Mortgage Lending Compliance Issues – Session 1

Higher Priced and High-Cost Mortgages

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Today's Topics

- Learn the definitions of Higher Priced and High Cost Mortgages and how to test to determine if you are making such loans
- Includes the steps that must be taken to comply with the requirements when a lender chooses to make such loans
- We will also review the exemptions that are available and counseling requirements that must be undertaken when making these loans

Mortgage Lending Compliance Issues: Higher Priced and High Cost Mortgages

Rulemaking Background

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CFPB January Rulemaking

- In January 2013, the Consumer Financial Protection Bureau (CFPB) issued 8 distinct final rules that apply to consumer mortgage transactions
- The rules amend several existing regulations, including Regulations Z, X and B. Most are effective in January of 2014 though the escrow rule went into effect in June 2013.

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CFPB January Rulemaking

- The rules implement the:

1. High-Cost Mortgage and Homeownership Counseling Amendments to TILA
2. Homeownership Counseling Amendments to RESPA
3. Escrow Requirements under TILA
4. Ability to Repay and Qualified Mortgage Standards under TILA

CFPB January Rulemaking

5. Mortgage Servicing Provisions under RESPA & TILA
6. Appraisal Requirements for Higher-Priced Mortgage Loans under TILA
7. Appraisal Requirements under ECOA
8. Loan Originator Compensation Requirements under TILA

CFPB January Rulemaking

- The scope of each of the rules varies considerably. For example, some rules apply to only closed end credit transactions.
- Others apply to both closed end and open end transactions
- Some apply only to transactions secured by the consumer's principal residence, while others apply to any consumer dwelling
- Moreover, some apply only to dwellings secured by real property, while others also apply to personal property used as a dwelling

CFPB January Rulemaking

- Since the release of the initial Final Rules in January, the CFPB has issued additional clarifications and supplemental guidance
- Several rule amendments have been issued between May 16, 2013 and September 13, 2013
- These amendments have made additional changes to ECOA, RESPA and TILA and are primarily set to go into effect in January 2014

Mortgage Lending Compliance Issues: Higher Priced and High Cost Mortgages

HPML & HCML

Definitions

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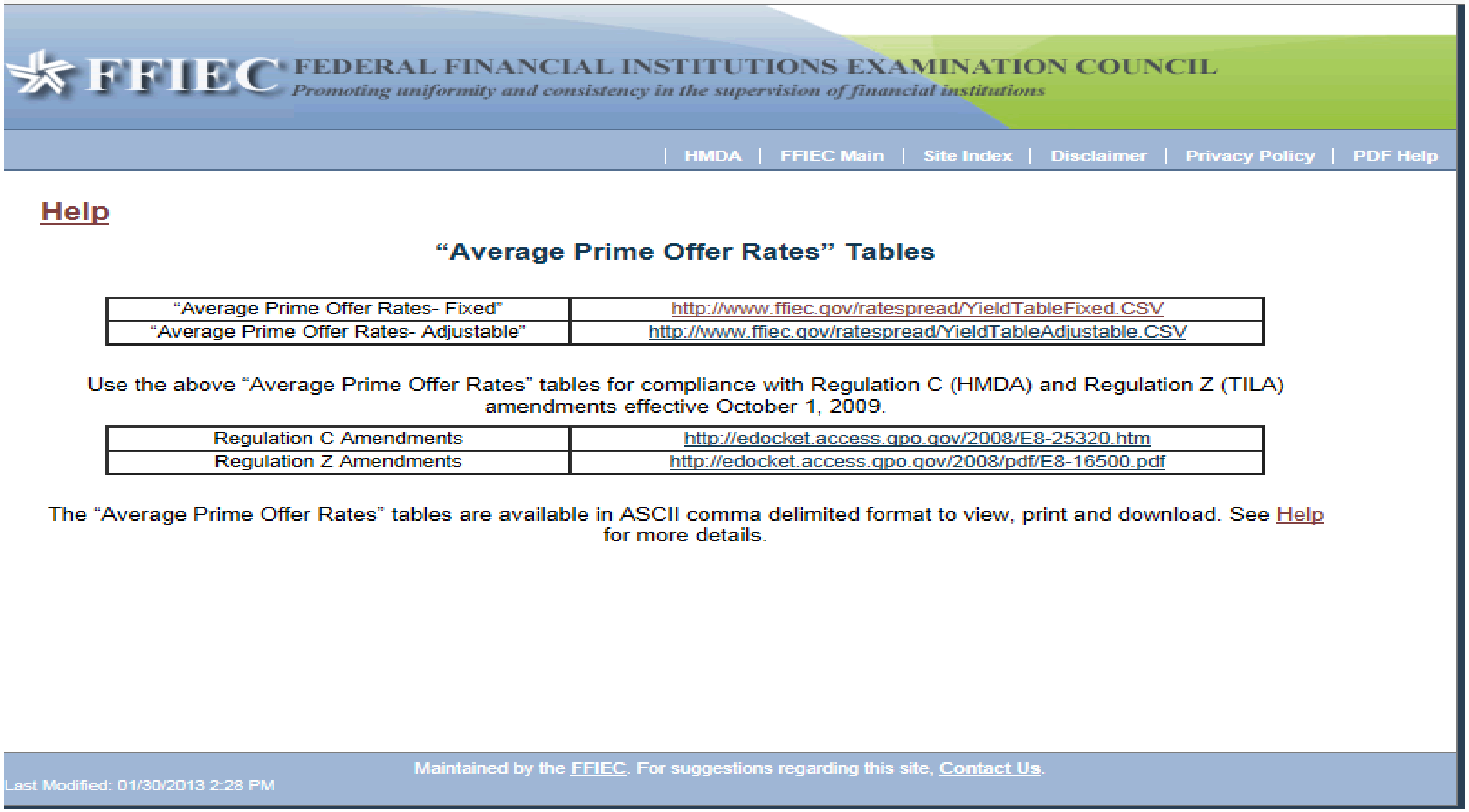
Understanding HPML & HCML Definitions

