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## July 2013 Banking and Mortgage Regulatory Update

For monthly updates on compliance issues email [mortgage@mccathernlaw.com](mailto:mortgage@mccathernlaw.com) with your request.

One of the biggest changes that will result from Dodd-Frank's implementation is the requirement for consumers to receive homeownership counseling prior to obtaining certain types of mortgage loans. Furthermore, lenders will be forced to provide most borrowers with a list of homeownership counseling services, and allow the consumer to decide whether homeownership counseling is right for them. This update will address the homeownership counseling requirements for applications received on or after January 10, 2014.

Homeownership counseling is required prior to obtaining some loans, and is optional for others. However, most borrowers will be required to receive a list of counseling organizations in their area regardless of the type of loan. The Dodd-Frank Act has focused a lot of its rule-making authority on protecting consumers from predatory or high-cost home loans. This includes a requirement that consumers receive counseling prior to obtaining a high-cost mortgage, and for first-time home borrowers who plan to obtain a negative amortization loan. The CFPB has further amended Regulation Z and Regulation X under a rule update designated as the 2013 Home Ownership and Equity Protection Act (HOEPA) Rule. These updates and amendments also affect Home Equity Line of Credit loans (HELOCs), and any HELOCs that are considered high-cost mortgage loans will be subject to the same disclosure and counseling requirements as high-cost mortgages.

### **Types of Loans Subject to HOEPA and High Cost Mortgage Requirements:**

Loans for a borrower's principal dwelling including purchase money mortgages, refinances, closed-end equity loans, and HELOCs that meet HOEPA's coverage tests must also meet the high-cost mortgage requirements, which include confirming that not only were the borrowers provided with a list of approved homeownership counseling organizations within three days of the lender receiving the application, but that the consumer in fact obtained such counseling. Conversely, reverse mortgages, certain construction loans, Housing Finance Agency loans (originated and financed), and loans originated under USDA's Rural Development Section 502 Program are exempt from HOEPA high-cost mortgage requirements. Furthermore, loans for homes other than a borrower's principal dwelling are not within HOEPA's counseling disclosure requirements.

If a loan is considered a high-cost mortgage under §1026.32, it will be subject to the disclosure and counseling requirements, in addition to other disclosure requirements set forth in the Act. This requires the lender to receive written confirmation that the consumer received homeownership counseling from an independent, approved organization. In continuing with Dodd-Frank's prohibition on steering activities, lenders cannot steer consumers to a particular counseling agency, regardless of whether the agency is affiliated with the lender.

Negative amortization loans made to first-time home borrowers also require mandatory counseling. The same counseling provisions applicable to high-cost mortgages also apply to negative amortization loans. However, these rules apply only to first-time borrowers.

Finally, the amendment to Regulation X requires federally-related loan applicants to be provided with a list of counseling organizations. This will affect most borrowers and require lenders to provide them with a list of approved counseling organizations. Unlike the loans mentioned above, counseling is not required for these applicants. It can be suggested or encouraged, but obtaining certification of counseling is not required. Lenders must merely provide a list of approved organizations. These disclosures must be made within three days of receiving the application.

**Timing of Disclosure:**

The consumer must receive either the Good-Faith Estimate or the disclosure requirements for home equity plans (§1026.40) prior to the consumer obtaining counseling. Furthermore, the counselor must confirm that the consumer has received all of the high-cost mortgage disclosures or the disclosures required under RESPA before signing off on the counseling. The CFPB has recommended a two-stage counseling approach for practical purposes: first, counseling occurs after the receipt of the GFE or §1026.40 disclosures; second, the counselor confirms that all additional disclosures are obtained by the consumer prior to issuing certification. In-person counseling is not required.

**Counseling Fee:**

The counseling fee can be paid in many ways. The lender can pay the fee, although the payment must be unconditional and not based on the consumer taking the loan. The consumers can also either pay the fee upfront, or finance the fee as a part of the loan.

**List of Counseling Organizations:**

During the comment period, there was much discussion regarding the list of approved organizations, such as the area from which a list could be compiled. Citing logistical issues, many commenters requested to provide a list of approved organizations for the borrower's specific state, thereby lessening the burden on lenders. The CFPB rejected this proposal, but has yet to provide a concrete response as to how large an area should be covered by a lender's list to a specific borrower. While in some instances, a single zip code would provide numerous approved organizations, the majority of situations could necessitate including all organizations in a borrower's city or county. In order to ease this burden, the CFPB plans to create a website that would list the approved organizations in the borrower's area. As with many things associated with implementing the Dodd-Frank Act, the CFPB is still working to develop the website and has not issued a firm time frame in which to expect it. This will undoubtedly cause some production and programming issues for lender's systems, but should be finalized in sufficient time before January 10, 2014.

*This update is not to be considered an offering of legal advice and does not constitute an attorney-client relationship. If you are interested in a more specific and tailored analysis of the compliance-related issues associated with the Dodd-Frank Act, and how it affects your business, please contact Arnold Shokouhi at 214.741.2662.*