



Housing Finance — 2013 Year in Review * Katie Wechsler and Sanford Shatz January, 2014

I. Regulatory Developments

A. Consumer Financial Protection Bureau

The CFPB was very busy in 2013 issuing the final mortgage rules under Dodd-Frank covering nearly every aspect of mortgages. While most of the main rules were released in January, the CFPB issued several clarifications and modifications to the rules throughout the year. Here is a brief review of the rules CFPB issued.

A.1. Ability to Repay/Qualified Mortgage (ATR/QM): The rule requires creditors to make a reasonable and good faith determination at or before consummation of a mortgage loan that the consumer will have a reasonable ability to repay that loan. Qualified Mortgages that are not higher-priced transactions have a safe harbor from liability under the ATR test, while QMs that are a higher-priced transaction (APR that exceeds the APOR by 1.5% or more for a first lien or by 3.5% or more for a subordinate lien) have a rebuttable presumption of compliance. Among other requirements, to qualify as a QM, the ratio of the consumer's total DTI cannot exceed 43%, and the total points and fees cannot exceed 3% (with an adjustment for smaller loans). The rule establishes a temporary category of QM loans in which the loans meet certain requirements, including the 3% points and fees cap, and are eligible to be purchased or insured by the GSEs while under conservatorship, FHA, VA, Department of Agriculture or Rural Housing Service. This temporary category is in place for a maximum of seven years or until other federal agencies define QM for

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their purposes (see HUD's rule below). The ATR/QM rule is effective January 10, 2014.

- A.1.a. *Amendments:* At the same time the CFPB issued the ATR/QM rule, it proposed amendments to that rule including addressing how loan originator compensation is included in points and fees and the applicability of ATR requirements to certain government programs. In the final rule, issued in May 2013, the CFPB clarified how loan originator compensation should be counted for purposes of points and fees, and exempted loan modifications made pursuant to government programs from the ATR standards, but did not exempt streamlined refinancing programs from the rule. This rule also includes rules for "small creditors" making QM loans, and includes narrow exemptions for certain types of creditors.
- A.1.b. *More Amendments:* In the summer, CFPB issued more clarifications to the ATR/QM rule, including additional guidance on the application of the temporary QM on GSE eligible loans, including the use of automated underwriting systems, the effect of written contract variances, and the impact of repurchase and indemnification demands. Additionally, CFPB modified several provisions in Appendix Q of ATR/QM rule which is used to determine a consumer's debt and income.
- A.1.c. **And one more:** In September the CFPB clarified the treatment of charges paid by parties other than the consumer and loan originator compensation paid to manufactured homes retailers for purposes of the points and fees calculation for QMs and high-cost mortgages.
- A.2. Mortgage Servicing Rules: In January, the CFPB finalized two rules related to nearly all aspects of mortgage servicing — one under TILA/Reg Z and the other under RESPA/Reg X. These rules cover a plethora of issues in mortgage servicing including periodic billing statements, ARM adjustment notices, payment crediting and payoff statements, force-placed insurance requirements, error resolution and information request procedures, information management policies and procedures, early intervention with delinquent borrowers, rules for contact with delinquent borrowers, and enhanced loss mitigation procedures.

- A.2.a. *Amendments:* In July, the CFPB finalized amendments to the two mortgage servicing rules, clarifying the preemption standard under Reg X and the effective date of the rule for the ARM adjustment notices.
- A.2.b. *More Amendments:* In September, CFPB made several amendments to the loss mitigation procedures under Reg X including what servicer activities are prohibited in the first 120 days of delinquency, procedures for obtaining missing information, and the offering of short-term forbearance plans.
- A.2.c. And One More Amendment: In October CFPB clarified the application of servicing rules to loans where the consumer is in bankruptcy or sends a cease communication request under the FDCPA.
- A.3. Loan Originator Compensation: The loan originator compensation rule includes prohibitions on compensation based on the terms of a mortgage transaction or a proxy for a transaction term, prohibition on loan originators being compensated by both the consumer and another person, and permitting certain compensation methods using bonuses and retirement plans based on mortgage-related profits. Additionally, the rule includes qualifications and screening for loan originators.
 - A.3.a. *Amendments:* Based on feedback from the industry, the CFPB changed the effective date of the loan originator compensation and qualification provisions from January 10, 2014 to January 1, 2014 to make it compliance more manageable. The rule provided clarifications on the definition of loan originator as it relates to those in administrative or clerical roles. Additionally, the CFPB revised the prohibition on single premium credit insurance and extended the compliance date to January 10, 2014.
- A.4. **High-Cost Mortgages:** The CFPB issued a rule that revises and expands the tests for coverage under HOEPA, and imposes additional restrictions on HOEPA mortgages. The rule imposes a pre-counseling requirement for HOEPA loans, and also imposes certain homeownership counseling requirements under Reg X for all mortgage loans, including that consumers receive information about homeownership counselors.
 - A.4.a. *Amendments:* In September the CFPB clarified the treatment of charges paid by parties other than the consumer and loan origi-

nator compensation paid to manufactured home retailers for purposes of the points and fees for HOEPA loans and QMs.

