Chapman and Cutler LLP

To the Point!

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CFPB Guidance on Private Mortgage Insurance Cancellation

The CFPB recently issued a Compliance Bulletin explaining the private mortgage insurance (*"PMI"*) cancellation requirements under the Homeowners Protection Act of 1998 (*"HPA"*). Under the HPA, if a borrower is current on mortgage payments and has a good payment history, the borrower can request PMI cancellation once the loan-to-value (*"LTV"*) ratio reaches 80%. The CFPB Bulletin also covers automatic termination requirements, where PMI must automatically terminate when the LTV ratio reaches 78%, provided the borrower is current. If the borrower is not current when the LTV ratio reaches 78%, PMI must be cancelled on the first day of the first month following the date the borrower becomes current again. For both automatic termination and PMI cancellation upon borrower request, the LTV ratios must be based on the original value of the property and not the current value.

In the event PMI coverage has not been cancelled upon borrower request or by automatic termination, final termination requirements will apply following the date that is the midpoint of the loan amortization period. If the borrower is not current at that time, PMI must be cancelled once the borrower becomes current.

The CFPB noted that it found compliance problems related to the HPA requirements, including collection of PMI premiums after the mandatory termination date, excessive delays in processing a borrower's cancellation request, and borrowers who either did not receive their annual HPA notice or received notices without contact information on how to cancel PMI. Although the HPA requirements have not changed, mortgage servicers are reminded to review their policies and procedures to ensure they comply with these requirements.

FDIC Announces Settlement with Credit Card Issuer Related to the Sale of Add-On Products

The FDIC entered into a settlement with a state bank related to the sale of credit card add-on products (payment protection/debt cancellation products) by its third-party servicer. The complaint alleged unfair and deceptive practices under section 5 of the FTC Act; specifically, that the servicer represented there would be no fee for the service while the account balance was zero and made material misrepresentations regarding the 30-day cancellation period, refund policy, and payment of incentives for enrollment.

The bank was required to pay both a civil money penalty and consumer restitution. This settlement emphasizes the importance of bank compliance management and oversight of third-party relationships. This action by the FDIC is consistent with previous actions brought by the CFPB asserting UDAAP claims against credit card issuers related to third-party sales of credit card add-on products.

Servicemember Updates

Following are three announcements by federal agencies on military-specific issues that banks should be aware of:

CFPB

Through its Office of Servicemember Affairs, the CFPB continues to express concern regarding unfair, deceptive, or abusive financial practices related to the treatment of servicemembers. Its most recent initiative is the publication of a Fraud Alert Fact Sheet that identifies steps for servicemembers to activate protective Active Duty Alerts with credit reporting agencies before leaving for active duty.

OCC

The OCC recently reiterated its concerns with bank compliance with the Servicemembers Civil Relief Act (*"SCRA"*), emphasizing that banks must improve their compliance procedures for determining eligibility for SCRA-related benefits, calculate SCRA benefits correctly, and have adequate procedures to verify eligibility for SCRA protections before seeking default judgments or initiating foreclosure proceedings.

New Military Lending Act Rules

The new Military Lending Act (*"MLA"*) rules become effective on October 1, 2015 and have a mandatory compliance date of October 3, 2016, with compliance for credit cards delayed until October 3, 2017. The new regulations apply to "covered borrowers," which include members of the military and the dependents of military members. Banks can no longer rely solely on representations by a borrower regarding its status as a "covered borrower" and instead must institute their own procedures to determine the eligibility of a borrower under the MLA. The MLA rules establish a safe harbor for bank eligibility determinations that are made by checking the Department of Defense's MLA database or a consumer credit report from a national credit reporting agency.

The new MLA rules apply to most consumer credit, including credit cards, payday loans, vehicle title loans, and deposit advance loans; however, they do not apply to mortgages and loans secured by personal property such as auto loans. The MLA establishes an APR cap of 36% (*"MAPR"*) that applies to each new covered loan and includes the following fees (unlike the Truth in Lending Act APR): (i) credit insurance, debt cancellation, or debt suspension; (ii) credit-related ancillary products sold in connection with a closed-end credit transaction; (iii) the periodic rate; (iv) finance charges beyond the periodic rate; (v) application fees; and (vi) participation fees. Banks must provide a disclosure (orally or in writing) describing the MAPR cap and are prohibited from using arbitration clauses, requiring servicemembers to waive their rights under the SCRA, and including payroll allotment as a condition of obtaining credit. Banks should become familiar with the new MLA rules and establish policies and procedures to ensure compliance by the mandatory compliance dates.

Eleventh Circuit Rules on Applicability of FDCPA to Bank

The U.S. Court of Appeals for the Eleventh Circuit recently ruled that a national bank collecting a defaulted credit card account purchased from another bank was not a debt collector within the meaning of the Fair Debt Collection Practices Act (*"FDCPA"*). The court determined that an entity can only be a debt collector covered by the FDCPA if (i) the principal purpose of its business is debt collection, or (ii) it regularly collects debts owed to other persons. Creditors are not subject to the FDCPA, but an entity collecting a debt owed to another that was in default at the time it was acquired is excluded from the definition of creditor under the act. The Eleventh Circuit held that while an entity that acquired a delinquent debt was not a creditor, such entity would

still not be a debt collector unless it met one of the two criteria under that definition. Since the principal purpose of the national bank's business in the case was not debt collection and it regularly collected its own debts but not debts owed to other persons, the court found that it was not a debt collector subject to the FDCPA.

The Eleventh Circuit's decision is significant because it would appear to preclude most banks from being subject to the FDCPA even when they are collecting a debt they did not originate that was delinquent when it was acquired. In addition, the decision is contrary to the interpretations of the Sixth and Seventh Circuits, which have found that a person who attempts to collect a debt that was delinquent at the time it was acquired is a debt collector under the FDCPA. The Federal Trade Commission (*"FTC"*) has filed an amicus brief with the Eleventh Circuit seeking en banc review, claiming that the court's interpretation would permit debt collectors to avoid complying with the FDCPA simply by engaging in other businesses.

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