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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

Truth in Lending Act (Regulation Z) Adjustment to Asset-Size Exemption Threshold

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretation.

SUMMARY: The Bureau is amending the official commentary that interprets the requirements of the Bureau's Regulation Z (Truth in Lending) to reflect a change in the asset-size threshold for certain creditors to qualify for an exemption to the requirement to establish an escrow account for a higher-priced mortgage loan based on the annual percentage change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for the 12-month period ending in November. The exemption threshold is adjusted to increase to \$2.112 billion from \$2.069 billion. The adjustment is based on the 2.1 percent increase in the average of the CPI-W for the 12-month period ending in November 2017. Therefore, creditors with assets of less than \$2.112 billion (including assets of certain affiliates) as of December 31, 2017, are exempt, if other requirements of Regulation Z also are met, from establishing escrow accounts for higher-priced mortgage loans in 2018. This asset limit will also apply during a grace period, in certain circumstances, with respect to transactions with applications received before April 1 of 2019. The adjustment to the escrows asset-size exemption threshold will also increase a similar threshold for small-creditor portfolio and balloon-payment qualified mortgages. Balloon-payment qualified mortgages that satisfy all applicable criteria, including being made by creditors that have (together with certain affiliates) total assets below the threshold, are also excepted from the prohibition on balloon payments for high-cost mortgages.

DATES: This final rule is effective January 1, 2018.

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SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended TILA to add section 129D(a), which contains a general requirement that an escrow account be established by a creditor to pay for property taxes and insurance premiums for certain first-lien higher-priced mortgage loan transactions. TILA section 129D also generally permits an exemption from the higher-priced mortgage loan escrow requirement for a creditor that meets certain requirements, including any asset-size threshold the Bureau may establish.

In the 2013 Escrows Final Rule,¹ the Bureau established such an asset-size threshold of \$2 billion, which would adjust automatically each year, based on the year-to-year change in the average of the CPI-W for each 12-month period ending in November, with rounding to the nearest million dollars.² In 2015, the Bureau revised the criteria for small creditors, and rural and underserved areas, for purposes of certain special provisions and exemptions from various requirements provided to certain small creditors under the Bureau's mortgage rules.³ As part of this revision the Bureau made certain changes that affect how the asset-size threshold applies. The Bureau revised § 1026.35(b)(2)(iii)(C) and its accompanying commentary to include in the calculation of the asset-size threshold the assets of the creditor's affiliates that regularly extended

¹ 78 FR 4726 (Jan. 22, 2013).

² See 12 CFR 1026.35(b)(2)(iii)(C).

³ See 80 FR 59944 (Oct. 2, 2015).

covered transactions secured by first liens during the applicable period. The Bureau also added a grace period from calendar year to calendar year to allow an otherwise eligible creditor that exceeded the asset limit in the preceding calendar year (but not in the calendar year before the preceding year) to continue to operate as a small creditor with respect to transactions with applications received before April 1 of the current calendar year.^{4,5} For 2017, the threshold was \$2.069 billion.

During the 12-month period ending in November 2017, the average of the CPI-W increased by 2.1 percent. As a result, the exemption threshold is increased to \$2.112 billion for 2018. Thus, if the creditor's assets together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2017 are less than \$2.112 billion on December 31, 2017, and it meets the other requirements of § 1026.35(b)(2)(iii), it will be exempt in 2018 from the escrow-accounts requirement for higher-priced mortgage loans and will also be exempt from the escrow-accounts requirement for higher-priced mortgage loans for purposes of any loan consummated in 2019 for which the application was received before April 1, 2019. The adjustment to the escrows asset-size exemption threshold will also increase the threshold for small-creditor portfolio and balloon-payment qualified mortgages under Regulation Z. The requirements for small-creditor portfolio qualified mortgages at § 1026.43(e)(5)(i)(D) reference the asset threshold in § 1026.35(b)(2)(iii)(C). Likewise, the requirements for balloon-payment qualified mortgages at § 1026.43(f)(1)(vi) reference the asset threshold in

⁴ See 80 FR 59943, 59951 (Oct. 2, 2015).

⁵ The Bureau also issued an interim final rule in March 2016 to revise certain provisions in Regulation Z to effectuate the Helping Expand Lending Practices in Rural Communities Act's amendments to TILA (Public Law 114-94, section 89003, 129 Stat. 1312, 1800- 01 (2015)). The rule broadened the cohort of creditors that may be eligible under TILA for the special provisions allowing origination of balloon-payment qualified mortgages and balloon-payment high-cost mortgages, as well as for the escrow exemption. See 81 FR 16074 (Mar. 25, 2016).

