Financial Services Update

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WBK News

Jack Konyk will present an overview of the TILA-RESPA Integrated Disclosure Requirements at the Oklahoma MBA Annual Convention on April 21 in Tulsa, OK. **MORE INFO**

Mitch Kider will present a webinar on RESPA Section 8 and Fair Lending Compliance to a large regional bank client on April 22. **MORE INFO**

Michael Kieval and **Jason McElroy** will present a free webinar titled "The CFPB's Push on Mortgage Advertising Regulations" in conjunction with SAI Global on April 23 at 2:00 pm. **MORE INFO**

Weiner Brodsky Kider PC recently held 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 now 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 Bans Marketing Scammers from Mortgage Relief Industry

A Utah-based marketing arm of a mortgage modification scam that allegedly bilked consumers out of millions of dollars in fees and mortgage payments has been banned from the mortgage relief and debt relief industries by the FTC in a settlement announced on April 3, 2015. The final order also imposed a $28.6 million judgment against the Utah marketing firm and prohibits it from violating the FTC's Telemarketing Sales Rule and its prohibitions against abusive telemarketing practices.

The FTC's action resulted from a complaint the commission filed in June 2014 against an alleged nationwide scheme run by several Utah-based individuals and closely associated companies that promised homeowners loan modifications or help in avoiding foreclosure in exchange for the payment of fees, usually in advance.

According to the complaint, the defendants violated the FTC Act and the Mortgage Assistance and Relief Services Rule by:

- Telling consumers they could reduce monthly payments or interest rates, even if their lender had previously denied them a modification;
- Encouraging consumers to stop making mortgage payments to their lenders;

- Telling at least one consumer to stop paying his mortgage so he could afford the modification fees;
- Requiring payments ranging from $500 to $3,900 upfront for services never provided; and
- Misrepresenting to consumers that they would receive legal representation.

The defendants in the mortgage modification scheme, according to the FTC's complaint, set up the Utah marketing firm when consumer complaints increased against another operation run by the defendants. The Utah marketing firm "prepared and mailed ads for mortgage relief services that were designed to look like they were coming from lawyers in the recipients' states," the FTC noted.

In December 2014, the FTC reached a settlement with the other individual and corporate defendants in the mortgage modification case, which imposed a judgment of $815,865 and banned those defendants from participating in the mortgage relief and debt relief industries.

The settlement prohibits the defendants from misrepresenting any aspect of a financial product or service and from disclosing any consumer information through fraudulent operations, and also prohibits defendants from engaging in marketing or assisting with any debt relief services. It also prohibits anyone associated with the defendants from collecting payments from any consumer who agreed to purchase mortgage relief products from the defendants.

The FTC's press release on the settlement, which includes a link to the final order, is available here: https://www.ftc.gov/news-events/press-releases/2015/04/marketers-banned-mortgage-relief-debt-relief-services-industry.

CFPB Sanctions Mortgage Lender for Deceptive FHA and VA Mailers

A California-based, nonbank mortgage lender sent print advertisements to more than 100,000 consumers—including U.S. Military servicemembers and veterans—with the names, logos and seals of the FHA and VA, allegedly made to look like the lender was affiliated with the two U.S. government agencies. For this and other ad-related issues, the CFPB alleged the lender had committed deceptive and misleading advertising practices in violation of federal consumer laws, including the unfair, deceptive, or abusive acts or practices (UDAAP) provisions of the Consumer Financial Protection Act of 2010 (CFPA), the Mortgage Acts and Practices Rule (MAP Rule or Regulation N), and TILA.

The CFPB on April 8, 2015 entered into a consent order with the lender, in which the bureau ordered the lender to pay $250,000 in a civil money penalty. Among other

conduct requirements, the order prohibits the lender from making certain misrepresentations in its mortgage advertising.

The CFPB alleged that the lender used the names, logos and seals of the FHA and VA on its mailers in a misleading way, such that it gave consumers the false impression that the agencies endorsed, sent or sponsored the advertisements.

Print ads for VA-guaranteed refinance loans placed a large VA seal on the top of the page, with the VA logo and "Department of Veterans Affairs" featured in the middle. The ad also referred to a "VA Interest Rate Reduction Department" and encouraged consumers to call, though allegedly no such department existed at the lender. And the phone number listed belonged to the lender. The envelopes also contained various warnings citing the U.S. Code and threatening fines and imprisonment for tampering with the letter.

The design and type of language used for the FHA-insured refinance loan mailers sent by the lender were similar to the VA ones. The FHA mailers included reference to the FHA and "FHA Benefits," a related FHA logo, and a description of the lender's loan products as part of a "distinctive program offered by the U.S. government." Also like the VA ads, consumers were directed to call an allegedly non-existent "FHA Streamline Department" on a number belonging to the lender.

