WEINER BRODSKY KIDER PC

Financial Services Update

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WBK News

Jack Konyk spoke on a variety of mortgage-related developments at the 2015 Lending Conference of the Pennsylvania Bankers Association on November 20 in Hershey, PA. MORE INFO

Mitch Kider will participate on two panels at MBA's Independent Mortgage Bankers Conference in Nashville, TN this week. The first is "Expert Insight on Mergers & Acquisitions" on December 2 and the second is the "Regulatory Super Session" on December 4. MORE INFO

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

Financial Regulators Release Revised IT Management Book

The Federal Financial Institutions Examination Council (FFIEC) recently released a substantially revised management booklet to serve as an update to the larger FFIEC Information Technology Examination Handbook (IT Handbook). The revised publication covers various information technology (IT) governance principles, including how IT risk management relates to enterprise-wide risk management and governance.

Other relevant changes to the IT Handbook include:

- Incorporation of cybersecurity concepts as part of information security.
- Incorporation of management-related concepts from other booklets of the IT Handbook.
- Augmentation and further delineation of the stages of the IT risk management process, including identification, measurement, mitigation, monitoring, and reporting.

The IT Handbook, which includes the updated management portion, is available at: http://ithandbook.ffiec.gov/it-booklets/management.aspx.

DOJ Requires Wells Fargo to Pay $81.6 Million to Bankrupt Homeowners

On November 5, 2015, through its U.S. Trustee Program, the DOJ entered a settlement agreement with Wells Fargo regarding an alleged failure to properly notify bankrupt debtors of mortgage payment increases.

Under Bankruptcy Rule 3002.1, mortgage creditors must file and serve notice on a Chapter 13 debtor at least 21 days before adjusting the debtor's monthly mortgage payment. The DOJ alleged that due to "systemic issues," Wells Fargo failed to file over 100,000 payment change notifications and perform more than 18,000 escrow analyses, thus depriving homeowners the ability to challenge mortgage payment increases.

As a result, Wells Fargo has agreed to pay a total of $81.6 million to affected homeowners in bankruptcy from December 1, 2011 to March 31, 2015. Wells Fargo will also correct its internal procedures to prevent future violations, including improving its computer platform, instituting better employee training and oversight, and implementing quality control processes. An independent reviewer will oversee compliance, and Wells Fargo will pay all costs associated with the independent reviewer, including her salary.

The DOJ's announcement is available at: http://www.justice.gov/opa/pr/us-trustee-program-reaches-816-million-settlement-wells-fargo-bank-na-protect-homeowners.

Federal Reserve and NY DFS Enter $258M Settlement With Deutsche bank for Allegedly Evading U.S. Sanctions

On November 4, 2015, the Federal Reserve and the New York Department of Financial Services each issued an order against Deutsche Bank for allegedly processing $10.86 billion worth of foreign transactions intentionally designed to evade U.S. sanctions administered by the U.S. Treasury's Office of Foreign Asset Control (OFAC). The settlements impose a $258 million penalty on the bank, among other ramifications.

The transactions in question occurred between 1999 and 2006 with financial institutions located in Syria, Iran, Burma, Libya, and Sudan. The consent order alleges that Deutsche Bank instituted a program to evade U.S. sanctions requirements through "OFAC-safe" methods. One method was "wire stripping," where the bank would alter the payment message information so as to avoid raising red flags. A second method used "non-transparent cover payments," which involved splitting an incoming Message Type 103 serial payment message ("MT103 message") into two: one MT103 message with all details, and a second MT202 message devoid of the relevant details which was forwarded to Deutsche Bank New York or another U.S.-based clearing bank. The bank allegedly marketed its ability to avoid U.S. sanctions to certain potential customers.

Many of the Deutsche Bank employees involved no longer work at the bank. The bank has agreed to terminate six of the employees who remain and suspend three more from any U.S. dollar based transactions.

A copy of the New York DFS consent order is available at http://www.dfs.ny.gov/about/ea/ea151103.pdf.

The Federal Reserve order is available at http://www.federalreserve.gov/newsevents/press/enforcement/enf20151104a1.pdf.

A copy of the press release is available at http://www.dfs.ny.gov/about/press/pr1511041.htm.

Memorandum of Understanding Between FCC and FTC Regarding Their Ongoing Cooperation on Consumer Protection Matters

The FCC and FTC recently signed a Memorandum of Understanding (MOU) in which they formalized their current cooperation and outlined how they will continue to coordinate their consumer protection efforts. These efforts specifically include protection of consumers from acts and practices that are deceptive, unfair, unjust, and/or unreasonable. Some of the steps identified in the MOU include, among others: (i) consulting with one another when investigations or actions implicate the other's jurisdiction; (ii) meeting regularly for various update purposes; (iii) collaborating on consumer and industry outreach and education efforts as appropriate; (iv) engaging in joint enforcement actions when appropriate and consistent with each agency's respective jurisdiction; and (v) sharing consumer complaint data (including granting access to qualified FCC staff to the FTC's Consumer Sentinel Network).

A copy of the FCC-FTC Consumer Protection MOU can be found at: https://www.ftc.gov/system/files/documents/cooperation_agreements/151116ftcfcc-mou.pdf.

CFPB releases its November 2015 Complaint Report

According to the November 2015 Monthly Complaint Report (Vol. 5), as of November 1, 2015, the CFPB has handled approximately 749,400 complaints, including approximately 24,300 complaints in October 2015.

