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MORTGAGE FINANCE NEWSLETTER

A PUBLICATION OF WEINER BRODSKY SIDMAN KIDER PC

The FCC Promulgates Rules Under the Junk Fax Prevention Act

The Junk Fax Prevention Act of 2005 (the Junk Fax Prevention Act) amended the Telephone Consumer Protection Act of 1991 (TCPA) with the intention of codifying an existing business relationship (EBR) exemption into the prohibition on sending unsolicited facsimile advertisements. On April 5, 2006 the FCC issued a report containing final rules adopted and promulgated under the Junk Fax Prevention Act. The new FCC rules act to do the following: (i) codify and define the EBR exemption and add additional requirements pertaining to methods of obtaining a fax number in connection with the EBR exemption, (ii) require senders to include on the first page of unsolicited facsimile advertisements both their contact information as well as information on how recipients may "opt-out" of future fax transmissions from the sender, (iii) require senders to honor opt-out requests, (iv) disallow a special exemption for small businesses and nonprofit trade organizations and clarify exactly what constitutes an "unsolicited advertisement."

The report explains that entities sending faxes under the EBR exemption are to bear the burden of demonstrating the existence of the relationship. However, the existence of an EBR alone is not sufficient to entitle a sender to fax unsolicited advertisements. In addition to the existence of the relationship, the telephone facsimile number must also be provided voluntarily by the recipient within the context of the EBR. In the alternative, this additional requirement may be satisfied if the recipient makes their facsimile telephone number available to the public by such means as publication in a directory, advertisement, or site on the Internet.

The new rules define an EBR and set forth that one can be formed by any of the following: an inquiry, application, purchase or transaction by the business or residential subscriber. However, the inquiry or application must be about the products or services offered by the entity. An EBR will remain intact until the recipient terminates by requesting not to receive future faxes. The Commission did state that in 2007 it would reconsider imposing a time limit for EBR after reviewing a year's worth of complaint data. The rules further require that directions on how to opt-out (without cost) of future faxes must be clear and conspicuous on the first page of unsolicited advertisement facsimiles. Senders must honor opt-out requests within the shortest reasonable time of such request, not to exceed thirty days.

The Junk Fax Prevention Act authorizes the Commission to consider other potential exemptions, specifically for nonprofit organizations and small businesses. The Commission declined to create a specific exemption for such organizations with less strict requirements. The report supports the conclusion that these organizations must use the EBR exemption and its accompanying opt-out requirement for unsolicited facsimile advertisements. However, the commission did stress that messages that do not promote a commercial product or service, including political or religious discourse, are not unsolicited advertisements under the act. Finally, the Commission upheld the Congressional creation of a private right of action set forth in the original TCPA and refused to clarify or limit such a private right of action stating that the job of doing so rests solely with Congress. ■



DOL Issues Ruling On Outside Sales Exemption

Under the Federal Fair Labor Standards Act of 1938, employees must receive at least \$5.15 per hour for each hour worked, and 1½ times their regular rates of pay for each hour over 40 worked in a workweek, unless the employees are exempt. Some states have stricter requirements, and employers generally must comply with whichever law offers the worker more protection. The most likely exemptions available for loan originators are the Outside Sales Exemption and the Administrative Exemption. These exemptions have very different requirements, and apply to very different types of loan originator employees. The U.S. Department of Labor ("DOL") recently issued a ruling regarding the Outside Sales Exemption as it relates to loan originators.

A distinct benefit of the Outside Sales Exemption is that it allows a Loan Officer to be paid solely through commissions. An Outside Sales employee is one: (i) whose primary duty is sales, and (ii) who is customarily and regularly engaged away from the employer's place of business engaged in this primary duty. Working in an employee's own "home office" does not qualify as "outside."

