COMPLIANCE PIPELINE

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Potential TRID Concerns

A bank should be cognizant of the changes from the previous RESPA era definition of a covered transaction to the current definition under Truth in Lending for the purposes of determining which transactions are covered by the TILA-RESPA Integrated Disclosure rule. The TIL definition notes, "closed-end consumer credit transaction(s) secured by real property, other than a reverse mortgage subject to § 1026.33" are covered and would therefore require compliance with various rules related to the Loan Estimate and Closing Disclosure under TRID. The previous RESPA exemptions of temporary loans and loans secured by 25 plus acres of land have been removed and no longer apply under the TRID rules. To be covered by this part, the application must be consumer (purpose driven) closed-end credit, and secured by real property (collateral driven).

The TRID rules will not apply to transactions that are primarily business, commercial, or agricultural in nature.

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Changes to Rural or Underserved Definition

On September 21st 2015, the CFPB issued a final rule revising the definitions of "small creditor" and "rural area", which may provide some relief for community banks. Effective January 1st, 2016, the new definitions for these key terms may impact a financial institution's responsibilities for escrow requirements for higher priced mortgage loans and the ability to make certain covered loans with balloon payments under ability to repay/qualified mortgage and high cost lending requirements. Below is a quick overview of the key changes and impacts to financial institutions under this revised rule.

Under Regulation Z, small creditor portfolio qualified mortgages are exempt from the appendix Q underwriting requirements, but must still determine a borrower's ability to repay considering the required criteria, under the Bank's self-directed underwriting standards. Certain small creditors are also permitted to make balloon loan-qualified mortgages (and certain high cost mortgages with balloon payments), provided the institution primarily serves rural or underserved areas, and the balloon does not take place within 5 years of the first payment. The same rules for determining a small creditor that primarily lends in rural and underserved areas is also used to determine if an institution qualifies for an exemption from the higher priced mortgage loan mandatory escrow requirements. However, this final rule does not revise the definition of "rural county" in Regulation Z's higher priced mortgage loan appraisal provisions or affect the exemption from the requirement to obtain a second appraisal for certain HPMLs.

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MLA Finalized October 1, 2015 (October 3, 2016 Mandatory Compliance)

The Military Lending Act (MLA) was finalized effective October 1, 2015 (October 3, 2016 mandatory compliance). The DOD has used its rule making authority under the Military Lending Act to expand the protections afforded to our service members. The Military lending Act initially provided significant protections in three loan categories to active military members and their families:

- Closed-end payday loans for no more than $2,000 and with a term of 91 days or less;
- Closed-end auto title loans with a term of 181 days or less; and
- Closed-end tax refund anticipation loans.

The new final rule will expand coverage of the protections of the Military Lending Act to all forms of payday loans, vehicle title loans, refund anticipation loans, deposit advance loans, installment loans, unsecured open-end lines of credit, and credit cards. The implementing regulation provides several significant protections extended to active duty service members and their families, including:

- A 36 percent Annual Percentage Rate limit. This cap, which is referred to as the Military Annual Percentage Rate or MAPR, covers all interest and fees associated with the loan. This limit now includes charges for most ancillary "add-on" products such as credit default insurance and debt suspension plans.
- The MLA prohibits creditors from requiring service members to: submit to mandatory arbitration and onerous legal notice requirements; waive their rights under the Service Members' Civil Relief Act; provide a payroll allotment as a condition of obtaining credit (other than from relief societies); refinance a payday loan; or secure credit using a post-dated check, access to a bank account (other than at an interest rate of less than 36 percent MAPR), or a car title (other than with a bank, savings association or credit union).
- The changes to definitions of credit in the final rule bring any closed or open-end loan within the scope of the regulation, except for loans secured by real estate or a purchase-money loan, including a loan to finance the purchase of a vehicle.
- New safe harbor requirements will require a creditor to legally conclusively determine whether a consumer is a covered borrower by using information obtained either: (i) Directly or indirectly from the MLA Database or (ii) in a consumer report from a nationwide consumer reporting agency or a reseller who provides such a consumer report. If the creditor uses one of these two methods (or both, as the creditor may elect), the creditor's determination would be conclusive with respect to that transaction or account involving consumer credit, so long as the creditor maintains a record of the information so obtained.

Mandatory compliance for the final rule is set for October 3, 2016 with delayed implementation dates for the following:

- Providing a temporary exemption for credit extended in a credit card account under an open-end (not home-secured) consumer credit plan. The exemption for a credit card account expires, at a minimum, in October 2017, and the rule permits the exemption to be extended for up to one year;
- Permitting a creditor, until October 3, 2016, to continue to use the method described in the existing rule for conducting a covered-borrower check, which involves the use of a covered borrower identification statement, as a safe harbor for compliance.

