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TILA/HOEPA Rules Finalized July 30, 2008



In its effort to better protect consumers and to facilitate what it calls responsible lending, the Federal Reserve Board has released its final rules under the Truth in Lending Act ("TILA") / Home Ownership Equity Protection Act ("HOEPA") for home mortgage loans. The new rules add four key protections for a *newly* defined category of "higher-priced mortgage loans" secured by a consumer's principal dwelling. The rules' definition of "higher-priced mortgage loans" is expected to capture virtually all loans in the sub-prime market, but generally exclude loans in the prime market. The Federal Reserve Board will publish an index of the "average prime offer rate," based on a survey published by Freddie Mac. A loan is considered higher-priced if it is a first-lien mortgage and has an annual percentage rate that is 1.5 percentage points or more above the published index, or 3.5 percentage points if it is a subordinate-lien mortgage.

For loans that meet the definition of this category, the new protections will:

- Prohibit a lender from making a loan without regard to a borrower's ability to repay the loan from income and assets other than the home's value. To comply, a lender must assess repayment ability based on the highest scheduled payment in the first seven years of the loan.
- Require that creditors verify the income and assets that they use to determine repayment ability.
- Prohibit any prepayment penalty if the payment can change in the initial four years. For other higher-priced loans, a prepayment period cannot last more than two years.
- Require creditors to establish escrow accounts for property taxes and homeowner's insurance for all first-lien mortgage loans.

In addition to the rules governing higher-priced loans, the following protections have been adopted for loans secured by a consumer's principal dwelling whether the loan is higher-priced or not:

- Creditors and mortgage brokers are prohibited from coercing a real estate appraiser to misstate a home's value.
- Companies that service mortgage loans are prohibited from engaging in certain practices, such as pyramiding late fees. In addition, servicers are required to credit consumers' loan payments as of the date of receipt and provide payoff statements within a reasonable time of request.
- Creditors must provide a good faith estimate of the loan costs, including a schedule of payments, within 3 days after a consumer applies for any mortgage loan secured by a consumer's principal dwelling. This would include refinances. Creditors are prohibited from charging fees until after the consumer has received the early disclosures, except a reasonable fee for obtaining the consumer's credit history.

The new rules also set forth additional advertising standards, including requiring additional rate information, monthly payments, and other loan features.

These rules are effective **October 1, 2009**. However, lenders are advised to start preparations to comply now. The only exception to the effective date is the escrow requirement which will be phased in during 2010 in order to give lenders time to establish new systems.



FEDERAL WATCH

New Fee Based Triggers under TILA and HOEPA

In August, the Federal Reserve Board published its annual adjustment of the dollar amount of fees that trigger the additional disclosure requirements under the Truth in Lending Act for home mortgage loans that bear rates or fees above a certain amount.

The dollar amount of the fee-based trigger has been adjusted to **\$583 for 2009** based on the annual percentage change reflected in the Consumer Price Index that was in effect on June 1, 2008.

The adjustment is **effective January 1, 2009**. This adjustment does not affect the new rules adopted by the Board in July 2008 for "higher-priced mortgage loans." Coverage of mortgage loans under the July 2008 rules is determined using a different rate-based trigger.

The Home Ownership and Equity Protection Act of 1994 restricts credit terms such as balloon payments and requires additional disclosures when total points and fees payable by the consumer exceed the fee-based trigger (initially set at \$400 and adjusted annually) or 8 percent of the total loan amount, whichever is larger.