- Some of the CFPB rulemaking activities from January 2013 generally involve specific requirements related to loans that are deemed as "higher priced mortgage loans" (HPMLs) and/or "high cost mortgage loans" (HCMLs)
- These are two categories of loans that include interest rates that exceed the standard average prime offer rate (APOR) by a defined margin

Understanding HPML & HCML Definitions

- The APOR is essentially an APR that is derived from the interest rates and fees charged in connection with low-risk mortgage transactions available from a representative sample of creditors
- The APOR for fixed and variable rate transactions is published separately by the FFIEC in an Excel spreadsheet that is updated weekly. Rates vary based on the term of the loan.

Understanding HPML & HCML Definitions



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"Average Prime Offer Rates" Tables

"Average Prime Offer Rates- Fixed"	http://www.ffiec.gov/ratespread/YieldTableFixed.CSV
"Average Prime Offer Rates- Adjustable"	http://www.ffiec.gov/ratespread/YieldTableAdjustable.CSV

Use the above "Average Prime Offer Rates" tables for compliance with Regulation C (HMDA) and Regulation Z (TILA) amendments effective October 1, 2009.

Regulation C Amendments	http://edocket.access.gpo.gov/2008/E8-25320.htm
Regulation Z Amendments	http://edocket.access.gpo.gov/2008/pdf/E8-16500.pdf

The "Average Prime Offer Rates" tables are available in ASCII comma delimited format to view, print and download. See Help for more details.

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http://www.ffiec.gov/ratespread/aportables.htm

Understanding HPML & HCML Definitions

- The APOR is calculated using FFIEC mortgage interest rate data. The APOR threshold is based on the term of the loan and the type of amortization. Rates are adjusted on a weekly basis.
- The 30-year fixed rate APOR on 9/16/13 was set at 4.64%
- The 15-year fixed rate APOR on 9/16/13 was set at 3.69%
- The 10-year fixed rate APOR on 9/16/13 was set at 4.52%
- The 5-year fixed rate APOR on 9/16/13 was set at 3.42%

Understanding HPML & HCML Definitions

- **HPMLs are defined as closed-end consumer credit transactions secured by the consumer's principal dwelling.**
- **Loans with an annual percentage rate that exceeds the average prime offer rate by the following margins are deemed HPMLs:**

Understanding HPML & HCML Definitions

- (i) 1.5% or more for loans secured by a first lien that are within the Fannie/Freddie conforming loan limits
- (ii) 2.5% or more for jumbo loans secured by a first lien
- (iii) 3.5% or more for loans secured by a subordinate lien

