the practical utility of the requested information.

The agencies request comments on: (A) the necessity of the collection of information for the proper performance of the agencies' functions, including whether the information will have practical utility; (B) the accuracy of the agencies' estimate of the information collection burden, including the validity of the methods and the assumptions used; (C) ways to enhance the quality, utility, and clarity of the information proposed to be collected; (D) ways to minimize the information collection burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (E) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Comments must be submitted on or before December 27, 2015.

The notice is available at: http://www.gpo.gov/fdsys/pkg/FR-2015-11-06/pdf/2015-28369.pdf.

CFPB's Supervisory Actions Result in $107 Million in Restitution to More Than 238,000 Consumers

On November 3, 2015, the CFPB released its Fall 2015 Supervisory Highlights report that addresses, among other things, the CFPB's examination findings from May 2015 to August 2015. In the report, the CFPB indicates that its recent non-public supervisory actions have resulted in $107 million in restitution to 238,000 consumers. The Supervisory Highlights report addresses the CFPB's findings across a variety of areas, including mortgage servicing, mortgage origination, student loan servicing, debt collection, consumer reporting, and fair lending.

In the mortgage origination area, the CFPB highlighted areas of non-compliance with certain Dodd-Frank Title XIV rules, and violations with respect to disclosure requirements under RESPA/Regulation X, TILA/Regulation Z, and consumer financial privacy rules under Regulation P. For example, under Regulation X, the CFPB made findings related to violations of the tolerance requirements, failure to properly document changed circumstances, inaccuracies in completing the HUD-1 settlement statement, failure to provide a homeownership counseling disclosure, and failure to provide an accurate loan servicing disclosure statement. In the TILA/Regulation Z area, the CFPB found that some entities failed to identify understated APRs and provide reimbursement.

With respect to mortgage servicing, the CFPB identified certain violations relating to requirements under Regulation X, Regulation Z, the Homeowners Protection Act, and the Fair Debt Collection Practices Act (FDCPA). For example, the CFPB identified certain deficiencies in servicers' policies and procedures, failure to adhere to the timing requirements for loss mitigation applications, and failure to comply with the PMI cancellation requirements of the HPA. It also cited servicers for charging fees that are

not authorized, as well as improper practices with respect to debt validation letters, both in violation of the FDCPA.

Regarding fair lending, the CFPB discussed its targeted ECOA reviews that its examination teams use to identify and evaluate areas of heightened fair lending risk. These reviews have resulted in findings of fair lending violations due to underwriting disparities resulting from alleged illegal discrimination. The report further describes the CFPB's underwriting review methodologies as well as its recommendations for managing underwriting risks.

The CFPB's Fall 2015 Supervisory Highlights can be found at the following link: http://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf.

State Regulatory Developments

Texas Updates Regulations Regarding Mortgage Loan Companies, Mortgage Bankers, and Residential Mortgage Loan Originators

The Finance Commissioner of Texas, on behalf of the Department of Savings and Lending, recently adopted provisions regarding the duties and responsibilities of mortgage loan companies, mortgage bankers, and residential mortgage loan originators. The amendments became effective November 5, 2015.

Advertising. 7 TAC § 80.203(b)(2) contains the advertising requirements of residential mortgage loans offered by or through a mortgage company or originator. As amended, this provision more closely resembles the advertising requirements of residential mortgage loans offered by or through mortgage bankers or originators contained in 7 TAC § 81.203(b)(2). Specifically, the provision now requires that any advertisement contain the name of the originator followed by the name of the sponsoring mortgage company, the originator's Nationwide Mortgage Licensing System and Registry identification number, and the company's physical office or branch office street address in Texas.

Books and Records. 7 TAC §§ 80.204(b) and 81.204(b) list the books and records that must be maintained by each company or originator. As amended, these provisions incorporate the integrated disclosure requirements of TILA/RESPA effective October 3, 2015. Specifically, the provisions now require that the residential mortgage loan file for each mortgage loan application received must include, in addition to other required documentation, and when applicable, copies of the integrated closing disclosure, initial integrated loan estimate disclosure, and both the initial Good Faith Estimate and the initial Good Faith Estimate fee itemization worksheet.

Loan Status Forms. 7 TAC §§ 80.201(a) and 81.201 formerly stated that whenever a conditional qualification was provided to a mortgage applicant, the conditional qualification was required to include the information in Form A, Figure: 7 TAC § 80.201(a) and Form A, Figure: 7 TAC § 81.201(a), respectively, which contain specific information

that must be included in a conditional qualification. As amended, these provisions now state that this information must also be included in a conditional qualification that is provided to a prospective mortgage applicant.

A copy of the amendments is available here:

http://www.allregs.com/AO/Viewform.aspx?formid=00049860&formtype=agency

Litigation Developments

Enforceability: Arbitrating the Arbitration Clause

The Eleventh Circuit recently reinforced Supreme Court precedent on challenges to the enforceability of an arbitration provision. ***If*** the arbitration clause delegates the enforceability decision to the arbitrator, and the challenge to arbitration does not focus specifically on the delegation provision, the arbitrator must determine enforceability.

In *Parnell v CashCall, Inc*., the plaintiff obtained a $1000 unsecured loan from Western Sky Financial. LLC, which had assigned the loan to CashCall. The loan agreement provided for annual interest at 232.99% over twenty-five months, resulting in total payments of $4,905.56. The loan agreement specified that it was governed by the Cheyenne River Sioux Tribal law. The loan agreement also contained an arbitration provision, which covered all "Disputes." Disputes were defined to include "*any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement*." (emphasis in original).

After paying the loan in full, Parnell sued CashCall and Western Sky, alleging that the loan agreement violated Georgia law. CashCall removed the case to federal court, and then moved to compel arbitration. Parnell opposed the motion on the grounds that arbitration was unconscionable. The district court agreed, but the Eleventh Circuit reversed and remanded, reminding the trial court that Parnell could still seek leave to challenge arbitration in accordance with the Court's appellate decision.

Specifically, Parnell's opposition to arbitration must specifically show why the arbitrator cannot decide the unconscionability of the arbitration clause, as a matter of state law. Significantly, the Eleventh Circuit relied on Georgia law for this analysis, even though the contract contained a provision specifying Cheyenne River Sioux Tribal law as governing to the exclusion of any state or federal law. The Eleventh Circuit explained that there did not appear to be any Tribal law applicable to this dispute, and Western Sky specifically targeted consumers in Georgia.

Under Georgia contract law, unambiguous contract language controlled. The Eleventh Circuit found that the arbitration provision, with its broad definition of disputes, was clear and unambiguous. Consequently, the Supreme Court's holding in *Rent-A-Center, West, Inc. v. Jackson* compelled the referral of the dispute to arbitration. "When an

arbitration agreement contains a delegation provision [here in the definition of "Disputes"] and the plaintiff raises a challenge to the contract as a whole, the federal courts may not review his claim[,] because it has been committed to the power of the arbitrator." To avoid arbitration, the challenge must focus on the ***delegation*** of the power to decide enforceability, and show the delegation is not enforceable.