PROPOSED RULES ISSUED FOR RISK BASED PRICING NOTICES

In May, the Federal Trade Commission and the Federal Reserve Board published proposed rules to implement the risk-based pricing provisions in Section 311 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), which amends the Fair Credit Reporting Act (FCRA). The proposed rules would require a creditor to provide a consumer with a risk based pricing notice when, based in whole or in part on the consumer's credit report, the creditor offers or provides credit to the consumer on terms less favorable than the terms it offers or provides to other consumers. Risk Based pricing refers to the practice of using a consumer's credit report, which reflects his or her risk of non-payment, in setting or adjusting the price and other terms of credit offered or extended to a particular consumer. Most of the time, creditors offer more favorable terms to consumers with better credit histories. The proposed rules would apply to all creditors that engage in risk based pricing. Under these rules, a risk based notice would be provided to the consumer after the terms of credit have been set, but before the consumer becomes contractually obligated to the credit transaction. The proposed rules include certain exceptions for creditors. One exception would permit creditors to provide all of their consumers with their credit scores and explanatory information that would provide context for the credit score disclosure. Comments are due on or before August 8, 2008.

There are a number of different approaches that creditors may use to identify the consumers to whom they must provide risk based notices and there are certain exceptions to the notice requirement.



STATE WATCH

NORTH CAROLINA

The state has enacted three new bills in an effort to stem the tide of mortgage foreclosures.

HB 2463—Effective January 1, 2009, the North Carolina Mortgage Lending Act is amended, granting the Office of the Commissioner of Banks (“OCOB”) authority to suspend any foreclosure proceeding for 60 days upon evidence that a material violation of law occurred in the origination or servicing of the defaulted loan and that the violation would be sufficient in law or equity to affect the validity or enforceability of the underlying contract or the right to foreclose.

HB 2623—Effective November 1, 2008, the Emergency Program to Reduce Home Foreclosures Act passed that stipulates additional requirements applicable to mortgage servicers enforcing subprime loans. “Subprime loan” is now defined as a loan originated on or after January 1, 2005 but before December 31, 2007, that would meet the definition of a rate spread home loan under N.C.G. S. § 24-1F. The definition of “mortgage servicer” is the same under as under the new mortgage servicer licensing law, however, the requirements under this bill are not limited to those mortgage servicers that must obtain a license. The bill requires that mortgage servicers of subprime loans send a detailed written notice to borrowers at least 45 days prior to the filing of a notice of hearing in a foreclosure proceeding on the borrower’s primary residence.

HB 2188—Effective October 1, 2008, the Mortgage Debt Collection and Servicing Act has been amended to clarify that servicers must provide notice to borrowers regarding incurred fees within 30 days of assessing such fees. Such notification is not required if the fee (1) results from a service that is affirmatively requested by the borrower; (2) is paid by the borrower at the time that such service is provided; and (3) is not charged to the borrower’s loan account. In addition, the amendments clarify that the 10-day notification required in the event that a servicer does not credit a fee received to a borrower’s account does not apply in the case of certain agreed-upon loss litigation, loan modification or forbearance agreements, or in the event of bank-

ruptcy. Also, provisions regarding the threshold for points and fees under the NC High Cost Home Law was amended, effective October 1, 2008. The points and fees subject to the 5% threshold are defined by referencing to all points and fees as opposed to those “payable by the borrower at or before loan closing.” Finally, the bill amends the Rate Spread Home Loan Law, effective October 1, 2008 to state that with regard to rate spread home loan transactions, lenders shall not pay and brokers shall not receive any compensation that changes based on the principal balance of the loan.

Virginia

Effective August 10, 2008, The Virginia State Corporation Commission (“SCC”) adopted new regulations (**10 VA ADC 5-160**) regarding initial and continuing education for mortgage professionals. Under the new regulation, mortgage licensees are responsible for providing initial training and continuing education to their covered employees on at least an annual basis with respect to all laws and regulations applicable to the licensees’ business. Initial education must consist of at least (12) hours of which must relate to applicable Virginia laws and regulations, and (2) must relate to mortgage fraud prevention, including penalties for participating in mortgage fraud. Initial education shall be provided to individuals who were covered employees as of July 1, 2008 on or before July 1, 2009, and to individuals who become covered employees after July 1, 2008 within 90 days of their date of hire. Continuing education must consist of at least (4) hours related to applicable Virginia laws and regulations, and at least one (1) hour relating to mortgage fraud prevention, including penalties for participating in mortgage fraud. Additionally, the regulation prohibits licensees from hiring any individual for a position of employment who may have access to personal identifying information or financial information to any customer, without first obtaining a criminal history record from the Central Criminal Records Exchange that shows the prospective employee has not been convicted in any court of any felony, or any other misdemeanor involving fraud, misrepresentation, or deceit under the laws of any state or the United States.