After October 3, 2016, a creditor seeking a safe harbor for compliance with the rule may elect to: use either of the new methods for conducting a covered-borrower check (and keep a record accordingly) set forth in § 232.5(b).

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From an audit stand point, if a loan is clearly business purpose and the use of the funds are clearly business purpose based upon the guidance in Regulation Z and its commentary, generally the customer's statement of purpose is sufficient along with other standard documentation that would normally be obtained for that type of credit (e.g. for example a loan to acquire a rental property where the Bank has taken the property and assignment of rents, has a lease on file, etc.). In instances where the use of the funds may be personal even though the collateral is used for business, the Bank would be required to comply with TRID and other consumer rules as applicable.

In instances where there is a multiple purpose loan (such as proceeds being used partly for business or agriculture and partly for consumer purposes), the bank may need to perform additional due diligence and obtain documentation to support any decision to treat the transaction as a business purpose or agricultural loan. As an alternative, the bank is permitted to treat multiple purpose loans as consumer and comply with applicable regulations instead of conducting the additional due diligence and documentation that may be necessary to support an exemption.

In addition, there has been a change to the general exemption under Regulation Z for an extension of credit to other than a natural person, including credit to government agencies or instrumentalities. Credit extended for consumer purposes to certain trusts is considered to be credit extended to a natural person rather than credit extended to an organization. In some instances, a creditor may extend credit for consumer purposes to a trust that a consumer has created for tax or estate planning purposes (or both). Regardless of the capacity or capacities in which the loan documents are executed, assuming the transaction is primarily for personal, family, or household purposes, the transaction is subject to the regulation because in substance (if not form) consumer credit is being extended. In addition, in some jurisdictions, a financial institution financing a residential real estate transaction for an individual uses a land trust mechanism. Assuming the transactions are primarily for personal, family, or household purposes, these transactions are subject to the regulation because in substance (if not form) consumer credit is being extended.

While the coverage criteria is fairly straight forward, consider these TRID coverage scenarios that may be somewhat different from what a bank was accustomed to under the previous rules.

- A local hardware store owner requests to consolidate some personal debt and offers a second lien on his hardware store
- An applicant requests a loan to purchase a classic car. The LTV on the car is not quite low enough for bank policy so she also offers a vacant lot as additional collateral
- An outdoorsman submitted an application to purchase 250 acres of land for general use and hunting
- A farmer is financing his daughter's wedding and has offered 100 acres of land containing barns, silos and a herd of cows
- An applicant needs to finance her son's college tuition. She has proposed an auto as collateral. As an abundance of caution the lender request to cross collateralize the auto loan with a recent commercial loan which has a warehouse as collateral
- A borrower applies for a 12 month bridge loan to purchase his or her primary residence
- A borrower applies for a 12 month construction loan to build a vacation home
- A creditor extends credit to finance the acquisition of a consumer's dwelling that is held in a trust established for tax or estate planning purposes and prepares the note, security instrument, and similar loan documents for execution by a trustee, rather than the beneficiaries of the trust

Assuming these credit requests where closed-end applications and none were reverse mortgages, they would require TRID disclosures as they are consumer purpose loans secured by real estate. This may be a training point to consider revisiting with lending staff, including commercial lenders. All lenders, even those that will not generally originate TRID covered loans, should be familiar with the coverage requirements as to not inadvertently originate TRID covered loans without proper disclosures.

Changes to Rural or Underserved Definition (Continued from Page 1)

The CFPB has revised the definition of small creditor, expanding the status to include creditors that originate no more than 2,000 first lien covered transactions (including covered transactions by any affiliate) during the preceding calendar year. This revised transaction limit has increased from 500 covered loans under the previous rule. Transactions held in the institution's (including covered transactions by any affiliate) portfolio are excluded from the coverage limit. In counting toward the coverage limit, an institution need only count first liens that were sold, assigned or otherwise transferred, or were subject to a commitment to be acquired at the time of consummation. The final rule also establishes a grace period from calendar year to calendar year to allow a creditor that exceeded the origination limit in the preceding calendar year to operate, in certain circumstances, as a small creditor with respect to transactions with applications received before April 1 of the current calendar year.

In addition to the quantity thresholds used to determine if an institution qualifies for small creditor status, is an asset size requirement. Under the new definition, the assets of the institution, along with the assets of any affiliate that normally extends first lien covered transactions, must in aggregate fall below the asset size threshold. As of December 31, 2014 the assets of the institution and its affiliate(s) must be below $2,060,000,000 to retain small creditor status. This asset size threshold will continue to be adjusted annually. The final rule also adds a grace period to the annual asset limit, to allow a creditor that exceeded the asset limit in the preceding calendar year to operate, in certain circumstances, as a small creditor with respect to transactions with applications received before April 1 of the current calendar year.

