CUNA REGULATORY ADVOCACY

CUNA REGULATORY COMMENT CALL

January 18, 2013

CONSUMER FINANCIAL PROTECTION BUREAU (CFPB)

Proposed Amendments to the Ability to Repay Standards Under the Truth in Lending Act, (Regulation Z)

Summary

- In conjunction with the final rule the CFPB published January 10, 2013 to require creditors to make a reasonable, good faith determination of a consumer's ability to repay a closed-end credit extension secured by a dwelling (referred to as home mortgage credit in this summary), the CFPB has proposed to amend Regulation Z, Truth in Lending Act (TILA). A copy of the proposal is here.
- Comments on the substantive changes are due to the CFPB February 25, 2013. Please share your comments with CUNA's Deputy General Counsel Mary Dunn by February 15th.[1]

1. Exemptions

- The final rule includes some legal protections for challenges from borrowers against creditors for noncompliance with the rule when lenders meet requirements for "qualified mortgages."
- The proposal would amend the final ability-to-repay rule to provide exemptions for groups of creditors[2] and types of home mortgage credit listed below. Home mortgage credit covered by the proposed exemptions would nonetheless be treated as "qualified."
- The proposed exemptions for certain creditors or types of home mortgage credit would include:

[1] Comments should be identified by Docket No. CFPB-2013-0002 or RIN 3170-AA34 and may be submitted via: *Electronic Delivery*: http://www.regulations.gov. Follow the instructions for submitting comments. *Mail/Hand Delivery/Courier*: Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street, NW, Washington, DC 20552.

[2] These creditors would be exempt from most of the minimum standards for transactions covered by the rule but would not escape record retention requirements, requirements for high-cost mortgages, or provisions regarding prepayment penalties (§§ 1026.25, 1026.32, and 1043(g), respectively.)

- Nonprofit creditors organized under 501(c)(3) of the IRS code; (as proposed, this would not include credit unions). Under this exemption, a borrower's income could not exceed the qualifying limit for moderate income families, set by HUD for individual communities, under section 8 of the U.S. Housing Act of 1937.
  - During the calendar year before the consumer's application is received, the creditor may not have extended mortgage credit more than 100 times and only to consumers with income that did not exceed the HUD qualifying limit.
  - The creditor would have to make a determination, in accordance with its written procedures, that the consumer has a reasonable ability to repay the loan.
- Creditors designated as a Community Development Financial Institution (which does include credit unions that have been certified by the CDFI Fund, within the U.S. Treasury Department), a Provider of Down Payment Assistance or a Community Housing Development Organization.
- Home mortgage credit provided pursuant to an Emergency Economic Stabilization Act (EESA) program, such as extensions of credit made pursuant to a State Hardest Hit Fund (HHF) program.
- Home mortgage credit refinancing that is eligible to be insured, guaranteed, or made pursuant to a program administered by the Federal Housing Administration, U.S. Department of Veterans Affairs, or the U.S. Department of Agriculture. The proposed exemption is available only until the Federal agency administering the program under which the extension of credit is eligible to be insured, guaranteed, or made prescribes rules pursuant to section 129C(a)(5) or 129C(b)(3)(B)(ii) of TILA.
- Home mortgage credit refinancing that is eligible to be purchased or guaranteed by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the GSEs) from the ability-to-repay requirements. This proposed exemption only applies if:
  - The refinancing is made pursuant to an eligible targeted refinancing program, as defined under regulations promulgated by the Federal Housing Finance Agency;
  - The GSEs are operating under the conservatorship or receivership of the Federal Housing Finance Agency on the date the refinancing is consummated;
  - The existing obligation satisfied and replaced by the refinancing is owned by Fannie Mae or Freddie Mac;
  - The existing obligation satisfied and replaced by the refinancing was not consummated on or after January 10, 2014; and
  - The refinancing is not consummated on or after January 10, 2021.

2. New Category of QMs

- In addition to the exemptions listed above, the agency is proposing a new category of “qualified mortgages.”