Understanding HPML & HCML Definitions

- HCMLs are really old Section 32 HOEPA loans. APOR margins for these types of loans are:
- 6.5 percentage points for a first-lien transaction, other than as described in the second bullet below;
- 8.5 percentage points for a first-lien transaction if the dwelling is personal property and the loan amount is less than $50,000 (this is intended to apply, among other things, to loans secured by manufactured homes that constitute personal property) ; or
- 8.5 percentage points for a subordinate-lien transaction;

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Understanding HPML & HCML Definitions

- HCMLs also include a Points and Fees Test
- The loan is an HCML if total "points and fees" will exceed:
- 5 percent of the total loan amount for a transaction with a loan amount of $20,000 or more (the $20,000 figure is adjusted annually for inflation); or
- The lesser of 8 percent of the total loan amount or $1,000 for a transaction with a loan amount of less than $20,000 (the $1,000 and $20,000 figures are adjusted annually for inflation);

Understanding HPML & HCML Definitions

- Finally HCMLs include a Prepayment Penalty Test
- Under the terms of the loan contract or open-end credit agreement, the creditor cannot charge a prepayment penalty more than 36 months after consummation or account opening, or prepayment penalties that can exceed, in total, more than 2 percent of the amount prepaid

Mortgage Lending Compliance Issues: Higher Priced and High Cost Mortgages

HPML Escrow Rule Requirements

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HPML Escrow Rule

- On January 10, 2013, the CFPB issued its final rule on escrow account requirements for first-lien higher-priced mortgage loans
- The Rule amends existing escrow requirements and exemptions for such loans by, among other things, extending the required period of time during which escrow accounts must be maintained from one to five years, and
- Creating a new exemption for small creditors that operate predominantly in rural or underserved areas. The Rule, which becomes effective June 1, 2013 and applies to loans for which creditors receive applications on or after this date.

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HPML Escrow Rule

- The Rule has three primary components:

1. It amends existing requirements for maintaining escrow accounts in connection with first-lien HPMLs, and extends the required period of time during which such accounts must be maintained from one to five years;
2. It creates a new exemption from the escrow account requirement for small creditors that operate predominantly in rural or underserved areas; and
3. It expands an existing exemption from escrowing of insurance premiums for loans secured by condominiums to include other types of property covered by a master insurance policy.

HPML Escrow Rule

- The Rule increases the length of time during which creditors are required to maintain escrow accounts for first-lien HPMLs from one to five years
- Specifically, it provides that a creditor or servicer may cancel an escrow account required under the Rule "only upon the earlier of:
- (A) Termination of the underlying debt obligation; or
- (B) Receipt no earlier than five years after consummation of a consumer's request to cancel the escrow account"

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HPML Escrow Rule

- However, even if five years have elapsed since consummation, and the creditor or servicer receives the consumer's cancellation request, the escrow account may not be cancelled unless
- (1) "The unpaid principal balance is less than 80 percent of the original value of the property securing the underlying debt obligation;" and
- (2) "The consumer currently is not delinquent or in default on the underlying debt obligation."

Small Creditor Exemption

- The Rule also creates a new exemption from these requirements for certain creditors operating in "rural" or "underserved" counties. As an initial matter, the applicability of this exemption depends in part on:
- (1) The number of "covered transactions" originated by the creditor and its affiliates. "Covered transactions" are defined in the Bureau's Ability-to-Repay final rule as consumer credit transactions that are secured by a dwelling (including any real property attached to a dwelling) other than an exempt transaction.

Small Creditor Exemption

- Exempt transactions include:
- A home equity line of credit
- A mortgage transaction secured by a consumer's interest in a timeshare plan
- A reverse mortgage
- A temporary or "bridge" loan with a term of 12 months or less; and
- A construction phase of 12 months or less of a construction-to-permanent loan

Small Creditor Exemption

- (2) Whether the creditor operates predominantly in "rural" and "underserved" counties.
- A "rural" county is a county that "is neither in a metropolitan statistical area nor in a micropolitan statistical area that is adjacent to a metropolitan statistical area, as those terms are defined by the U.S. Office of Management and Budget and applied under currently applicable Urban Influence Center Codes (UICs), established by the U.S. Department of Agriculture's Economic Research Services (USDA-ERS)."

