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CFPB's rule making changes the rules for everyone - Ability to repay rule-effective January 10, 2014

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Under a new section of Regulation Z, issued pursuant to amendments to the Truth in Lending Act made by the Dodd Frank Act, every residential mortgage loan to a consumer, secured by a dwelling made by a lender (a creditor who makes more than 5 mortgages a year) must exhibit that the borrower has the ability to repay it. In general, the lender must analyze 8 factors that show the borrower can pay the full amount of the mortgage and all related costs as well as all other debt. The factors are:

* Income in general - Income; employment;
* Debt in general- The fully indexed payment on mortgage #1; The fully indexed payment on any other financing (i.e. mortgage #2); Other "mortgage related obligations" (insurance, condo fees and assessments, taxes); All other installment debt;
* Likelihood of repayment- Mortgage debt to income ratio and credit history.

The analysis must be based on information that the lender has verified as coming from a reasonably reliable third party record, not from information provided orally by the borrower or another interested party.

Lenders are taking the rules very seriously as they face strict penalties for non-compliance under the Truth in Lending Act:

If there is no assessment of the ability to repay, or if the borrower does not exhibit that ability there is a 3 year statute of limitations during which the borrower can sue for up to 3 years of finance charges and fees as well as attorney's fees. In the event of a foreclosure action, there is an unlimited Statute of Limitations. In addition, the lender can be assessed civil penalties of $5,000 per day for a violation, $25,000 per day for gross negligence, and $1 million per day for intentional violations.

While the rules were written for lenders, the impact is felt by all who are involved in the residential mortgage lending business, including attorneys and settlement agents, whether representing lenders, buyers or sellers.

For those who represent lenders in conducting the closing there has been an increase in requests from lenders for information about expenses related to the property such as municipal assessments, costs of private road maintenance and home owners association dues. And, these requests are coming at a time when the lender is underwriting the loan, not after the commitment has issued. For some, transactions are halted the morning of the closing as a lender's internal review finds a flaw and the loan is not funded.

For those who represent buyers and sellers, there is a longer period needed to secure the commitment from the lender and more information is needed by the lender to process the application. This has led to more detailed financing contingencies including requests for extensions up to the closing date, clarifying that the seller will cooperate with the buyer's lender's need for information (such as amounts of annual homeowner's association dues) and a cap on the amount of the buyer's deposit that is at risk if the lender fails to fund the loan at the last minute, where the buyer is not at fault.

As noted above, all are impacted by these rules and attention needs to be given to new business practices which will reflect the new mortgage lending requirements.

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