Financial Services Update

December 10, 2015

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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

FDIC Issues CRA Examination Results and Upcoming Schedule

The Federal Deposit Insurance Corporation (FDIC) recently issued its list of state nonmember banks evaluated for compliance with the Community Reinvestment Act (CRA). The list covers evaluation ratings that the FDIC assigned to institutions in September 2015. The Federal Deposit Insurance Corporation (FDIC) also has issued the public list of institutions scheduled for a Community Reinvestment Act (CRA) examination during the first quarter of 2016.

The CRA is a 1977 law intended to encourage insured banks and thrifts to meet local credit needs, including those of low- and moderate-income neighborhoods, consistent with safe and sound operations. As part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Congress mandated the public disclosure of an evaluation and rating for each bank or thrift that undergoes a CRA examination on or after July 1, 1990.

The list of institutions scheduled for a CRA examination is published pursuant to revised CRA regulations published in May 1995 that require each federal bank and thrift regulator to publish a quarterly CRA examination schedule at least 30 days before the beginning of each quarter. The examination schedule reflects the effects of an institution's size and CRA rating on examination frequency. Absent reasonable cause, an institution with $250 million or less in assets and a CRA rating of Satisfactory can be subject to a CRA examination no more frequently than once every 48 months. Absent reasonable cause, an institution with $250 million or less in assets and a CRA rating of Outstanding can be subject to a CRA examination no more frequently than once every 60 months. Examination schedules may change.

CFPB Releases HMDA Compliance Guide

On December 1, 2015, the CFPB released the Home Mortgage Disclosure Small Entity Compliance Guide ("Compliance Guide") to help banks and other entities understand their obligations under the Home Mortgage Disclosure Act ("HMDA") and Regulation C. According to the CFPB, the Compliance Guide is intended to provide an easy-to-use summary of Regulation C, as amended by the 2015 HMDA Rule. The CFPB believes that the Compliance Guide will highlight key information for financial institutions that will assist them implement the new rule.

The Compliance Guide contains instructions on data reporting and collection, sample notices of availability of HMDA data, a "coverage chart" to assist institutions understand whether they are covered by the new rule, and an "action taken chart" to provide information on how to determine the reportable action taken and date of action taken.

As we previously reported, the updated Regulation C will greatly expand the scope of collecting and reporting requirements under HMDA. The final rule also revises the scope of the financial institutions that are required to collect and report HMDA data. Under the new Regulation C, 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 Compliance Guide is available at:
http://files.consumerfinance.gov/f/201512_cfpb_hmda_small-entity-compliance-guide.pdf

CFPB Files Administrative Complaint Against Online Payday Lender

The CFPB recently initiated administrative enforcement proceedings against an online payday lender for alleged violations of the Truth in Lending Act and the Electronic Funds Transfer Act. The administrative complaint, which is titled a "Notice of Charges," was filed on November 18, 2015.

The allegations made include:

- Hiding the total cost of loans: the CFPB alleges that consumers were given contracts with disclosures based on repaying the loan in a single payment, but the default terms of the contract called for multiple rollovers and additional finance charges.
- Requiring repayment by pre-authorized electronic funds transfers: The CFPB alleges the company required consumers to agree to repay their loans via pre-authorized Automated Clearing House (ACH) payments, in violation of the EFTA.
- Continuing to debit borrowers' accounts after consumers canceled the authorization: The CFPB alleges the company included a provision in its contracts allowing the company to use remotely created checks if a consumer successfully canceled his or her authorization for ACH withdrawals, and used this provision to take funds from consumer who did not owe money to it.

The CFPB still does not have its own administrative law judges, and this proceeding has been assigned to an administrative law judge from the U.S. Coast Guard. The Company must respond to the Notice of Charges by December 11, 2015.

The CFPB's administrative docket for this matter may be found here:
http://files.consumerfinance.gov/f/201512_cfpb_order-granting-motion-of-extension-integrity-advance-llc-james-r-carnes.pdf

Litigation Developments

Supreme Court to Consider Whether "Implied" False Certification Can Create False Claims Act Liability

The Supreme Court on Friday agreed to consider whether a claim can be "false" under the False Claims Act based upon an "implied" false certification of compliance with a statute, regulation or contractual provision, and if so, whether the provision at issue must expressly state that compliance with its requirements is a condition of payment.

On December 4, 2015, the U.S. Supreme Court granted cert in *Universal Health Services, Inc., v. U.S. and Massachusetts* ex rel. *Escobar*, a *qui tam* case against the operator of a mental health clinic brought by the parents of a former patient. The grant of cert is limited to the second and third questions presented in the petition: whether False Claims Act liability can arise from making a false "implied certification"; and if so, whether failure to comply with a statute, regulation or contractual provision that does not state that it is a condition of payment can give rise to such false "implied certification." The Court will not consider the first question presented in the petition, which was the petitioner's contention that the court of appeals exceeded its authority by ruling on the basis of a regulatory provision not raised by the plaintiff/appellant below.

The petitioner (defendant/appellee below) is Universal Health Services ("Universal"), which operates mental health clinics in Massachusetts, including the clinic where the relators' late daughter had been treated. Universal seeks and receives payments of both federal and state government funds through the state Medicaid program. The relators alleged that Universal did not comply with certain state regulations concerning supervision of the clinic, which were allegedly preconditions to payment from Medicaid.

As you may recall, the False Claims Act (in relevant part) establishes civil liability for presenting or causing to be presented a "false or fraudulent" claim for payment by the federal government, as well as for making a false statement that is material to a false claim. This case involves alleged presentment of false claims.

A claim for payment may be "false" so as to give rise to liability under the False Claims Act if it is factually false, that is if the goods or services were not provided or were deficient. It is also generally accepted that False Claims Act liability may arise from a claim that is legally false. Although different courts use different language to describe them, there are two principle theories of legal falsity: express false certification, and implied false certification. Express certification is where the claimant certifies compliance with a regulation or other condition. Implied certification is where the claimant does not expressly certify compliance, but some courts have held that by presenting a claim for payment the claimant has impliedly certified compliance with any regulation that imposes a precondition on the payment sought. In other words, by making the claim, the claimant is impliedly certifying that it is entitled to receive the money, which by implication would mean that it has complied with all conditions required to receive the money. There is a split among the federal courts of appeals as

to whether such an "implied certification" of compliance can give rise to liability under the False Claims Act. Additionally, courts have reached different conclusions regarding what types of regulations are conditions of payment (and therefore potentially actionable under the False Claims Act), as opposed to mere conditions of participation in the government program at issue.

While granting cert on these two questions does not guarantee that the Court will resolve them, this case should provide some clarity and predictability for FHA lenders and participants in other federal programs. Note also that in this case, alleged non-compliance with a state—as opposed to federal—regulation gave rise to potential liability under the federal False Claims Act, since federal money is distributed by the state Medicaid program.

The WBK Firm regularly represents companies throughout the United States in litigation under the False Claims Act, FIRREA, Program Fraud Civil Remedies Act, and other statutes.