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Small Creditor Exemption

- A county is considered “underserved” if Home Mortgage Disclosure Act (HMDA) data for the year indicates that “no more than two creditors extend covered transactions… secured by a first lien five or more times in the county.”
- The Bureau determines annually which counties are rural or underserved and publishes a list of those counties to enable creditors to determine whether they meet this condition for the exemption. Creditors may rely on this list as a safe harbor.

Small Creditor Exemption

- Pursuant to the new exemption, a creditor is not required to establish an escrow account for taxes and insurance for an HPML if all four of the following conditions are satisfied when the loan is consummated:

1. "During the preceding calendar year, the creditor [must have] extended more than 50 percent of its total covered transactions…, secured by a first-lien, on properties that are located in counties designated either 'rural' or 'underserved' by the Bureau."
2. The creditor and its affiliates together must have originated 500 or fewer covered transactions secured by a first lien during the preceding calendar year
3. "As of the end of the preceding calendar year, the creditor must have had total assets of less than $2 Billion" (adjusted annually)

Small Creditor Exemption

4. The creditor and its affiliates must not maintain an escrow account of the type described in new § 35(b)(1) “for any extension of consumer credit secured by real property or a dwelling that the creditor or its affiliate currently services, other than:

- a. - Escrow accounts established for first-lien HPMLs on or after April 1, 2010, and before June 1, 2013; or
- b. - Escrow accounts established after consummation as an accommodation to distressed consumers to assist such consumers in avoiding default or foreclosure

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HCML H/O Counseling Rule Requirements

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HCML Counseling Rule

- On January 10, 2013, the CFPB issued a final rule (the "Rule") that amends Regulation Z to implement changes to the Home Ownership and Equity Protection Act (HOEPA)
- The Rule expands the types of loans subject to HOEPA, revises the tests for whether a loan is "high-cost" and therefore subject to HOEPA, imposes new restrictions on high-cost loans, and requires new disclosures

HCML Counseling Rule

- Loans that meet HOEPA's high-cost coverage tests are currently subject to special disclosure requirements and restrictions on loan terms
- Borrowers in high-cost mortgages also have enhanced remedies for violations of the law
- Purchasers and assignees of high cost mortgages, unlike acquirors of non-HOEPA loans, are subject to all claims and defenses that may be brought against the original creditor with respect to the mortgage, with certain limited exceptions

HCML Counseling Rule

- The Rule also implements two additional Dodd-Frank provisions that are not amendments to HOEPA related to homeownership counseling
- The first requires that first-time borrowers receive homeownership counseling before taking out a negative amortization loan
- The second is an amendment to RESPA that requires the disclosure of a list of counseling organizations to any consumer applying for a federally related mortgage loan within three business days after receiving the consumer's application
- The Rule is effective January 10, 2014

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HCML Counseling Rule

- The Rule expands the types of loans that may be subject to HOEPA by removing the previous exclusions for “residential mortgage transactions” (defined under Regulation Z to mean purchase money mortgage loans) and home equity lines of credit (“HELOCs”) as potentially covered loans
- Thus, the term high-cost mortgage now may include both a closed-end credit transaction and an open-end credit plan secured by the consumer’s principal dwelling

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HCML Counseling Rule

- The Rule retains the exemption for reverse mortgages, largely because they are already subject to counseling requirements, and also exempts three other types of loans:
- Construction loans
- Loans originated and financed by Housing Finance Agencies, and
- Loans originated through the United States Department of Agriculture's (USDA) Rural Housing Services

HCML Counseling Rule

- Creditors must use one of three methods to determine the interest rate for purposes of calculating the APR for high-cost mortgage coverage:

1. For a transaction in which the APR will not vary during the term of the loan or credit plan, the interest rate in effect as of the date the interest rate for the transaction is set

HCML Counseling Rule

2. For a transaction in which the interest rate may vary during the term of the loan or credit plan in accordance with an index, the interest rate that results from adding the maximum margin permitted at any time during the term of the loan or credit plan to the value of the index rate in effect as of the date the interest rate for the transaction is set, or the introductory interest rate, whichever is greater; and
3. For a transaction in which the interest rate may or will vary during the term of the loan or credit plan, other than a transaction described in the previous paragraph, the maximum interest rate that may be imposed during the term of the loan or credit plan