§ 1026.35(b)(2)(iii)(C). Under § 1026.32(d)(1)(ii)(C), balloon-payment qualified mortgages that satisfy all applicable criteria in § 1026.43(f)(1)(i) through (vi) and (f)(2), including being made by creditors that have (together with certain affiliates) total assets below the threshold in § 1026.35(b)(2)(iii)(C), are also excepted from the prohibition on balloon payments for high-cost mortgages.

II. Procedural Requirements

A. Administrative Procedure Act

Under the Administrative Procedure Act (APA), notice and opportunity for public comment are not required if the Bureau finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(B). Pursuant to this final rule, comment 35(b)(2)(iii)-1 in Regulation Z is amended to update the exemption threshold. The amendment in this final rule is technical and merely applies the formula previously established in Regulation Z for determining any adjustments to the exemption threshold. For these reasons, the Bureau has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary. Therefore, the amendment is adopted in final form.

Section 553(d) of the APA generally requires publication of a final rule not less than 30 days before its effective date, except (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule. 5 U.S.C. 553(d). At a minimum, the Bureau believes the amendments fall under the third exception to section 553(d). The Bureau finds that there is good cause to make the amendments effective on

January 1, 2018. The amendment in this document is technical and applies the method previously established in the agency's regulations for automatic adjustments to the threshold.

B. Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a).

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320), the agency reviewed this final rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

D. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), CFPB will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the rule taking effect. The Office of Information and Regulatory Affairs (OIRA) has designated this rule as not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 10 CFR Part 1026

Advertising, Appraisal, Appraiser, Banking, Banks, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

Authority and Issuance

For the reasons set forth above, the Bureau amends Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603-2605, 2607, 2609, 2617, 3353, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 et seq.

2. In Supplement I to Part 1026—Official Interpretations, under *Section 1026.35—Requirements for Higher-Priced Mortgage Loans, 35(b)(2) Exemptions, Paragraph 35(b)(2)(iii)* is revised to read as follows:

Supplement I to Part 1026—Official Interpretations

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Section 1026.35—Requirements for Higher-Priced Mortgage Loans

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35(b)(2) Exemptions.

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Paragraph 35(b)(2)(iii).

1. *Requirements for exemption.* Under § 1026.35(b)(2)(iii), except as provided in §1026.35(b)(2)(v), a creditor need not establish an escrow account for taxes and insurance for a higher-priced mortgage loan, provided the following four conditions are satisfied when the higher-priced mortgage loan is consummated:

i. During the preceding calendar year, or during either of the two preceding calendar years if the application for the loan was received before April 1 of the current calendar year, a creditor extended a first-lien covered transaction, as defined in §1026.43(b)(1), secured by a property located in an area that is either “rural” or “underserved,” as set forth in §1026.35(b)(2)(iv).

A. In general, whether the rural-or-underserved test is satisfied depends on the creditor's

activity during the preceding calendar year. However, if the application for the loan in question was received before April 1 of the current calendar year, the creditor may instead meet the rural-or-underserved test based on its activity during the next-to-last calendar year. This provides creditors with a grace period if their activity meets the rural-or-underserved test (in §1026.35(b)(2)(iii)(A)) in one calendar year but fails to meet it in the next calendar year.

B. A creditor meets the rural-or-underserved test for any higher-priced mortgage loan consummated during a calendar year if it extended a first-lien covered transaction in the preceding calendar year secured by a property located in a rural-or-underserved area. If the creditor does not meet the rural-or-underserved test in the preceding calendar year, the creditor meets this condition for a higher-priced mortgage loan consummated during the current calendar year only if the application for the loan was received before April 1 of the current calendar year and the creditor extended a first-lien covered transaction during the next-to-last calendar year that is secured by a property located in a rural or underserved area. The following examples are illustrative:

1. Assume that a creditor extended during 2016 a first-lien covered transaction that is secured by a property located in a rural or underserved area. Because the creditor extended a first-lien covered transaction during 2016 that is secured by a property located in a rural or underserved area, the creditor can meet this condition for exemption for any higher-priced mortgage loan consummated during 2017.