The new rules, in part, may change which financial institutions must escrow for higher priced mortgage loans and who are eligible to make balloon loan qualified mortgages, by modifying the requirements for a bank to determine if they primarily serve rural or underserved areas. The final rule makes two changes to the rural area requirements. First, the final rule reduces the time period for determining if an institution operates predominately in rural or underserved areas. A bank is no longer required to look back over the three previous years to determine if 50% of their covered loans served rural and underserved areas. The final rule now only requires a one year lookback period. For example, starting in 2016, an institution need only look back through their lending history in 2015 to determine if 50% of their first lien, covered transactions were in rural or underserved areas. As with the origination and asset limits for small creditor status, the final rule adds a grace period to allow a creditor that fails to meet this threshold in the preceding calendar year, to continue operating, in certain circumstances, as if it had met this threshold with respect to transactions with applications received before April 1 of the current calendar year. Moreover, the final rule ensures that creditors who established escrow accounts solely to comply with the current rule will be eligible for the exemption if they meet the expanded definitions of small creditors operating predominantly in rural or underserved areas under the final rule.

Another challenge with the new rules is that the CFPB has also changed the definition of "rural area". Under the new definition, a rural area is either: (a) a county that meets the current definition of a rural county; or (b) a census block that is not in an urban area as defined by the U.S. Census Bureau. The final rule provides a safe harbor where an institution may demonstrate that a property is located in a rural or underserved area by relying on the automated address lookup device located on the

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Census Bureau website, or a new automated tool that can be found on the CFPB website. However, the census bureau website doesn't provide an efficient method of determining which tracts are "non-urban" areas. The CFPB has indicated it will provide an address lookup tool on their website, which financial institutions can use to determine if their loan is located in a "non-urban" area but has not disclosed when it will be available for use.

The final rule also extends the current two-year transition period, which allows certain small creditors to make balloon-payment qualified mortgages and balloon-payment high cost mortgages, regardless of whether they operate predominantly in rural or underserved areas. The transition period will include covered transactions for which the application was received before April 1, 2016, rather than covered transactions consummated on or before January 10, 2016.

Additional information on this final rule and the available tools can be found at the following CFPB webpage:

http://www.consumerfinance.gov/regulatory-implementation/title-xiv/

Georgia State Law & Elder Abuse

The *Compliance Pipeline* has contained several articles over the last couple of years addressing elder abuse including FinCEN's guidance for filing SARs relative to elder abuse (http://www.shpco.net/pdf/newsletters/complyq1_11.pdf) and the FFIEC's guidance on privacy expectations and elder abuse (http://shpco.net/pdf/newsletters/complyq3_13.pdf.)

The O.C.G.A. 16-5-102 notes that it is a crime to exploit, abuse or neglect an elderly person or disabled adult and this crime is punishable by 1-20 years in prison and/or a $50,000.00 fine. Abuse is noted as physical abuse; mental, emotional, or verbal abuse; sexual abuse; neglect; self-neglect; and financial exploitation. By definition, exploitation means the illegal or improper use of a disabled adult or elder person or that person's resources through undue influence, coercion, harassment, duress, deception, false representation, false pretense, or other similar means for one's own or another's profit or advantage.

Financial institutions are mandatory reporters under O.C.G.A. 30-5-4, which notes that any employee of a financial institution having reasonable cause to believe that a disabled adult or elder person has been exploited shall report or cause reports to be made in accordance with the provisions of this Code section. The same section also provides a safe harbor from civil and criminal liability unless the financial institution knew or should have known that the employee acted in bad faith or with a malicious purpose and failed to take reasonable and available measures to prevent such employee from acting in bad faith or with a malicious purpose. Failure for a mandated reporter to report abuse, neglect and/or exploitation of a disabled adult or elder person is punishable by a criminal misdemeanor.

The Georgia Department of Adult Protective Services has methods for reporting on its website at http://aging.dhs.georgia.gov/adult-protective-services which include online, fax and telephone. Adult Protective Services encourages mandatory reporters to call local law enforcement if the assumed victim appears to be in danger or otherwise needs immediate assistance.

Financial institutions should have policies in place to address elder abuse and exploitation. This policy could be integrated into or separate from the Bank's BSA policy. However, the BSA policy should at least address the FinCEN requirements for filing SARs relative to elder abuse and red flags for this type of activity. Banks should consider designating an employee responsible for handling elder abuse issues and state reporting. Further, policies should address the state law requirements, definitions and reporting processes. Employee training should be conducted in relation to warning signs for elder abuse to ensure potential abuse is reported to a designated bank officer for potential referral to law enforcement.

