

Mortgage Disclosure Act And Multifamily Lending: Part 1

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The Home Mortgage Disclosure Act^[1](HMDA), as implemented by Regulation C,^[2] is a federal statute that requires most entities that make dwelling-secured loans, including depository and nondepository institutions, to collect a series of data points about each covered loan application they receive. The required data points include information about the loan applicant, the secured property and the ultimate disposition of the application. Institutions submit their HMDA data to the federal government on a regular basis and government agencies and other interested parties use the data to enforce anti-discrimination statutes, determine whether financial institutions are meeting the housing needs of their local communities and assist in directing allocations of public money.^[3]

Recent amendments^[4] to Regulation C have brought HMDA's data reporting requirements to the attention of institutions that make or purchase commercial loans secured by multifamily housing. Because HMDA largely focuses on single family, consumer loans, certain multifamily lenders — particularly nondepository institutions for which lending is not a major focus — are not aware that they are covered by the statute. Although some entities do not currently need to report because their low loan volumes do not trigger HMDA's current coverage thresholds, when the lower volume thresholds in amended Regulation C become effective, many entities will become subject to HMDA for the first time.^[5]

Failure to comply with HMDA carries significant risk, including the possibility of penalties^[6] and being required to retroactively gather and report data for activity occurring in past years. Further, the U.S. Consumer Financial Protection Bureau, the agency primarily responsible for enforcing HMDA, has indicated that ensuring HMDA compliance — including identifying entities that should be reporting but are not — is a major part of its fair lending agenda.

For these reasons, institutions that make or purchase commercial multifamily loans should evaluate whether HMDA currently applies to their activities and, if not, whether it will apply after the amendments to Regulation C become effective.



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Part one of this series offers an overview of how the amended Regulation C will impact multifamily housing, including which institutions and transactions are covered. Part two will address reporting issues and challenges specific to multifamily housing.

Coverage

The two key coverage questions under HMDA are: whether an institution is subject to the statute; and if the institution is covered, whether any given loan transaction must be reported or not.

Coverage of Institutions

HMDA reporting obligations apply to “financial institutions,” as defined in Regulation C and described below. The CFPB has made changes to which depository institutions are covered for 2017^[7] and has made further changes that affect both depository institutions and nondepository institutions for 2018 and later years.^[8]

1. Current Rule

Regulation C contains separate tests for determining whether depository institutions^[9] and nondepository institutions qualify as financial institutions for purposes of the rule.^[10] Because most depository institutions are well aware of HMDA and whether they must comply, we have not included the coverage test for them herein.

Under the current version of Regulation C, a nondepository is generally a “financial institution” if it:

(i) In the preceding calendar year, either:

(A) Originated [closed-end] home purchase loans, including refinancings of home purchase loans, that equaled at least 10 percent of its loan-origination volume, measured in dollars; or

(B) Originated [closed-end] home purchase loans, including refinancings of home purchase loans, that equaled at least \$25 million; and

(ii) On the preceding Dec. 31, had a home or branch office in [a metropolitan statistical area]; and

(iii) Either:

(A) On the preceding Dec. 31, had total assets of more than \$10 million, counting the assets of any parent corporation; or

(B) In the preceding calendar year, originated at least 100 [closed-end] home purchase loans, including refinancings of home purchase loans.^[11]

A “home purchase loan” is defined as “a loan secured by and made for the purpose of purchasing a dwelling.”^[12] Home purchase loans are not limited to loans made to consumers, but can include loans made to businesses for the purpose of purchasing “dwellings,” which can include multifamily housing.^[13] Note that an “assumption,” defined as “a written agreement accepting a new borrower as the obligor on an existing obligation,” may be classified as a home purchase loan.^[14] Also note that the

institutional coverage tests are based on loans originated, and so applications that do not result in loans are not counted towards institutional coverage.

2. Amended Rule

Amended Regulation C also contains separate tests for depositories and nondepositories, but the loan volume thresholds have changed.[15] Under the amended rule, effective Jan. 1, 2018 a nondepository will generally be a “financial institution” if it:

(i) On the preceding Dec. 31, had a home or branch office[16] in [a metropolitan statistical area]; and

(ii) Meets at least one of the following criteria:

(A) In each of the two preceding calendar years, originated at least 25 closed-end mortgage loans [with certain exclusions]; or

(B) In each of the two preceding calendar years, originated at least 100 open-end lines of credit [with certain exclusions].

3. Key Coverage Issues for Nondepository Multifamily Lenders Under the Amended Rule

From the perspective of many nondepositories that engage in multifamily lending, perhaps the most important change to the coverage test relates to the loan volume thresholds. As noted above, starting in 2018 the minimum threshold of 100 closed-end home purchase loans (including refinancings) in the preceding calendar year will effectively be replaced by a threshold of either 25 closed-end mortgage loans or 100 open-end lines of credit, respectively, in each of the preceding two calendar years. These new volume thresholds will likely pull new institutions into scope.