2. Assume that a creditor did not extend during 2016 a first-lien covered transaction secured by a property that is located in a rural or underserved area. Assume further that the same creditor extended during 2015 a first-lien covered transaction that is located in a rural or underserved area. Assume further that the creditor consummates a higher-priced mortgage loan

in 2017 for which the application was received in November 2017. Because the creditor did not extend during 2016 a first-lien covered transaction secured by a property that is located in a rural or underserved area, and the application was received on or after April 1, 2017, the creditor does not meet this condition for exemption. However, assume instead that the creditor consummates a higher-priced mortgage loan in 2017 based on an application received in February 2017. The creditor meets this condition for exemption for this loan because the application was received before April 1, 2017, and the creditor extended during 2015 a first-lien covered transaction that is located in a rural or underserved area.

ii. The creditor and its affiliates together extended no more than 2,000 covered transactions, as defined in § 1026.43(b)(1), secured by first liens, that were sold, assigned, or otherwise transferred by the creditor or its affiliates to another person, or that were subject at the time of consummation to a commitment to be acquired by another person, during the preceding calendar year or during either of the two preceding calendar years if the application for the loan was received before April 1 of the current calendar year. For purposes of § 1026.35(b)(2)(iii)(B), a transfer of a first-lien covered transaction to “another person” includes a transfer by a creditor to its affiliate.

A. In general, whether this condition is satisfied depends on the creditor's activity during the preceding calendar year. However, if the application for the loan in question is received before April 1 of the current calendar year, the creditor may instead meet this condition based on activity during the next-to-last calendar year. This provides creditors with a grace period if their activity falls at or below the threshold in one calendar year but exceeds it in the next calendar year.

B. For example, assume that in 2015 a creditor and its affiliates together extended 1,500

loans that were sold, assigned, or otherwise transferred by the creditor or its affiliates to another person, or that were subject at the time of consummation to a commitment to be acquired by another person, and 2,500 such loans in 2016. Because the 2016 transaction activity exceeds the threshold but the 2015 transaction activity does not, the creditor satisfies this condition for exemption for a higher-priced mortgage loan consummated during 2017 if the creditor received the application for the loan before April 1, 2017, but does not satisfy this condition for a higher-priced mortgage loan consummated during 2017 if the application for the loan was received on or after April 1, 2017.

C. For purposes of § 1026.35(b)(2)(iii)(B), extensions of first-lien covered transactions, during the applicable time period, by all of a creditor's affiliates, as “affiliate” is defined in § 1026.32(b)(5), are counted toward the threshold in this section. “Affiliate” is defined in § 1026.32(b)(5) as “any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*)” Under the Bank Holding Company Act, a company has control over a bank or another company if it “directly or indirectly or acting through one or more persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company”; it “controls in any manner the election of a majority of the directors or trustees of the bank or company”; or the Federal Reserve Board “determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.” 12 U.S.C. 1841(a)(2).

iii. As of the end of the preceding calendar year, or as of the end of either of the two preceding calendar years if the application for the loan was received before April 1 of the current

calendar year, the creditor and its affiliates that regularly extended covered transactions secured by first liens, together, had total assets that are less than the applicable annual asset threshold.

A. For purposes of § 1026.35(b)(2)(iii)(C), in addition to the creditor's assets, only the assets of a creditor's "affiliate" (as defined by § 1026.32(b)(5)) that regularly extended covered transactions (as defined by § 1026.43(b)(1)) secured by first liens, are counted toward the applicable annual asset threshold. *See* comment 35(b)(2)(iii)-1.ii.C for discussion of definition of "affiliate."

B. Only the assets of a creditor's affiliate that regularly extended first-lien covered transactions during the applicable period are included in calculating the creditor's assets. The meaning of "regularly extended" is based on the number of times a person extends consumer credit for purposes of the definition of "creditor" in §1026.2(a)(17). Because covered transactions are "transactions secured by a dwelling," consistent with § 1026.2(a)(17)(v), an affiliate regularly extended covered transactions if it extended more than five covered transactions in a calendar year. Also consistent with § 1026.2(a)(17)(v), because a covered transaction may be a high-cost mortgage subject to § 1026.32, an affiliate regularly extends covered transactions if, in any 12-month period, it extends more than one covered transaction that is subject to the requirements of §1026.32 or one or more such transactions through a mortgage broker. Thus, if a creditor's affiliate regularly extended first-lien covered transactions during the preceding calendar year, the creditor's assets as of the end of the preceding calendar year, for purposes of the asset limit, take into account the assets of that affiliate. If the creditor, together with its affiliates that regularly extended first-lien covered transactions, exceeded the asset limit in the preceding calendar year—to be eligible to operate as a small creditor for transactions with applications received before April 1 of the current calendar year—the assets of

the creditor's affiliates that regularly extended covered transactions in the year before the preceding calendar year are included in calculating the creditor's assets.