- A.4.b. *More Amendments:* In October, the CFPB issued amendments clarifying the specific disclosures that must be provided before counseling for HOEPA loans can occur.
- A.4.c. **And One More:** In November, the CFPB issued an interpretive rule that included data instructions for lenders to use in complying with the RESPA/Reg X requirement to provide a list of homeownership counselors to mortgage applicants.
- A.5. Escrow Requirements: CFPB issued a rule lengthening the time for which a mandatory escrow account for high-priced mortgage must be maintained, and the rule exempts certain transactions from the escrow requirement including certain creditors that operate predominantly in "rural or underserved areas."
 - A.5.a. *Amendments:* In May the CFPB clarified the method to determine what areas are "rural" and "underserved" for purposes of the exemption, and also kept in place some existing protections until the similar provisions take effect in January 2014.
 - A.5.b. *More Amendments:* In July the CFPB clarified the May amendments by stating that construction and bridge loans and reverse mortgages are not subject to certain requirements.
 - A.5.c. And One More: In September the CFPB amended the exemption for small creditors in "rural" and "underserved" areas.
- A.6. Appraisal Requirements under ECOA: CFPB issued a rule revising the appraisal requirements under ECOA/Reg B, requiring creditors to provide a free copy of all appraisals in relation to a first lien to applicants, and requiring creditors to notify applicants in writing that copies of appraisals will be provided to them promptly.
 - A.6.a. *Amendments:* In September the CFPB clarified that meaning of "valuation" for purposes of this appraisal rule.
- A.7. **TILA-RESPA Mortgage Disclosures:** CFPB ended its year of mortgage rulemaking with issuing the final rule of the much-anticipated rule combining mortgage disclosures under TILA and RESPA. The final rule does not include the proposed changes to the calculation of the APR. The rule is effective August 1, 2015.

A.8. **Rural and Underserved Counties:** On July 2, the CFPB released the list of rural and underserved counties for use in 2014.

B. Federal Banking Agencies

- B.1. Appraisals for Higher-Priced Mortgages: The CFPB, Federal Reserve Board, FDIC, FHFA, NCUA and OCC issued a final rule under TILA requiring appraisals for higher-risk mortgages. For certain mortgages, creditors must obtain an appraisal meeting certain standards, provide the applicant with a notification about the use of appraisals, and give applicants a copy of the written appraisals used.
 - B.1.a. *Amendments:* In December the CFPB and the other federal agencies amended the rule to provide exemptions for transactions secured by existing manufactured homes and not land; certain streamlined refinancings; and transactions of \$25,000 or less.
- B.2. Credit Risk Retention/QRM: In August, the Federal Reserve Board, HUD, FDIC, FHFA, OCC and SEC re-proposed the credit risk retention/qualified residential mortgage rule, originally proposed in 2011. Under the rule, qualified residential mortgages (QRMs) would be exempt from the credit risk retention requirements, and the proposed definition aligns QRMs with QMs. The agencies are expected to finalize the rule in 2014.

C. HUD

C.1. FHA QM Rule: In late 2013, HUD proposed and finalized a rule defining QMs for FHA. This rule, which goes into effect on January 10, 2014 replaces the temporary QM category for FHA-eligible loans. The HUD rule establishes two types of FHA QMs (safe harbor and rebuttable presumption) based on the APR compared to APOR and factoring in the mortgage insurance premium. All FHA QMs must meet the 3% points and fees test as in the CFPB's rule, however the FHA QMs do not have a specific DTI ratio requirement.

II. GSEs

- A. Bank of America and Fannie Mae announced a \$10.3 Billion dollar settlement concerning delinquent mortgages. The Bank agreed to pay \$3.55 billion and repurchase approximately 30,000 loans for \$6.75 billion. In addition, the Bank agreed to pay 1.3 to resolve loan servicing compensatory fee obligations.
- B. In April 2013, the FHFA announced that Fannie Mae and Freddie Mac will extend the Home Affordable Refinance Program to December 31, 2015.
- C. On May 6, 2013, the FHFA announced that Fannie Mae and Freddie Mac will limit their loan portfolio to qualified mortgages under the Bureau's ATR-QM Rule.

III. Enforcement Actions

A. Federal Banking Agencies

In February 2013, the Federal Reserve Board and OCC Amended the April 2011 Foreclosure Consent Orders against several large mortgage servicers. The revised settlement provides for \$3.6 billion in cash payments and \$5.7 billion in other assistance, including loan modifications and forgiveness of deficiency judgments, to 4 million borrowers whose homes were in foreclosure in 2009 or 2010. The agreement ended the Independent Foreclosure Review process.

B. CFPB

B.1. **RESPA Kickbacks Prohibition:** The CFPB took several actions against mortgage insurers for violating RESPA's kickback prohibition by participating in captive reinsurance arrangements with lenders. In total, Genworth, United Guaranty, Radian and MGIC paid \$15 million in penalties to CFPB. In November, CFPB announced another action against another mortgage insurer, RMIC, for similar practices, requiring RMIC to pay \$100,000 in penalties. In May, CFPB fined

a Texas homebuilder, Paul Taylor, for receiving illegal referral fees through partnerships with two mortgage companies and sham entities he created. In October, CFPB filed a lawsuit against a Kentucky law firm, Borders & Borders, PLC for illegally paying kickbacks for referrals through a network of shell companies.