For purposes of the new coverage requirements, a “closed-end mortgage loan” means “an extension of credit that is secured by a lien on a dwelling and that is not an open-end line of credit.”[17] An “open-end line of credit” means “an extension of credit that: (1) Is secured by a lien on a dwelling; and (2) Is an open-end credit plan as defined in Regulation Z [implementing the Truth in Lending Act], but without regard to whether the credit is consumer credit, is extended by a creditor, or is extended to a consumer.”[18] Finally, a “dwelling” is “a residential structure, whether or not attached to real property. The term includes ... a multifamily residential structure or community.”[19] Assumptions may qualify as closed-end mortgages or as open-end lines of credit.[20]

Note that commercial-purpose transactions are excluded from the thresholds of 25 closed-end mortgage loans and 100 open-end lines of credit if they do not qualify as “home purchase loans,” “refinancings” or “home improvement loans.”[21] See discussion below.

Because of the two-calendar-year look-back period, the number of loans that a nondepository entity originates during 2016 and 2017 may well affect whether the entity is subject to HMDA in 2018. Therefore, nondepository entities should consider putting procedures in place during 2016 and 2017 to assess whether the transactions that they originate qualify as closed-end mortgage loans or open-end lines of credit.

Coverage of Transactions

Once an entity qualifies as a financial institution subject to HMDA, it faces the issue of which specific transactions it is required to report.

1. Current Rule

Under the current version of Regulation C, transaction coverage is determined using a purpose-based test. In particular, financial institutions must generally report information about applications for closed-end home purchase loans, closed-end refinancings and closed-end home improvement loans.[22] Reporting of open-end transactions is optional. All applications must be reported even if they do not result in a loan being originated.

2. Amended Rule

Amended Regulation C revises HMDA's transaction coverage test in two key ways. First, it requires reporting of open-end lines of credit. Second, for consumer purpose transactions, it replaces the purpose-based coverage test with a simpler test that covers most dwelling-secured loans.

Specifically, under the amended Regulation C, a consumer-purpose transaction must generally be reported if it qualifies as either a "closed-end mortgage loan" or an "open-end line of credit," as defined above, with certain exclusions.[23] For consumer-purpose transactions, these requirements are significantly broader than the current coverage test, which, as noted above, is generally limited to closed-end home purchase loans, closed-end refinancings and closed-end home improvement loans.[24]

For commercial-purpose transactions, however, the transaction coverage test is different. The new rule retains existing Regulation C's purpose-based coverage test for commercial purpose transactions, although it expands coverage to include open-end lines of credit. This means that, in the commercial context, only closed- and open-end home purchase loans, closed- and open-end refinancings and closed- and open-end home improvement loans will generally be reportable.[25]

3. Key Coverage Issues for Multifamily Lending Under the Amended Rule

Many commenters to the proposed amendments urged the CFPB to exclude all commercial-purpose transactions from Regulation C's requirements, because, among other matters, requiring reporting on commercial transactions would be burdensome, especially for smaller institutions, and excluding such transactions would align Regulation C's coverage with other federal regulations governing mortgage finance. Commenters also noted that many HMDA data fields are not applicable to commercial purpose loans and a lot of information that is relevant to commercial lending are not reported. Other commenters urged the bureau to exclude multifamily transactions, due to the differences in how multifamily transactions are underwritten, and because multifamily loans often are made to corporate borrowers rather than consumers and therefore are ill-suited to serving HMDA's purposes.

After considering these views, the bureau declined to exclude commercial-purpose transactions or multifamily loans from the scope of the amended rule. According to the bureau, requiring data collection on such transactions serves HMDA's purposes by showing the availability and condition of multifamily housing units, and also the "full extent of leverage on single-family homes, particularly in communities that may rely heavily on dwelling-secured loans to finance small-business expenditures." [26] Although the bureau declined to entirely exclude multifamily or commercial transactions, it did acknowledge that it is unclear whether the benefits of reporting *all* such transactions is justified by the associated burdens. The bureau therefore opted to balance the benefits and burdens

by requiring reporting on only those dwelling-secured commercial purpose loans and lines of credit that satisfy the purpose-based test in current Regulation C.

Accordingly, the amended rule expressly excludes from coverage a closed-end mortgage loan or open-end line of credit that is or will be made primarily for a business or commercial purpose, *unless* the closed-end mortgage loan or open-end line of credit is a home improvement loan, a home purchase loan or a refinancing.

In part two, we will address some of the HMDA reporting issues and challenges specific to commercial multifamily lenders.

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[1] Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801–2811.

[2] 12 C.F.R. pt. 1003.

[3] The Equal Credit Opportunity Act applies to commercial as well as consumer lending. 12 C.F.R. § 1002.1(a); *id.*

pt. 1002, *supp. I*, comment 1(a)-1.