In September 2005, the National Association of Mortgage Brokers ("NAMB") asked the DOL to interpret the Outside Sales Exemption as applied to a hypothetical loan originator employee. On March 31, 2006 the DOL issued a favorable opinion. First, the DOL confirmed that the loan officer met the first requirement of the exemption. A loan officer whose principal duty is the sale of mortgage loan packages fulfills the "sales" requirement of the exemption. Second, the DOL held that the loan originator described in the NAMB request also satisfied the second element

of the exemption, being customarily and regularly engaged away from the employer's place of business. "By meeting clients outside of the employer's place of business in order to initiate sales, such as at the clients' homes, the . . . loan officers fulfill the 'outside' requirement of the outside sales exemption." The DOL also noted that a loan originator would not be disqualified merely because of performing "some" activities at the employer's place of business – so long as any inside sales activities were incidental to and in conjunction with qualifying outside sales activity.

The latest ruling from the DOL should provide comfort to certain mortgage companies. However, the ruling does not apply to everyone. Companies should take a close look at the duties and compensation structures of their loan originators to help ensure compliance. ■

Agencies Request Comments on FCRA Information Furnisher Requirements

On March 22, 2006 the federal financial institution regulatory agencies and the Federal Trade Commission (the "Agencies") published in the Federal Register an advanced notice of proposed rulemaking under the Fair Credit Reporting Act (the "FCRA"). Section 312 of the Fair and Accurate Credit Transactions Act (the "Fact Act") amended the FCRA by adding a requirement that the Agencies adopt guidelines and regulations regarding the furnishing and reinvestigation of information that is submitted to consumer reporting agencies. To assist in the development of proposed guidelines and regulations, the Agencies seek comments from interested parties. The Agencies specifically request that non-depository institutions, including mortgage lenders, submit comments. Comments are due by May 22, 2006.

FACT ACT

Requirements. Pursuant to Section 312 of Fact Act, the Agencies must:

1. Establish and maintain guidelines

for use by furnishers of information regarding the accuracy and integrity of the information relating to consumers that they furnish to consumer reporting agencies. (Once the Agencies adopt the guidelines, they must update the guidelines as often as necessary.)

2. Prescribe regulations requiring furnishers to establish reasonable policies and procedures for implementing such guidelines.
3. Prescribe regulations identifying the circumstances under which a furnisher must reinvestigate a dispute about the accuracy of information contained in a consumer report based on a direct request of a consumer.

Considerations. The Fact Act directs the Agencies to do the following in connection with developing the guidelines:

1. Identify patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies.
2. Review the methods, including the technological means, used to furnish consumer information to consumer reporting agencies.
3. Determine whether furnishers maintain and enforce policies to assure the accuracy and integrity of information furnished to consumer reporting agencies.
4. Examine the policies and processes employed by furnishers to conduct reinvestigations and correct inaccurate consumer information that has been furnished to consumer reporting agencies.

In connection with developing regulations regarding when a furnisher must reinvestigate a dispute concerning the accuracy of information, the Agencies must weigh:

1. The benefits to consumers with the costs on furnishers and the credit reporting system.
2. The impact of any direct dispute requirements on the overall accuracy and integrity of consumer reports.
3. Whether direct contact by the consumer would likely result in the most expeditious resolution of any dispute.
4. The potential impact on the credit

reporting process if credit repair organizations were able to circumvent the exclusion of such organizations from being able to provide notices of dispute on behalf of consumers pursuant to any direct dispute requirements.