HCML Counseling Rule

- Points and Fee calculation methodologies are similar to the requirements outlined in the ATR Rule.
- Loan originator compensation calculations are also similar to the ATR and must be included in the Points & Fees determination
- Certain prepayment penalties are counted toward the “points and fees’ trigger for high cost mortgages. Specifically, both of the following are included in “points and fees”:

HCML Counseling Rule

- The maximum "prepayment penalty" that may be charged or collected under the terms of the mortgage loan; and
- The total "prepayment penalty" that would be incurred by the consumer if the consumer were to refinance the existing mortgage loan with any of the following:
- (a) the current holder of the existing loan,
- (b) a servicer acting on behalf of the current holder, or
- (c) an affiliate of either

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HCML New Restrictions and Disclosures

- For loans which meet one of the high cost mortgage tests and are considered high-cost, there are new restrictions on such loans, briefly summarized as follows:
- Balloon Payments - The payment schedule may not include a payment that is more than two times a regular periodic payment.
- However, this prohibition does not apply to:

HCML New Restrictions and Disclosures

- (i) a payment schedule adjusted to the seasonal or irregular income of the consumer,
- (ii) a bridge loan of 12 months or less connected with the acquisition or construction of a dwelling intended to become the consumer’s principal dwelling, or
- (iii) loans made by creditors operating predominantly in rural or underserved area and meeting other criteria. For an open-end credit plan, “regular periodic payment” means the required minimum periodic payment

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Prepayment Penalties

- Prepayment penalties are not allowed
- For a closed-end credit transaction, prepayment penalty means other than a waived, bona fide third-party charge that the creditor imposes if the consumer prepays all of the transaction's principal sooner than 36 months after consummation
- Interest charged consistent with the monthly interest accrual amortization method is not a prepayment penalty for FHA loans consummated before January 21, 2015.

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Other Stipulations

- Creditors and mortgage brokers must not recommend or encourage a consumer to default on an existing loan or other debt in connection with consummating or opening a high-cost mortgage that refinances all or part of that loan or debt
- For example, the creditor must not advise the consumer to stop making payments in a manner that is likely to cause the consumer to default on the loan

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Other Stipulations

- There are several restrictions on servicing fees:
- Modification fees and deferral fees are prohibited
- Fees for payoff statements are generally banned; however, creditors and servicers may charge a reasonable fee once the creditor or servicer has provided such information four times during a calendar year
- Furthermore, creditors and servicers may charge a processing fee for providing a payoff statement by fax or courier, provided the fee is comparable to fees imposed for similar services provided for non-high-cost loans and provided the creditor or servicer discloses that other delivery options are available without charge

Other Stipulations

- Late fees are restricted to four percent of the amount past due, must be specifically permitted by the terms of the loan documents, and may not be imposed more than once for a single late payment
- Furthermore, payments may not be applied in a way that results in the pyramiding of late fees. Late fees may only be imposed after a payment is 15 days past due (or 30 days for loans on which interest on each installment is paid in advance)
- Points and fees that are required to be included in the calculation of points and fees may not be financed

Other Stipulations

- The Rule also revises various consumer disclosure requirements for high-cost mortgages. Creditors must make these disclosures within three business days before consummating a closed-end high cost mortgage
- For closed-end loans, the creditor must disclose the amount of the regular monthly (or other periodic) payment and the amount of any balloon payment provided in the contract
- The creditor must also disclose the total amount the consumer will borrow, as reflected by the face amount of the note, and if this amount includes finance charges not otherwise prohibited, that fact must be included as well

Other Stipulations

- The disclosure of the amount borrowed will be treated as accurate if it is not more than $100 above or below the amount required to be disclosed
- The regular payment is the amount due from the consumer at regular intervals, but the amounts for voluntary items (e.g. credit life insurance), may be included in the regular payment disclosure only if the consumer previously agreed to those amounts

Other Stipulations

- For variable-rate transactions, the creditor must disclose a statement that the interest rate and monthly payment may increase and the amount of the single maximum monthly payment based on the maximum interest rate
- If the loan has multiple payment levels and more than one maximum payment amount is possible, the maximum payment for each level must be included in the disclosure