[4] Final Rule, Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66,127 (Oct. 28, 2015) (to be codified at 12 C.F.R. pt. 1003).

[5] See *infra* Part I.

[6] The Consumer Financial Protection Bureau can potentially obtain civil money penalties of as much as \$1 million for each day that a violation of a HMDA requirement continued, in addition to other forms of relief. 12 U.S.C. §§ 5481(12), (14), 5565.

[7] See 80 Fed. Reg. at 66,308 (to be codified at 12 C.F.R. pt. 1003.2(Financial institution)(1)) (effective Jan. 1, 2017 until Dec. 31, 2017).

[8] See 80 Fed. Reg. at 66,309 (to be codified at 12 C.F.R. § 1003.2(g)) (effective Jan. 1, 2018). Because the tests are complicated, a helpful overview of them is found in the flow charts that the Federal Financial Institutions Examination Council has prepared for previous years and that the CFPB has prepared for 2017 and for 2018. But even these flow charts do not fully capture all of the nuances of the tests.

[9] Because most depository institutions are well aware if they qualify as financial institutions under HMDA, we have not included the coverage test herein. The current definition of a “financial institution”

for a depositories can be found at 12 C.F.R § 1003.2(Financial institution)(1).

[10] See 12 C.F.R. § 1003.2(Financial institution).

[11] 12 C.F.R § 1003.2(Financial institution)(2). Note that for a nondepository, a “branch office” is “Any office ... that takes applications from the public for home purchase loans, home improvement loans, or refinancings. A [nondepository] is also deemed to have a branch office in a [Metropolitan Statistical Area] if, in the preceding calendar year, it received applications for, originated, or purchased five or more home purchase loans, home improvement loans, or refinancings related to property located in that [Metropolitan Statistical Area].” Id. § 1003.2(Branch office)(2).

[12] 12 C.F.R. § 1003.2(Home purchase loan).

[13] A “dwelling” can generally include any “residential structure (whether or not attached to real property) located in a state of the United States of America, the District of Columbia, or the Commonwealth of Puerto Rico....” 12 C.F.R. § 1003.2(Dwelling).

[14] 12 C.F.R. pt. 1003, supp. I, comment 1(c)-9.

[15] 80 Fed. Reg. at 66,309 (to be codified at 12 C.F.R. § 1003.2(g)) (effective Jan. 1, 2018).

[16] Id. The definition of a “branch office” of a nondepository will be slightly changed to mean “Any office ... that takes applications from the public for covered loans. A [nondepository] is also deemed to have a branch office in [a Metropolitan Statistical Area] if, in the preceding calendar year, it received applications for, originated, or purchased five or more covered loans related to property located in that [a Metropolitan Statistical Area].” Id. (to be codified at 12 C.F.R. § 1003.2(c)(2)) (effective Jan. 1, 2018).

[17] Id. (to be codified at 12 C.F.R. § 1003.2(d)) (effective Jan. 1, 2018).

[18] See id. (to be codified at 12 C.F.R. pt. 1003.2(o)) (effective Jan. 1, 2018) (internal citations omitted). Note that this definition of “open-end line of credit” may not necessarily align with transactions that typically are considered “lines of credit” in the world of commercial lending. Careful analysis may be necessary to determine whether transactions that the lender thinks of as “lines of credit” actually count toward the 25-loan threshold for closed-end mortgage loans, rather than the 100-loan threshold for open-end lines of credit.

[19] Id. (to be codified at 12 C.F.R. § 1003.2(f)) (effective Jan. 1, 2018). Note that Regulation C’s definition of “open-end line of credit” may not necessarily align with transactions that typically are considered “lines of credit” in the world of commercial lending. Careful analysis may be necessary to determine whether transactions that the lender thinks of as “lines of credit” are actually count toward the 25-loan threshold for closed-end mortgage loans, rather than the 100-loan threshold for open-end lines of credit.

[20] See 80 Fed. Reg. at 66,318-19 (to be codified at 12 C.F.R. pt. 1003, supp. I, comments 2(d)-2(i), 2(j)-5) (effective Jan. 1, 2018).

[21] See 80 Fed. Reg. at 66,309 (to be codified at 12 C.F.R. § 1003.3(c)(10)) (effective Jan. 1, 2018).

[22] See 12 C.F.R. § 1003.2(Home improvement loan), (Home purchase loan), (Refinancing); id. §

1003.4(a).

[23] See *id.* (to be codified at 12 C.F.R. pt. 1003.2(e)) (effective Jan. 1, 2018).

[24] See 12 C.F.R. §§ 1003.2, 1003(a).

[25] See 80 Fed. Reg. at 66,309 (to be codified at 12 C.F.R. § 1003.3(c)(10)) (effective Jan. 1, 2018).

[26] 80 Fed. Reg. at 66,171 (preamble).

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