REQUESTS FOR COMMENTS

Accuracy and Integrity Guidelines and Regulations. The Agencies seek comment on 10 primary topics with regard to the guidelines and regulations for the accuracy and integrity of the information that is furnished to consumer reporting agencies. The Agencies request that parties describe in detail:

1. The types of errors, omissions, or other problems that may impair the accuracy and integrity of information furnished to consumer reporting agencies.
2. The patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies.
3. Any business, economic, or other reasons for the patterns, practices, and specific forms of activity noted in item 2.
4. The policies and procedures that a furnisher should implement and maintain to identify, prevent, or mitigate those patterns, practices, and specific forms of activity noted in item 2.
5. The methods, including the technological means, used to furnish consumer information to consumer reporting agencies.
6. Whether and to what extent furnishers maintain and enforce policies and procedures to ensure the accuracy and integrity of information furnished to consumer reporting agencies, including a description of any policies and procedures that are maintained and enforced, such as policies and procedures relating to data controls, points of failure, account termination, the re-reporting of deleted consumer information, the reporting of the deferral or suspension of payment obligations in unusual circumstances (such as natural disasters), or the frequency, timing, categories and content of information furnished to consumer reporting agencies.

7. Any methods, including any technological means, that a furnisher should use to ensure the accuracy and integrity of consumer information furnished to a consumer reporting agency.
8. The policies, procedures, and processes used by furnishers to conduct reinvestigations and to correct inaccurate consumer information that has been furnished to consumer reporting agencies.
9. The policies, procedures, and processes that furnishers should use to conduct reinvestigations and to correct inaccurate consumer information that has been furnished to consumer reporting agencies.
10. The policies and procedures of consumer reporting agencies for ensuring the accuracy and integrity of information received from furnishers, including any policies, procedures or other requirements imposed on furnishers, by contract or otherwise, to ensure the accuracy and integrity of information furnished to consumer reporting agencies.

Direct Dispute Regulations. The Agencies seek comment on eight primary topics with regard to the regulations for the reinvestigation of a dispute based on the direct request of a consumer:

1. Identify the circumstances under which a furnisher should (or alternatively, should not) be required to investigate a dispute concerning the accuracy of information furnished to a consumer reporting agency based on a direct request from the consumer, and explain why.
2. Describe any benefits or costs to consumers from having the right to dispute information directly with the furnisher, rather than through a consumer reporting agency, in some or all circumstances.
3. Describe any benefits to furnishers, consumer reporting agencies, or the credit reporting system that may result if furnishers were required to investigate disputes based on direct requests from consumers in some or all circumstances.
4. Describe any costs, including start-up costs, to furnishers and any costs to consumer reporting agencies or the credit reporting system, of requiring a furnisher to investigate a

States Licensing Update

IOWA – Loan Officer Licensing Requirement Reminder

As previously noted in the June 2005 edition of Mortgage Finance Newsletter, as of July 1, 2006, loan officers must be licensed in order to conduct business for licensed Iowa Mortgage Bankers and Brokers. The Iowa Division of Banking has made its Loan Officer License Application available on its website and has advised that, in order to have loan officer licenses issued on or before July 1, 2006, completed applications should be submitted on or before May 15, 2006. Individuals who do not have direct contact with loan applicants, along with loan processors, are statutorily exempt from registering as loan officers.

NEBRASKA – Revised Surety Bond Requirements

As of March 1, 2007, Nebraska Mortgage Banker Licensees will be required to maintain a surety bond with a penal sum of \$100,000, unless a Mortgage Banker Licensee is already required to maintain a supplemental surety bond in a greater amount. Effective on or about July 13, 2006, applicants for a Nebraska Mortgage Banker License must provide a surety bond with a penal sum of \$100,000.

UTAH – Activation of Residential Mortgage License

Effective March 4, 2006, the Utah Division of Real Estate, which regulates Residential Mortgage Lender Licensees, amended existing regulations to revise the procedure for activating inactive licenses. Specifically, in order to activate an existing license that was inactive as of the date of its most recent renewal, such licensee must: (1) apply to activate the license; (2) provide an activation fee; and (3) provide evidence of the successful completion of the number of hours of approved continuing education that otherwise would have been required if the license were active at the time of license renewal. Such approved continuing education must have been completed within twenty-four (24) months prior to the licensee's application to activate the license.

dispute based on a direct request by a consumer in some or all circumstances.