HMDA Final Rule

On October 19, 2015 the CFPB issued a final rule amending Regulation C, better known as the Home Mortgage Disclosure Act (HMDA) regulation. The changes will increase the information fields required to be collected, recorded, and submitted, but some small lenders with low loan volume may now be exempt from HMDA reporting.

As of January 1, 2018, an institution will be HMDA reportable if it originated at least 25 covered closed-end mortgage loans in each of the two preceding calendar years or at least 100 covered open-end lines of credit in each of the two preceding calendar years, and it meets current Regulation C asset-size, location, federally related, and loan activity tests. The CFPB estimates that the new threshold will reduce the overall number of institutions required to report HMDA data by an estimated 22 percent. A bank will be required to report open-end credit if they meet the threshold of 100 covered open-end lines of credit in each of the two preceding calendar years. The rules for excluding low volume banks under the new coverage rules will go into effect on January 1, 2017 and cease collecting data at that time.

A couple of other noteworthy changes include that loans primarily for agricultural purposes will be excluded and non-dwelling secured home improvement loans will no longer need to be reported. There are minimal changes to commercial loan reporting and the new rule does not categorically exclude all business or commercial purpose loans and lines of credit from coverage.

Notable information fields added to the HMDA LAR include property value, term of the loan, and the duration of any teaser or introductory rate. Also, institutions will be required to provide more information about mortgage loan underwriting and pricing, such as an applicant's debt-to-income ratio, the interest rate of the loan, and the discount points charged for the loan.

Steve H. Powell and Company will have a detailed analysis of the new reporting fields and changes in HMDA compliance in the coming months. Covered institutions will not be required to start collecting under the new rules until January 1, 2018.

Fair Credit Reporting Act (FCRA) Compliance Reminders

Under the FCRA, a notice of negative information must be sent to the respective customer either before the negative information is reported to a consumer reporting agency or within thirty days of reporting the information. This is typically accomplished by providing a negative information notice at loan closing or by providing the information on a past due notice. Minor adjustments to the model language are permitted. The notice is required to be sent to borrowers, co-signers, and guarantors in the event that derogatory information may be reported on the consumer signatory party. An institution should ensure that any individuals that could possibly be reported to the credit reporting agency are provided a notice of negative information sharing before the information is shared.

The FCRA also requires financial institutions to provide the name of the person or entity that provided the credit score in certain instances. Some banks obtain credit reports directly from one or a combination of the three major credit reporting agencies (CRAs) such as Equifax, Experian, or TransUnion. In other instances banks contract with a third party "reseller" that obtains the information from the CRA (e.g. Kroll Factual Data or other service providers) and might provide other ancillary services such as identity verification, OFAC screens or risk scoring. Confusion can arise when deciding whose information (either the third party reseller or Equifax for example) to include on denial notices, exception risk based pricing notices or the notice to home loan applicant. If your bank does not utilize a reseller the answer is simple, it's the major credit reporting agency or agencies that the bank utilizes. The definitions of the terms "credit reporting agency" and "reseller" make it clear that resellers are in fact CRAs; therefore, the resellers information should be listed on the applicable FCRA notices. For example, when Kroll Factual Data is used and an adverse action notice is required, Kroll Factual Data will be listed as the outside source from where the information was obtained while the entity providing the score such as Equifax, Experian, or Transunion will be listed as the CRA which provided the score and related information.

Marital Status and ECOA

The Supreme Court has changed the law of the land in relation to persons eligible to be married. Marriage was largely a states right issue until the passing of the Defense of Marriage Act under the Clinton Administration which specifically defined marriage to include only one man and one woman. The Supreme Court has ruled the Act unconstitutional. The court decided in Obergefell v. Hodges and three related cases that the Constitution guarantees a right to same-sex marriage.

What does this mean for your financial institution?

The supreme court ruling doesn't change prohibited basis groups defined in the Equal Credit Opportunity Act and the Fair Housing Act. To date, sexual orientation is not defined as a prohibited discrimination factor, however, marital status is. Financial institutions will now have to apply the same marital status protections afforded in ECOA to same sex marriages in states that previously didn't recognize same sex couples marriage licenses.

What protections are offered in ECOA in relation to marital status?

A creditor is required to evaluate married and unmarried applicants by the same standards; and in evaluating joint applicants, a creditor shall not treat applicants differently based on the existence, absence, or likelihood of a marital relationship between the parties.

A creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested. A creditor shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

A bank should ensure that its lending and compliance programs ensure compliance with the marital status rules and monitor closely for any additional regulatory guidance that may be issued.

Email us at compliancenewsletter@shpco.net with any questions or comments.

Visit our website at www.shpco.net to register your email for the Compliance Pipeline!