As alleged in the consent order, on some calls to the lender's call center, the lender's employees or other agents "falsely stated or implied that the company was part of or endorsed by the FHA or VA." Among other clarifications, the order states that the lender's products were not endorsed or sponsored by the FHA or VA, even if they were insured or guaranteed by those agencies.

The CFPB further alleges that most of the mailers failed to clearly and conspicuously indicate that they were variable-rate mortgages and that, as a result, a reasonable consumer was likely to believe the ads were for fixed-rate loans with fixed monthly payment amounts.

The CFPB also alleged that the mortgage ads violated TILA by failing to properly disclose the following four elements, as they applied to the products advertised:

- that the products were adjustable-rate mortgages, where the APR could be increased after consummation of the loan;
- each simple annual rate of interest that would apply over the life of the loan and the periods of time when those rates would apply, in proper relation to the advertised interest rate;
- the amount of each estimated payment that would apply over the life of the loan, and when each would apply, in proper relation to the advertised payment amount; and

- a statement that the estimated payment amount did not include any taxes or insurance premiums and that the actual payment obligation would be greater than the estimated amount.

The press release on the CFPB's action against the allegedly deceptive advertisements is available here: http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-mortgage-lender-for-deceptive-advertising/.

A copy of the consent order the CFPB reached with the California-based lender can be found here: http://files.consumerfinance.gov/f/201504_cfpb_consent-order_rmk-financial-corporation.pdf.

CFPB Report Shines Light on Debt Collection Practices

The CFPB considers problems with the practices of debt collectors to be pervasive, cutting across all the consumer financial markets overseen by the CFPB. That is one of the findings of the 2015 Fair Debt Collection Practices Act (FDCPA) Annual Report released March 26, 2015 by the CFPB.

The report covers the developments, consumer complaints and enforcement actions in 2014 in the $13 billion debt collection industry, and the CFPB's and FTC's efforts in administering FDCPA. The two agencies are responsible for enforcement of the act. The CFPB and the FTC recently reauthorized for three years their Memorandum of Understanding through which they coordinate efforts in investigations and in supervisory, enforcement and rulemaking actions.

Debt collection generated more than 88,300 consumer complaints fielded by the CFPB in 2014, the most of any industry. Mortgage complaints came in second at around 51,200.

The top complaint cited by consumers about debt collectors is their continued attempts to collect disputed debt. The problem cited by consumers in most of these cases is not that they didn't owe any debt, but rather that the amount of underlying debt calculated by collectors was either inaccurate or unfair.

Another area of concern is communications tactics, primarily excessive or inconvenient telephone calls. These represent violations of FDCPA, which prohibits many harmful practices concerning telephone calls.

In an examination of a debt collection firm in 2014, the CFPB determined that the firm had repeatedly violated the FDCPA when during the review period the company "made approximately 17,000 calls to consumers outside the appropriate calling hours set forth

in the FDCPA," according to the report. Some consumers were contacted by this firm as many as 20 times over two days.

The CFPB also cited the false or misleading representations collectors made when collecting debts, which violated FDCPA. For example, collection firms expressed or implied to consumers that they would file an action in court in order to establish how much debt was owed, when they had no intention to do so, which misled consumers.

In fact, according to the report, 70% of the lawsuits initiated by debt collectors that the CFPB reviewed in 2014 were dismissed by the collectors when the consumer filed an answer, because they were unable to locate documentation to support their claims, the report noted.

The CFPB also noted that debt collectors harassed consumers with false threats of litigation, which is another violation of FDCPA. The act prohibits a debt collector from threatening consumers with any action it does not intend to pursue. In 2014, the bureau found that some collectors "routinely threatened consumers with litigation even though they generally did not intend to file suit." These collectors were ordered by the CFPB to cease this practice.

On the enforcement front in 2014, the CFPB announced seven public enforcement actions concerning unfair, deceptive and abusive debt collection practices, and noted that it non-publicly is investigating a number of companies to see if they have been involved in debt collection practices that violate FDCPA or Dodd-Frank.

The public enforcement actions resulted in more than $570 million in consumer relief and more than $13 million paid into a civil money fund. These actions involved an unlawful predatory lending scheme, an illegal cash-grab scheme and illegal debt collection tactics, among others.

The annual report also covered the FTC's enforcement actions, noting the 15 debt collection cases brought or resolved by the FTC in 2014, which represent the largest number of cases the FTC has handled in any single year. In one case, the FTC put out of business more than 20 debt collection companies that employed nearly 500 collectors and obtained a record $90.5 million in judgments.