C. If multiple creditors share ownership of a company that regularly extended first-lien covered transactions, the assets of the company count toward the asset limit for a co-owner creditor if the company is an “affiliate,” as defined in § 1026.32(b)(5), of the co-owner creditor. Assuming the company is not an affiliate of the co-owner creditor by virtue of any other aspect of the definition (such as by the company and co-owner creditor being under common control), the company's assets are included toward the asset limit of the co-owner creditor only if the company is controlled by the co-owner creditor, “as set forth in the Bank Holding Company Act.” If the co-owner creditor and the company are affiliates (by virtue of any aspect of the definition), the co-owner creditor counts all of the company's assets toward the asset limit, regardless of the co-owner creditor's ownership share. Further, because the co-owner and the company are mutual affiliates the company also would count all of the co-owner's assets towards its own asset limit. *See* comment 35(b)(2)(iii)-1.ii.C for discussion of the definition of “affiliate.”

D. A creditor satisfies the criterion in § 1026.35(b)(2)(iii)(C) for purposes of any higher-priced mortgage loan consummated during 2016, for example, if the creditor (together with its affiliates that regularly extended first-lien covered transactions) had total assets of less than the applicable asset threshold on December 31, 2015. A creditor that (together with its affiliates that regularly extended first-lien covered transactions) did not meet the applicable asset threshold on December 31, 2015 satisfies this criterion for a higher-priced mortgage loan consummated during 2016 if the application for the loan was received before April 1, 2016 and the creditor

(together with its affiliates that regularly extended first-lien covered transactions) had total assets of less than the applicable asset threshold on December 31, 2014.

E. Under § 1026.35(b)(2)(iii)(C), the \$2,000,000,000 asset threshold adjusts automatically each year based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each 12-month period ending in November, with rounding to the nearest million dollars. The Bureau will publish notice of the asset threshold each year by amending this comment. For calendar year 2018, the asset threshold is \$2,112,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2017 has total assets of less than \$2,112,000,000 on December 31, 2017, satisfies this criterion for purposes of any loan consummated in 2018 and for purposes of any loan consummated in 2019 for which the application was received before April 1, 2019. For historical purposes:

1. For calendar year 2013, the asset threshold was \$2,000,000,000. Creditors that had total assets of less than \$2,000,000,000 on December 31, 2012, satisfied this criterion for purposes of the exemption during 2013.

2. For calendar year 2014, the asset threshold was \$2,028,000,000. Creditors that had total assets of less than \$2,028,000,000 on December 31, 2013, satisfied this criterion for purposes of the exemption during 2014.

3. For calendar year 2015, the asset threshold was \$2,060,000,000. Creditors that had total assets of less than \$2,060,000,000 on December 31, 2014, satisfied this criterion for purposes of any loan consummated in 2015 and, if the creditor's assets together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2014

were less than that amount, for purposes of any loan consummated in 2016 for which the application was received before April 1, 2016.

4. For calendar year 2016, the asset threshold was \$2,052,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2015 had total assets of less than \$2,052,000,000 on December 31, 2015, satisfied this criterion for purposes of any loan consummated in 2016 and for purposes of any loan consummated in 2017 for which the application was received before April 1, 2017.

5. For calendar year 2017, the asset threshold was \$2,069,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2016 had total assets of less than \$2,069,000,000 on December 31, 2016, satisfied this criterion for purposes of any loan consummated in 2017 and for purposes of any loan consummated in 2018 for which the application was received before April 1, 2018.

iv. The creditor and its affiliates do not maintain an escrow account for any mortgage transaction being serviced by the creditor or its affiliate at the time the transaction is consummated, except as provided in § 1026.35(b)(2)(iii)(D)(I) and (2). Thus, the exemption applies, provided the other conditions of § 1026.35(b)(2)(iii) are satisfied, even if the creditor previously maintained escrow accounts for mortgage loans, provided it no longer maintains any such accounts except as provided in § 1026.35(b)(2)(iii)(D)(I) and (2). Once a creditor or its affiliate begins escrowing for loans currently serviced other than those addressed in § 1026.35(b)(2)(iii)(D)(I) and (2), however, the creditor and its affiliate become ineligible for the exemption in § 1026.35(b)(2)(iii) on higher-priced mortgage loans they make while such escrowing continues. Thus, as long as a creditor (or its affiliate) services and maintains escrow accounts for any mortgage loans, other than as provided in §1026.35(b)(2)(iii)(D)(I) and (2), the

creditor will not be eligible for the exemption for any higher-priced mortgage loan it may make.

For purposes of § 1026.35(b)(2)(iii), a creditor or its affiliate “maintains” an escrow account only if it services a mortgage loan for which an escrow account has been established at least through the due date of the second periodic payment under the terms of the legal obligation.

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Dated: December 14, 2017.

Mick Mulvaney,

Acting Director, Bureau of Consumer Financial Protection.

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