- The new ability to repay rule provides three categories of qualified mortgages. Whether a mortgage is a “qualified mortgage” is significant under the new rule because such loans are entitled to either a conclusive or rebuttable presumption of compliance with the requirements that a reasonable, good faith determination of a consumer’s ability to repay has been made before the loans was originated.
- The proposed new category would include certain loans originated by small creditors that:
  - Have total assets of $2 billion or less at the end of the previous calendar year; and
  - Together with all affiliates, originated 500 or fewer first-lien covered transactions during the previous calendar year.
  - The proposed new category would include only loans held in portfolio by these creditors and if a creditor agreed prior to consummation to sell a loan, that loan would not be a qualified mortgage under the proposed definition. A loan in this proposed new category would lose its status as a qualified mortgage if it is held in portfolio for less than three years after consummation, with certain exceptions. However, a forward commitment to another person that also meets the QM requirements.
- The loan also would have to conform to all of the requirements under the general definition of a qualified mortgage except the 43 percent limit on monthly debt-to-income ratio. In other words, the loan could not have:
  - Negative-amortization, interest-only, or balloon-payment features;
  - A term longer than 30 years; and
  - Points and fees greater than 3 percent of the total loan amount (or, for smaller loans, the amount specified in the regulation).
  - Also, the creditor would have to:
    - Consider and verify the consumer’s income and assets; and
    - Base the underwriting on a monthly payment calculated using the maximum interest rate that may apply during the first five years of the loan and that is fully amortizing.
  - The creditor also would have to consider the consumer’s debt-to-income ratio or residual income and verify the underlying information. As a result, a creditor would not have to use the instructions in appendix Q to the new final rule to calculate debt-to-income ratio, and a loan with a consumer debt-to-income ratio higher than43 percent could be a qualified mortgage if all other criteria are met.
  - Under the new rules, first-lien qualified mortgages with an annual percentage rate less than or equal to the average prime offer rate plus 1.5 percentage points and subordinate-lien qualified mortgages with an annual percentage rate less than or equal to the average prime offer rate plus 3.5 percentage points are within the safe harbor. A qualified mortgage with an annual percentage rate above those thresholds is presumed to comply with the ability-to-repay rules, but a consumer could rebut that presumption.
  - The CFPB is proposing that a qualified mortgage in the proposed new category would be conclusively presumed to comply if the annual

percentage rate is equal to or less than the average prime offer rate plus 3.5 percentage points for both first-lien and subordinate-lien loans.

3. Mortgage Loan Originator Compensation

- Under a separate CFPB rule regarding requirements for high-cost mortgages, (12 CFP 1026. 32, that implement Dodd-Frank Act requirements), creditors must treat compensation paid directly or indirectly by a consumer or creditor to a mortgage loan originator as up-front charges paid by the consumer and included in the other elements of points and fees. However, the CFPB is concerned that it did not have sufficient information to support this interpretation.
- The CFPB is seeking comments on two alternatives regarding the treatment of loan compensation in relation to the calculation of points and fees.
- One alternative would explicitly preclude offsetting, while the other would allow creditors to offset the amount of loan originator compensation by the amount of finance charges paid by the consumer. The Bureau is also seeking comment on whether other alternatives might be appropriate.

Questions to Consider

1. The proposed exemptions may have limited impact on credit unions. The proposed exemptions that seem to be the most relevant are the ones for creditors designated as CDFIs and for refinancings that are eligible to be sold to FNMA or FHLMC (this exemption would also be available until 1/10/2021.

    a) In light of that, should the exemption for nonprofit institutions be expanded to include credit unions?

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    b) Should any of the other exemptions be expanded? If so, how?

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    c) Should the exemption for refinancings sold to the GSEs terminate in 2012?

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    d) Should any termination date be included for this exemption?

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2. The CFPB is proposing to include a new category of QMs for small issuers.

   a) Do you support the agency's definition of small creditor?

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   (That would be one with total assets of $2 billion or less and 500 or fewer first lien mortgages that it originated during the previous year.)

   b) If not, how should small creditors be defined for purposes of the new QM category?

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   c) The QM would only include loans held in portfolio; do you agree with this requirement?

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   d) The new category of QMs would not have to meet the 43% limit on a borrower's debit-to-income ratio, Do you agree that points and fees should be limited to 3% of the total loan amount for these QMs?

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   e) Such QMs could also have an annual percentage rate that is no more than the average prime offer rate plus 3.5 percentage points for first-line and subordinate lien loans. Do you support his approach?

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3. The CFPB is proposing two alternatives for the treatment of mortgage loan originator compensation. One is hat creditors could offset the amount of loan originator compensation by the amount of finance charges paid by the consumer. Under the other alternative, no offsetting would be permitted.

a) Which approach do you think is preferable?

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4. Are there other issues or concerns you would like to raise about the proposal?

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