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

CFPB Releases Bulletin Concerning Preauthorized Electronic Payments

The CFPB recently issued Compliance Bulletin 2015-06 (Bulletin) clarifying its expectations for entities under the Electronic Fund Transfer Act (EFTA) and Regulation E when obtaining consumer authorizations for preauthorized electronic fund transfers (EFTs) from a consumers account. According to the CFPB, the Bulletin was released because the some entities are not fully complying with the requirements imposed by the EFTA and Regulation E.

In the Bulletin, the CFPB observes that under the EFTA and Regulation E, preauthorized EFTs refer to an "electronic fund transfer authorized in advance to recur at substantially regular intervals," and that a company can obtain authorizations for preauthorized EFTs in paper or electronic form. Further, the CFPB confirms that the EFTA and Regulation E permit a company to use oral recordings obtained over the phone to authorize preauthorized EFTs if the recordings also comply with the E-Sign Act. The Bulletin states that: "[i]n at least one examination, Supervision has concluded that one or more entities did not violate EFTA or Regulation E merely because they obtained by telephone consumer authorizations that were signed or similarly authenticated by the consumer orally. Regulation E may be satisfied if a consumer authorizes preauthorized EFTs by entering a code into their telephone keypad, or, Supervision concluded, the company records and retains the consumer's oral authorization, provided in both cases the consumer intends to sign the record as required by the E-Sign Act."

In addition, the Bulletin summarizes the Regulation E requirement for a company to provide a copy of authorization for preauthorized EFTs to the consumer in electronic or paper form. The CFPB comments that the authorization should contain two of the most significant terms of an authorization, which are "the timing and amount of the recurring transfers from the consumer's account." The CFPB also states that as an alternative to providing a copy of the authorization after its execution, a company can comply with the Regulation E requirement by using a confirmation form. For example, according to the Bulletin, a company may provide a consumer with two copies of a preauthorization form, and then ask the consumer to sign and return one copy and to retain the second. Note that the CFPB cautions that a company will not satisfy Regulation E if it only makes the consumer's copy of the authorization available upon request.

The Bulletin was also released with four sample form letters for consumers to send to entities to revoke permission to automatically take payments from their accounts and to provide notice of unauthorized transfers from consumers' accounts.

The CFPB Bulletin is available here: http://files.consumerfinance.gov/f/201511_cfpb_compliance-bulletin-2015-06-requirements-for-consumer-authorizations-for-preauthorized-electronic-fund-transfers.pdf

The sample letters are available here: http://www.consumerfinance.gov/blog/you-have-protections-when-it-comes-to-automatic-debit-payments-from-your-account

Statutory Exception to Gramm-Leach-Bliley Act Annual Privacy Notice Requirement Recently Passed by Congress

The Gramm-Leach-Bliley Act (GLBA) generally requires financial institutions to provide annual privacy notices to their customers. Congress recently passed a new transportation bill, Fixing America's Surface Transportation Act (the FAST Act). Among its many provisions, the FAST Act includes a provision (Section 75001 of the Act) which creates a statutory exception from this GLBA annual notice requirement in limited circumstances.

Under this exception, unless the financial institution no longer complies with the following two criteria, a financial institution is not required to provide the annual disclosure if:

(1) it provides nonpublic personal information (NPI) only as permitted under certain exceptions to the GLBA opt-out requirements or to both the GLBA opt-out and initial notice requirements in certain instances (e.g., in connection with servicing or processing a financial product or service requested or authorized by the consumer; with the consent or at the direction of the consumer; etc.); and

(2) it has not changed its policies and practices with regard to disclosing NPI from the policies and practices that were disclosed in the most recent privacy notice sent to consumers pursuant to the GLBA.

While the statutory amendment went into effect December 4, 2015, the CFPB has not yet announced a proposed related amendment to the privacy regulations implementing the GLBA, Regulation P. In its last significant amendment to the regulations governing the annual privacy notice requirement, which took effect on October 28, 2014, the CFPB issued a final rule that, in certain instances, permitted a financial institution to post its annual privacy notices online as an alternative method to meet the delivery requirement.

The FAST Act can be found at: https://www.congress.gov/114/bills/hr22/BILLS-114hr22enr.pdf.

GSEs Announce URLA Revisions

Fannie Mae and Freddie Mac recently announced that they are revising and redesigning the Uniform Residential Loan Application (URLA) (Freddie Mac Form 65 or Fannie Mae Form 1003). At the same time, they are developing a corresponding standardized dataset, the Uniform Loan Application Dataset (ULAD), and updating each GSE's automated underwriting system specifications. They plan to publish the final URLA, ULAD and specifications in the summer of 2016, but they do not plan to begin collecting the new URLA or ULAD in 2016 and will provide additional information regarding an implementation timeline in upcoming months.

The GSEs have worked with industry players and conducted studies with consumers, underwriters, mortgage processors, and loan officers to develop the new form. They are reorganizing the layout of the URLA form to make it more consumer-friendly and updating the terminology to make it easier for borrowers and industry stakeholders to understand and use. In addition, the GSEs are adding new data fields to support GSE, federal agency and regulatory requirements.

The GSEs' announcement can be read here: http://www.freddiemac.com/singlefamily/news/2015/1208_gses_urla.html.