- B.2. Mortgage Servicing: In December, due to mortgage servicing errors, CFPB and state authorities required Ocwen to provide \$2 billion in principal reduction to underwater borrowers and \$125 million in refunds to consumers foreclosed on. The alleged mortgage servicing violations include servicing shortcuts, charging unauthorized fees, deceiving consumers about loss mitigation options, and illegal foreclosure practices.
- B.3. Fair Lending: In December, CFPB and the Department of Justice filed a consent order with National City for allegedly violating ECOA and the Fair Housing Act by charging African-Americans and Hispanic borrowers higher mortgage prices that similarly creditworthy white borrowers. PNC, National City's successor, must pay \$35 million in restitution to harmed borrowers.
- B.4. Loan Originator Compensation: The CFPB issued an enforcement action against Castle & Cooke Mortgage, LLC and two of its officers for paying loan officers bonuses that varied based on the interest rate of the loans they offered to borrowers. Castle & Cooke is required to pay \$9 million in restitution and \$4 million in civil penalties.
- B.5. **HMDA Reporting:** CFPB issued two enforcement actions against a bank and a nonbank for inaccurate reporting of HMDA data, finding that the companies' compliance systems were inadequate and the data was compromised. Mortgage Master must pay \$425,000 and Washington Federal must pay \$34,000 in civil penalties.
- B.6. Examination Procedures: On June 4, the CFPB updated its examination procedures for TILA and ECOA to account for the new mortgage rules.

IV. State-Level Developments

- A. In January, California's Homeowner Bill of Rights, regulating the default and foreclosure process, became effective.
- B. Illinois amended its mortgage foreclosure rules effective March 1, 2013.
- C. Illinois adopts a streamlined foreclosure process for certain vacant properties effective June 1, 2013.
- D. In June, Oregon expanded its mediation program for judicial foreclosures.
- E. In June, Nevada enacted its version of the Homeowner's Bill of Rights, effective October 1, 2013, regulating the default and foreclosure process. The state also amended its foreclosure mediation program to include all borrowers and require additional information from the parties.
- F. In June, Florida amended its judicial foreclosure law to streamline the process, reduce the statute of limitation for deficiency judgments, update procedures for "lost" notes, and enhance protections for foreclosure-property purchasers.
- G. In June, Massachusetts amended its foreclosure regulations by strengthening the modification requirements and providing greater protections for creditors who comply.
- H. In July, Rhode Island created a foreclosure mediation program that will be in effect from September 1, 2013 to July 1, 2018. The program requires that borrowers who are less than 120 days delinquent be given the opportunity to participate in mediation before a foreclosure sale can proceed.
- I. In July, the California Court of Appeal held that a lender cannot obtain a deficiency judgment after accepting a short sale, despite the borrower's apparent waiver of the deficiency bar. Coker v. JP Morgan Chase Bank, N.A., 2013 WL 3816978.
- J. In July, the City of Richmond, CA sent letters to lenders stating that it would begin condemning underwater mortgages. The federal courts have rejected two challenges to the proposed eminent domain actions.

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K. Uniform MLO Test: In April the Conference of State Bank Supervisors announced that twenty states adopted the new National SAFE MLO test. In July, the CSBS announced that ten more states adopted the test. In September, the CSBS announced that five more states adopted the test.

V. Litigation

On August 8, the Ninth Circuit held that HAMP Trial Period Plans (TPPs) create a contractual obligation that the servicer offer a permanent modification to borrowers who complete the trial plan. *Corvello v. Wells Fargo Bank, N.A.*, 2013 WL 4017279. The Ninth Circuit joined the Seventh Circuit in this holding. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Circ. 2012).

On August 5, the Northern District of California certified a class of borrowers who allege that a mortgage servicer wrongly rejected mortgage modification applications and improperly initiated foreclosure proceedings after the borrowers completed their trial plan payments. *Gaudin v. Saxon Mortgage Services, Inc., 2013 WL 4029043.*

On September 24, The Southern District of New York denied a motion to dismiss a case where the government alleged that the bank falsely certified loans under the FHA's Direct Endorsement Lender Program in violation of the False Claims Act and the Financial Institutions Reform, Recovery, and Enforcement Act. U.S. v. Wells Fargo Bank, 2013 WL 5312564.

On September 30, the District of Columbia permitted a surviving spouse, who was not a borrower, to remain in the property after the death of a borrower on a reverse mortgage. The Court rejected HUD's regulations that required the loan to be repaid on the borrower's death because they were contrary to the applicable statute. The court direct HUD to determine appropriate relief.

On October 31, a tentative settlement was reached in a case where the Supreme Court had an opportunity to rule on the disparate impact theory under the Fair Housing Act. *Township of Mount Holly, New Jersey v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507.

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VI. Other

A. On July 16, the Senate confirmed Richard Cordray as director of the Consumer Financial Protection Bureau.

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