Counseling Requirements

- The Rule also includes new requirements related to homeownership counseling
- Creditors must ensure that consumers receive homeownership counseling before extending a high-cost loan
- The consumer must receive this counseling after receiving either the good faith estimate or the disclosures required to be provided to open-end credit plan applicants by 12 C.F.R. § 1026.40.83
- This counseling must be provided by a federally certified or approved homeownership counselor and may not be provided by an employee or affiliate of the creditor

Counseling Requirements

- Furthermore, the creditor may not steer a consumer to choose a particular counselor. The creditor must receive a written certification which includes the consumer's name, the date of counseling, the name and address of the counselor, a statement that the consumer received counseling on the advisability of the high-cost mortgage, and a statement that the counselor verified that the consumer received the disclosures required by 12 C.F.R. § 1026.32(c) or RESPA.
- This statement does not require the counselor to have made a judgment or determination as to the appropriateness of the mortgage transaction for the consumer

Counseling Requirements

- Creditors may pay the counseling fees and may confirm that the counseling took place but may not condition the payment of such fees on the consummation or account-opening of the high-cost mortgage
- Alternatively, these fees may be financed. Before receiving certification of counseling, a creditor may not extend a high-cost mortgage, but may engage in other activities, such as processing an application that will result in the extension of a high-cost mortgage (e.g., ordering an appraisal or title search).

Counseling Requirements

- In addition, and regardless of whether the loan is high-cost, creditors must ensure that first-time borrowers receive homeownership counseling before making closed-end loans that may result in negative amortization (except with respect to reverse mortgages and timeshare loans)
- This counseling must be provided by a federally certified or approved homeownership counselor, and the creditor may not steer a consumer to choose a particular counselor

Counseling Requirements

- The creditor must receive documentation that the consumer obtained this counseling before extending credit, such as a certificate, letter, or email
- The Rule also amends Regulation X to require that within three days of receipt of an application by a lender, a mortgage broker, or a dealer, the lender must provide the applicant a clear and conspicuous list of homeownership counseling organizations that provide relevant counseling services in the loan applicant's location

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HPML Appraisal Rule Requirements

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HPML Appraisal Rule

- On January 18, the Federal Reserve Board, the CFPB, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, National Credit Union Administration, and Office of the Comptroller of the Currency (together, the Joint Agencies) issued a final rule that requires creditors to obtain appraisals for all Higher-Priced Mortgage Loans (HPMLs) and to notify consumers who apply for these loans of their right to a copy of the appraisal
- The requirements of this rule are effective on January 18, 2014, giving creditors a year to implement

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HPML Appraisal Rule

- The Final Rule requires creditors to take certain steps before extending credit in the form of an HPML. Before a creditor originates a non-exempt HPML, the creditor must:
- Obtain a written appraisal performed by a certified or licensed appraiser who has conducted a physical visit of the interior of the property;
- Provide the applicant, within three business days of receiving the initial application, with a statement that any appraisals prepared for the mortgage loan are for the sole use of the lender

HPML Appraisal Rule

- Provide the applicant with one copy of each appraisal report, without charge, at least three days before the closing date (or if the loan is not consummated, no later than 30 days after the determination that the loan will not be consummated)
- The creditor must also provide the applicant with a disclosure, within three business days of receiving the application for a HPML, that the creditor will give the consumer a copy of any appraisal report, even if the loan does not close

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HPML Appraisal Rule

- The Final Rule does include a safe harbor provision that lays out affirmative steps a creditor may take to ensure that it has satisfied its obligations to provide an appraisal for an HPML. In order to avail itself of the safe harbor, the creditor must:
- Order the appraiser to perform the appraisal in conformity with the Uniform Standards of Professional Appraisal Practice (USPAP) and Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA);
- Verify through the National Registry database of certified and licensed appraisers that the appraiser holds a valid appraisal license or certification within the state where the property is located;

HPML Appraisal Rule

- Confirm that the written appraisal addresses certain elements specified in the Appendix to the Final Rule (such as that the appraisal identifies the creditor who ordered the appraisal, indicates whether the contract price was analyzed, addresses neighborhood conditions, includes a signed certification from the appraiser, etc.); and
- Have no knowledge that the facts or certifications within the appraisal are false
- If the creditor chooses to follow these steps, it will be deemed to have obtained a written appraisal that meets the statutory requirements

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