State Regulatory Developments

California Amends Security Breach Notification Statute

California has enacted three bills revising its personal information security breach notification statute. The bills, which take effect January 1, 2016, clarify the meaning of "encrypted," specify formatting requirements for security breach notification letters, and expand the definition of "personal information."

"Encrypted" Defined. Under California law, a breach occurs only if compromised personal information is not encrypted. Prior to the enactment of Assembly Bill 964, the term "encrypted" was not defined, which created some ambiguity as to what type of information qualified as being "encrypted." A.B. 964 defines "encrypted," clarifying that personal information is encrypted if it is rendered "unusable, unreadable, or indecipherable to an unauthorized person through a security technology or methodology generally accepted in the field of information security."

Notification Letter Formatting. California law requires certain content to be included in a security breach notification letter. In addition to the existing content requirements, Senate Bill 570 adds the following formatting requirements: (1) the notification must be titled "Notice of Data Breach"; (2) the required content must be set forth under the headings "What Happened," "What Information Was Involved," "What We Are Doing," "What You Can Do," and "For More Information"; (3) the notification must be formatted to call attention to the nature and significance of the information it contains; (4) the title

and headings must be clearly and conspicuously displayed; and (5) the text must be at least 10-point font size. A model security breach notification form is also created which, if used, is deemed to comply with the new formatting requirements.

"Personal Information" Definition Expansion. Senate Bill 34 amends the definition of "personal information" to include "information or data collected through the use or operation of an automated license plate recognition system." This amendment requires automated license plate recognition systems (ALPR) operators and end-users to implement and maintain reasonable safeguards to protect ALPR data from unauthorized use or disclosure, including a usage and privacy policy detailing ALPR information collection, use, maintenance, sharing, and dissemination practices. A private right of action is also created for individuals harmed by a violation of the security requirements.

Copies of the amendments are available here:

http://www.legislature.ca.gov/

Litigation Developments

Supreme Court Enforces Class Arbitration Waiver—Again

The U.S. Supreme Court recently re-emphasized its ruling that waivers of class actions in arbitration clauses are enforceable under the Federal Arbitration Act, despite state laws that may purport to ban such waivers.

In *DirecTV, Inc. v. Imburgia*, the Supreme Court underscored its 2011 ruling that the Federal Arbitration Act pre-empts and invalidates California's ban on class action waivers in arbitration agreements. In 2008, DirecTV had an arbitration agreement in place that included a class action waiver, but also included a provision that made the arbitration clause unenforceable if the "law of your state" made such waivers unenforceable. A 2005 California Supreme Court decision rendered such provisions unenforceable—but the U.S. Supreme Court's 2011 decision in *AT&T Mobility, LLC v. Concepcion* rendered the California rule invalid and pre-empted by the Federal Arbitration Act.

Despite the U.S. Supreme Court's rejection of the California standard, when *Imburgia* came before an intermediate state-appellate court in California, it ruled that DirecTV's arbitration clause was unenforceable because California state law did not allow waiver of class actions in arbitration clauses. Instead of relying on the 2005 California Supreme Court opinion, though, the intermediate appellate court relied on a California statute that purports to ban all waivers of class actions in arbitration clauses for actions brought under that statute (California's Consumer Legal Remedies Act). The California Supreme Court declined to review the intermediate appellate court's decision.

The U.S. Supreme Court overruled the California court forcefully, finding that the term "law of your state" applies only to the ***valid*** law of your state. Because the Supreme Court rejected California's class action waiver ban as pre-empted by the Federal Arbitration Act in *Concepcion*, any such ban on waiver of class actions with respect to arbitration clauses would also be pre-empted, and thus not valid law of any state. *The WBK Firm regularly assists clients located nationwide with arbitration-related proceedings.*

DC Circuit Rejects False Claims Liability Premised on Reasonable Interpretation of Ambiguous Regulation

The U.S. Court of Appeals for the D.C. Circuit recently rejected a trial court's decision rendering false claims liability against a company for paying commissions to sales agents—commissions which the agency at issue later determined to be irregular. The DC Circuit rejected the decision because the company had based its actions on a reasonable interpretation of an ambiguous regulation, and the knowledge requirement of the false claims act cannot be met where a company acts upon a reasonable interpretation of an ambiguous standard.

In *U.S. ex rel. Purcell v. MWI Corp.*, the government secured a civil judgement against a company for false claims with regard to certifications the company had provided to the Export-Import Bank that the company had paid only "regular commissions" to the sales agent responsible for the contract. But the bank had never published any written guidance on the meaning of the term "regular commission." Instead, the bank testified that it preferred a flexible standard in order to make the loan approval process more efficient, and that it was wary of adopting a rigid standard for the term.

Because the government had failed to issue any guidance on the meaning of the term, and because the term was susceptible to at least three separate plausible meanings in ordinary business terms, the term was ambiguous. Further, even informal guidance would not have been enough to "warn a regulated defendant away from an otherwise reasonable interpretation it adopted." Nor is the failure to obtain a legal opinion or prior agency approval enough in itself to establish the knowledge prong.

The DC Circuit further affirmed that subjective intent, including bad faith, is irrelevant to the knowledge determination if the interpretation of the regulation is reasonable. Thus, the DC Circuit ruled that False Claims liability cannot lie where a company acts upon a reasonable interpretation of an ambiguous regulation.

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.

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