STATE WATCH CONT'D

MINNESOTA

Effective August 1, 2008, Minnesota companion bills **SB 3214** and **HB 3774** increase the record retention time period from the current 26 months to 60 months. The bills also make minor changes to the definition in Minnesota Statute 58.02

DELAWARE

HB 508 was signed on August 21, 2008 that requires a mortgage originator to apply to the Office of the State Bank Commissioner for a mortgage loan originator license. In addition, the bill establishes initial and continuing education requirements for licensees, and authorizes the Commissioner to adopt regulations to

facilitate participation in the Nationwide Mortgage System. Although **HB 508** is effective January 1, 2009, mortgage loan originators will not be required to obtain a license until the State Bank Commissioner adopts regulations implementing the new licensing laws.

PENNSYLVANIA

Effective July 4, 2008, **HB 2428** prohibits a lender from requiring a borrower, as a condition of obtaining or maintaining a secured loan, to obtain property insurance coverage exceeding the replacement value of buildings and structures situated on the land used to secure the loan. In addition, the bill provides that a borrower on a loan secured by real property may not be required to insure the value of the land. The legislation, though in effect, has not yet been codified.

INDUSTRY UPDATES

NATIONAL MORTGAGE LICENSING SYSTEM ("NMLS")

So far a total of 20 regulatory agencies are anticipated to participate in the NMLS during 2008. The Board Members of State Regulatory Registry, LLC ("SSR") has confirmed that 44 regulatory agencies in 42 states are currently participating in the NMLS or have signed a Statement of Intent to do so. Now the state must pass legislation to implement the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 ("S.A.F.E Act"). The S.A.F.E Act requires that states pass legislation to ensure compliance with certain minimum requirements of the S.A.F.E Act. For those states that are not in a position to implement these requirements, the S.A.F.E Act requires that the Department of Housing and Urban Development develop and implement a system consistent with the S.A.F.E Act. However, a Model Law is currently in draft form and being revised by SSR to minimize the potential that the Department of Housing and Urban Development has to take on the responsibility of developing and implementing the S.A.F.E Act. The sooner the Model Law is finalized, the sooner it can be distributed to the respective legislatures for consideration.

Additional information about the NMLS and specific state implementation plans is available on the NMLS homepage at: <http://www.statereregulatoryregistry.org/NMLS/AM/Template.cfm?Section=Home3>

RESPA PUSH by YEAR END

Although industry groups are fighting the proposed disclosures, Housing Secretary Steve Preston has vowed to implement permanent changes to Real Estate Settlement Procedures Act by year's end. After making major modifications to the originally proposed consumer disclosures based on conversations with the Fed and other government agencies, as well as 12,000 comment letters received, HUD's FINAL proposal is under review by the Office of Management and Budget ("OMB") as of August 21, 2008.

Federal Reserve Board Seeks Comment on Revisions to Reg C (HMDA) for Reporting Price Information

The Board is proposing to amend Regulation C (Home Mortgage Disclosure) to revise the rules for reporting price information on higher-priced loans. The rules would be conformed to the definition of "higher-priced mortgage loan" adopted by the Board under Regulation Z (Truth in Lending) contemporaneously with this proposal. Regulation C currently requires lenders to report the spread between the annual percentage rate (APR) on a loan and the yield on Treasury securities of comparable maturity if the spread meets or exceeds 3.0 percentage points for a first-lien loan (or 5.0 percentage points for a subordinate-lien loan). Under the proposal, a lender would report the spread between the loan's APR and a survey-based estimate of rates currently offered on prime mortgage loans of a comparable type if the spread meets or exceeds 1.5 percentage points for a first-lien loan (or 3.5 percentage points for a subordinate-lien loan).



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