The CFPB is continuing to explore issuing debt collection rules, which would be the first comprehensive federal regulation of this sector. In November 2013, the bureau issued an advance notice of public rulemaking announcing the idea of developing such rules and received more than 23,000 comments.

CFPB Director Richard Cordray said in the report, "In developing these rules, we are considering provisions to protect consumers from problematic practices of some

collectors as well as to reflect technological changes in the debt collection industry." Some of practices that concern commenters are the accuracy of collector information, the manner of debt collection communications and the extension of debt collection rules to first-party collectors.

The CFPB Fair Debt Collection Practices Annual Report is available here: http://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf.

FDIC Issues FAQs to Assist Smaller Banks with New Regulatory Capital Rule

Community banks just got some more technical help from the FDIC in how to implement the revised regulatory capital rule. The agency on April 6, 2015 issued a set of frequently asked questions (FAQs) that cover the proper risk-weightings for residential mortgages in certain situations, as well as for reverse mortgages, FHA Title I loans and home equity lines of credit (HELOCs).

The FDIC noted that the FAQs have been targeted to assist smaller, less complex community banks with the rule, which took effect on January 1, 2015 for the majority of banking organizations. The agency added that the FAQs are not a statement of policy or guidance, but instead a resource for bankers should they have questions when implementing the rule. The FAQs are just one of several resources the regulators have published to assist community banks in applying the requirements of the revised regulatory capital rule.

The FAQs cover topics on the revised regulatory capital requirements ranging from reverse mortgages and HELOCs to loan-to-value (LTV) ratios, private mortgage insurance and prudent underwriting standards. For instance, the FAQs include examples of the risk weighting treatment of on-balance sheet and off-balance sheet portions of reverse mortgages, as well as the portion conditionally guaranteed by FHA with Home Equity Conversion Mortgages (HECMs).

In a more esoteric category, the FAQs highlighted the capital treatment of FHA Title I loans. These home improvement loans are secured by junior liens and are insured by FHA either at an individual loan basis or on a portfolio loan level, which covers FHA Title I loans that have been securitized.

The FDIC Financial Institution Letter on the FAQs is available here: https://www.fdic.gov/news/news/financial/2015/fil15016.html?source=govdelivery&utm_medium=email&utm_source=govdelivery.

The FAQs on the Regulatory Capital Rule can be found here: https://fdic.gov/regulations/capital/capital/faq.pdf.

State Regulatory Developments

Mortgage Lender Admits Employees Cheated on SAFE Act Tests, Penalized and Fined by State Regulators

Forty-three state mortgage regulators and a Maryland-based nonbank mortgage lender have reached a settlement agreement and consent order, which alleges that employees of the lender engaged in widespread cheating on mortgage licensing tests and continuing education courses required by the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act).

The cheating allegedly reached the top level of the company as the chief executive officer and the chief operating officer acknowledged that other employees took their required continuing education courses for them.

The settlement agreement and consent order, announced on April 13, 2015, was negotiated by the Multi-State Mortgage Committee (MMC) on behalf of forty-three mortgage regulators in states where the Maryland lender does business. It imposed a substantial administrative penalty of $5.28 million on the lender.

The case resulted from both an internal company investigation and an external state of Maryland investigation of allegations that employees of the lender improperly shared confidential test information in violation of the rules of conduct for test takers of the Nationwide Mortgage Licensing System & Registry (NMLS).

In fact, the lender's director of training is alleged to have "encouraged [loan officers] to report information that they acquire while taking the SAFE mortgage loan originator test for the purpose of updating [the lender's] internal test preparation materials," according to the settlement agreement. Also, a senior vice president and others allegedly shared answers to quizzes and tests included in NMLS pre-licensure and continuing education courses.

The settlement agreement noted the Maryland investigation found that certain members of the lender's compliance staff had taken continuing education courses and quiz requirements on behalf of at least 20 other employees, including the CEO and COO.

The Maryland investigation determined that other employees completed continuing education requirements for the CEO and COO at least 18 times for each of them. Both the CEO and COO said they were unaware of their continuing education requirements and only became aware of this alleged activity after the initial complaint was disclosed to them by state regulators.

However, the Maryland investigation, “uncovered evidence demonstrating that [the COO] did indeed have direct knowledge of and condoned these practices while they were occurring,” according to the settlement agreement.

As part of the agreement, the COO will be removed and replaced. He is allowed to keep his minority ownership interest in the lender and to remain an employee, but cannot hold a position in senior management or as a “control person.” In addition, prior to the agreement, certain other employees of the lender, including the head of the lender’s reverse mortgage division and a vice president for sales, were terminated or resigned in connection with the lender’s internal investigation.