5. Discuss whether it is the current practice of furnishers to investigate disputes about the accuracy of information furnished to a consumer reporting agency based on direct requests of consumers.
6. Describe the impact on the overall accuracy and integrity of consumer reports if furnishers were required, under some or all circumstances, to investigate disputes concerning the accuracy of information furnished to consumer reporting agencies based on the

direct request of the consumer.

7. Describe the circumstances in which direct contact by the consumer with the furnisher would likely result, or alternatively, would likely not result, in the most expeditious resolution of any dispute concerning the accuracy of information furnished to a consumer reporting agency.
8. Describe the potential impact on the credit reporting process if a credit repair organization is able to circumvent the exclusion of such organizations from being able to provide notices of dispute on behalf of consumers pursuant to any direct dispute requirements. ■

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WEINER BRODSKY SIDMAN KIDER PC

1300 Nineteenth Street, N.W., Floor 5, Washington, D.C. 20036-1609

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Emmanuel P. Cruz, Licensing Specialist
Dawn R. Gould, Licensing Specialist
Melissa M. Jewett, Licensing Specialist

(202)628-2000

www.wbsk.com

info@wbsk.com

States Legislation and Rulings

ILLINOIS – Title Insurers in Illinois Are Not in the Business of Supplying Information

In a victory for the title insurance industry, the Illinois Supreme Court has ruled that title insurers are not “in the business of supplying information” and, therefore, cannot be held liable for negligent misrepresentation when they issue title commitments and title insurance policies that contain erroneous information or omissions.

In the case of *First Midwest Bank, N.A. v. Stewart Title Guaranty Co.*, a lender sought to hold Stewart Title Guaranty Company (“Stewart Title”) liable for its failure to disclose a restrictive covenant in title commitments and policies of title insurance issued relative to a loan made to borrowers for their purchase of a residential property they intended to use as both their residence and as a home office for their architectural and interior design business. Only after the borrowers obtained a construction loan and later consolidated their original and construction loans into a wraparound loan did they discover that there was a restrictive covenant prohibiting any portion of the property from being used for business or commercial purposes. The borrowers defaulted on their loan and the lender looked to Stewart Title to recoup its losses that could not be recovered through its foreclosure action against the borrowers.

While the lender initially attempted to hold Stewart Title liable for breach of the title policy, it later abandoned this theory because the payoff of the original loan (via the wraparound loan) had extinguished coverage under the title policy. Moreover, the other potentially liable parties -- the title insurer and issuing agent for the title commitments and insurance policies for the construction and wraparound loans -- had declared bankruptcy. Accordingly,

the lender was proceeding against Stewart Title under a negligent misrepresentation theory.

The key issue in determining whether Stewart Title could be held liable under a negligent misrepresentation theory was whether title insurers are “in the business of supplying information for the guidance of others” when they issue title commitments and title insurance policies. Under Illinois’s “economic loss rule” (also known as the *Moorman* doctrine), purely economic losses generally are recoverable only under a contract theory. One exception to this doctrine is where a plaintiff’s damages are caused by the negligent misrepresentation of a defendant in the business of supplying information for the guidance of others in their business transactions.

The Illinois Supreme Court agreed with the arguments advanced by ATLA in its amicus brief that the lender was trying to equate a title commitment with an abstract of title. According to the Court, the sole purpose of an abstract of title is to provide information regarding the state of title, and the failure of an abstractor to furnish accurate information would be actionable under a negligence theory. By contrast, however, the Court explained that a title commitment is simply a promise to insure a particular state of title and does not contain, nor does it purport to contain, a listing of all defects, liens, and encumbrances affecting title to the property. Therefore, the Court concluded, “a title insurer is not in the business of supplying information when it issues a title commitment or a policy of title insurance and, accordingly, the negligent misrepresentation exception to the *Moorman* doctrine does not apply. The scope of a title insurer’s liability is properly defined by contract.”