Prepaid complaints showed the greatest percentage increase from August - October 2014 (142 complaints) to August - October 2015 (417 complaints), representing about a 193 percent increase. Payday loan complaints showed the greatest percentage decrease from August - October 2014 (589 complaints) to August - October 2015 (469 complaints), representing about a 20 percent decline. For the 26th consecutive month, the CFPB handled more complaints about debt collection than any other type of complaint. Debt collection complaints represented about 28 percent of complaints submitted in October 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 66 percent of complaints submitted in October 2015.

For the October 2015 complaint report, Connecticut and the Hartford metro area was the geographic spotlight.

State Regulatory Developments

Colorado Adopts Licensing Education Revisions For MLOs

The Colorado Department of Regulatory Agencies, Division of Real Estate, has adopted multiple revisions to licensing education requirements for mortgage loan originators (MLOs). The revisions amend Chapters 2, 3, and 4 of 4 CCR 725-3 and are effective March 1, 2016.

Requirements for Licensure. Chapter 2 contains pre-licensing education requirements for MLO applicants. Applicants currently must complete 20 hours of pre-licensing education. As amended, applicants must also complete 2 hours of Colorado specific pre-licensing education, which replaces what was a required general elective within the 20 hours of pre-licensing education. Applicants may also complete the 2 hours of Colorado specific pre-licensing education as a standalone course. Applicants must also receive a passing score of 75% on a Colorado specific education examination.

Continuing Education Requirements. Chapter 3 contains continuing education requirements for MLOs. MLOs currently must annually complete at least 8 hours of continuing education courses as well as a 2 hour Colorado specific state update course. As amended, the additional 2 hour Colorado specific state update course is eliminated and instead, the 8 hours of continuing education courses must include 1 hour of Colorado specific education, which may replace what was a required general elective within the 8 hours of continuing education courses, or which may be completed as a standalone course.

Renewal, Reinstatement, Inactivation, Suspension, Surrender or Revocation of a License or Registration. Chapter 4 contains re-application requirements for MLOs. MLOs who fail to maintain a valid license for up to 5 years after license expiration and who are not compliant with the annual continuing education requirement currently must complete 20 hours of pre-licensing education. As amended, the applicability of the re-application education requirement changes from those who are not compliant with the annual continuing education requirement to those who were not compliant at the time of license expiration. The 20 hours of pre-licensing education requirement is also eliminated and instead, re-applicants must complete at least 8 hours of “late” continuing education courses, which must include 1 hour of Colorado specific education.

Copies of the amendments are available here:

https://www.colorado.gov/pacific/dora/node/96966

Litigation Developments

Second Circuit Holds FDCPA Violation "Occurs" at the Time of Injury

The Second Circuit recently held that a Fair Debt Collection Practices Act ("FDCPA") violation "occurs" when a plaintiff actually suffers injury, rather than when a creditor attempts to collect a debt. In this case a judgment creditor sent a restraining notice, but the bank did not put a hold on the account of the erroneously designated customer until many days later. The trial court ruled that the claim was time-barred, based on the date the restraining notice was sent. The Second Circuit reversed.

In *Benzemann v. Citibank N.A.*, New Century Financial Services, Inc. ("New Century"), obtained a judgment against a debtor in 2003. The debtor's name was very similar to the name of the *Benzemann* plaintiff. Five years later, New Century sent a restraining notice to Citibank based on the judgment, but misspelled the debtor's name. Citibank froze the account of the *Benzemann* plaintiff, but lifted the freeze after the *Benzemann* plaintiff notified Citibank of the apparent error based on his name being similar to the judgment debtor.

Three years later, the judgment creditor repeated the mistake, with a restraining notice sent on December 6, 2011, based on the same judgment from 2003. Citibank froze the account about a week later, "on or about" December 14, 2011. The *Benzemann* plaintiff filed suit on December 14, 2012 for FDCPA violations.

The issue on appeal was whether suit was within the FDCPA's one-year statute of limitations. If the alleged FDCPA violation "occurred" on December 6, 2011, when the restraining notice was sent, then the claim would be time-barred because suit was filed more than one year later – December 14, 2012. If the FDCPA violation occurred when the plaintiff's account was frozen by Citibank on December 14, 2011, then the lawsuit was timely.

The Second Circuit found that for purposes of the FDCPA, the violation "occurred" at the time of actual injury—when the account was frozen on December 14, 2011. To hold otherwise, the Court reasoned, would create an "anomaly" where the "FDCPA claim accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit."

The *Benzemann* plaintiff could not have filed suit for an FDCPA violation based upon the mailing of the restraining notice alone, because the plaintiff had not yet suffered any injury. The plaintiff did not suffer a cognizable harm until the account was frozen on December 14, 2011.

Correspondingly, if the FCDPA violation had "occurred" when the restraining notice was mailed on December 6, 2011, the statute of limitations would have already run for 8 days by the time the plaintiff could file suit based on the frozen account. The court further explained that the Supreme Court has instructed courts to avoid interpreting

statutes of limitations in a way that creates such an anomaly, unless the statute is clearly designed to do so.

The *Benzemann* opinion is also notable for its departure from the Eight and Eleventh Circuits, which have held that the FDCPA "occurs" when the restraining notice is mailed. The Second Circuit distinguished those cases, finding they hinged on the restraining notice being the "last opportunity" for the debt collector to comply with the FDCPA. The Court explained that New Century could have requested Citibank to disregard the restraining notice before December 14, 2011. Consequently, the "last opportunity" to comply with the FDCPA occurred after the restraining notice was mailed, but before the account was frozen.