The lender also is ordered to hire an independent auditor to review and evaluate the lender’s policies and procedures to ensure that the lender is in compliance with federal and state law. The auditor also will specifically review the lender’s training and education program to ensure its compliance with testing and continuing education requirements and obligations. The auditor is to submit a report to the MMC on these matters within 270 days.

The lender also is required to submit a report to the MMC within 270 days with a comprehensive plan on improving corporate management and governance structures that include “best practices for a mortgage company of its size and scope of business.”

The settlement agreement also calls for the lender to continue implementing certain self-imposed remedial actions, including enhanced ethics education for all employees, more stringent management policies and controls, the development and implementation of a Whistle Blower Policy, the implementation of a “tip line” for the anonymous reporting of compliance concerns by employees, and the fulfillment of continuing education requirements in a proctored and controlled environment.

A Conference of State Bank Supervisors press release on the settlement, which includes a link to the settlement agreement and consent order, can be found here: http://www.csbs.org/news/press-releases/pr2015/Pages/pr04132015.aspx.

Litigation Developments

Foreclosure Counsel May be Subject to FDCPA Liability

Inaccurate allegations about the amount of indebtedness in a residential mortgage foreclosure action may violate the Fair Debt Collection Practices Act (FDCPA). Including amounts of anticipated fees or costs expected in the near future can make the amount of the debt inaccurate, within the meaning of FDCPA.

In *Kaymark v. Bank of America, N.A.*, the foreclosure complaint generally itemized the debt due as of a date two months prior to the filing of the complaint. The itemization, however, included some fees that had not yet been incurred, including some attorneys' fees, title report fees and property inspection fees.

The plaintiff alleged that the inclusion of these fees in the foreclosure complaint violated the FDCPA in two ways: (1) as a "false, deceptive, or misleading representation or means in connection with the collection of [a] debt" under FDCPA § 1692e; and, (2) as an improper attempt to collect an amount not "expressly authorized by the agreement creating the debt or permitted by law" under FDCPA § 1692f(1).

In reaching its holding, the Third Circuit Court of Appeals analyzed the language of the FDCPA and the mortgage. Under the FDCPA, neither formal pleadings nor mortgage foreclosure proceedings are exempt from its requirements. The mortgage did not authorize the collection of fees for services not yet performed.

Consequently, the inclusion of fees for services not yet performed could violate the FDCPA, which was consistent with the holding of a number of other circuit courts of appeals—including the Eighth Circuit and the Eleventh Circuit—where the courts had come to analogous conclusions.

Weiner Brodsky Kider represents mortgage lenders and servicers throughout the United States.

Bank Reaches $212.5 Million Settlement in Principle of FHA Underwriting and Origination Claims, Sues Insurers

First Tennessee Bank, N.A. (First Tennessee) announced on April 9, 2015, that it had reached an agreement in principle with the U.S. Department of Justice (DOJ) and the U.S. Department of Housing and Urban Development (HUD) to pay $212.5 million to settle allegations that it falsely certified compliance with certain requirements for FHA loans. The same day, First Tennessee and parent First Horizon National Corporation filed suit against eight insurance companies, seeking coverage for $75 million of the settlement.

In 2012, DOJ initiated an investigation into First Tennessee's FHA certifications as a Direct Endorsement (DE) lender concerning origination, underwriting and quality control, as well as its compliance with self-reporting requirements. That investigation was completed by December 2014, and DOJ informed First Tennessee it was seeking "suit authority" to bring an action against First Tennessee.

First Tennessee reached an agreement in principle with DOJ on April 2, 2015, which is subject to the negotiation of a formal settlement agreement and a statement of stipulated facts.

According to the lawsuit filed by First Horizon and First Tennessee against the insurers in federal court in Tennessee, First Tennessee disclosed the investigation to its insurers when applying for the policies in question, and held at least one meeting with the insurance companies before providing a formal "notice of circumstances that may give rise to a claim" in May 2014, during the policy period.

The insurance companies agreed not to raise lack of consent to the settlement as a defense to coverage, and First Horizon and First Tennessee then settled the government's claims. Nonetheless, the suit asserts, the insurers "have failed to accept coverage."

Although this type of settlement is typically announced by the government after it is finalized, the announcement in this case appears to have been motivated by the timing of First Horizon's earnings announcement, as well as by the filing of the lawsuit against the insurance companies.

This serves as a timely reminder that a company should review its insurance policies and consider putting its insurers on notice when it is faced with a civil investigative demand or other government investigation, and/or when a government agency makes a demand or threatens suit against the company.

Weiner Brodsky Kider frequently represents lenders, servicers, and other companies in the financial services industry in connection with government investigations and related issues.

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