HMDA and Revised Regulation C: Guidance for Multifamily Lenders

The US Home Mortgage Disclosure Act (HMDA), as implemented by Regulation C, is a federal statute that requires most entities that make dwelling-secured loans, including depository and non-depository 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 antidiscrimination statutes, determine whether financial institutions are meeting the housing needs of their local communities, and assist in directing allocations of public money.

Recent amendments 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 non-depository 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.

Failure to comply with HMDA carries significant risk, including the possibility of penalties and being required to retroactively gather and report data for activity occurring in past years. Further, the Consumer Financial Protection Bureau (the “CFPB” or “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.

This article offers an overview of how the amended Regulation C will impact multifamily housing, including which institutions and transactions are covered, as well as reporting issues and challenges specific to multifamily housing.

I. Coverage

The two key coverage questions under HMDA are: (A) whether an institution is subject to the statute and (B) if the institution is covered, whether any given loan transaction must be reported or not.
A. 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 and has made further changes that affect both depository institutions and non-depository institutions for 2018 and later years.

1. Current Rule

Regulation C contains separate tests for determining whether depository institutions and non-depository institutions qualify as financial institutions for purposes of the rule. 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 non-depository 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 December 31, had a home or branch office in [a Metropolitan Statistical Area]; and

iii. Either:
   A) On the preceding December 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.

A “home purchase loan” is defined as “a loan secured by and made for the purpose of purchasing a dwelling.” 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. 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. 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 non-depositories, but the loan volume thresholds have changed. Under the amended rule, effective January 1, 2018, a non-depository will generally be a “financial institution” if it:

i. On the preceding December 31, had a home or branch office 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 Non-Depository Multifamily Lenders under the Amended Rule

From the perspective of many non-depositories 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.” 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.” Finally, a “dwelling” is “a residential structure, whether or not attached to real property. The term includes... a multifamily residential structure or community.” Assumptions may qualify as closed-end mortgages or as open-end lines of credit.

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.” See discussion under Section I.B.3, below.

Because of the two-calendar-year look-back period, the number of loans that a non-depository entity originates during 2016 and 2017 may well affect whether the entity is subject to HMDA in 2018. Therefore, non-depository 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.

**B. 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. 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. 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.

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.
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 is 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.” 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 are 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 the 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.

II. Applications and Multifamily Lending

HMDA’s requirements are triggered when a financial institution receives an “application” for a covered loan. Current Regulation C defines the term “application” as “an oral or written request for a home purchase loan, a home improvement loan, or a refinancing that is made in accordance with procedures used by a financial institution for the type of credit requested.” Amended Regulation C similarly defines the term as “an oral or written request for a covered loan that is made in accordance with procedures used by a financial institution for the type of credit requested.” In the preamble to the amended rule, the CFPB explains that Regulation C’s definition of “application” is closely aligned with Regulation B’s definition of the term and “serves HMDA’s fair lending purposes by requiring information about the disposition of credit requests . . . that do not lead to originations.”

For consumer-purpose, 1-4 family residential mortgage loans, determining when a lender has received an application triggering HMDA’s reporting requirements is fairly straightforward. For multifamily transactions, however, the issue is a bit more complicated because multifamily loans involve a “more fluid application process.” For example, a potential purchaser of a multifamily property might submit a pitch book request, i.e., investment package information specifying desirable loan terms, to one or more potential financing sources. Concerned about the complexities associated with applying HMDA to this type of scenario, commenters to the proposed Regulation C
amendments asked the Bureau to exclude pitch book requests from the definition of the term application. The Bureau declined this request, indicating that a uniform exclusion for pitch book requests could be problematic because institutions may not define and handle such requests consistently.

Although multifamily lenders will need to determine on a case-by-case basis whether pitch book requests or other interactions with potential multifamily borrowers are applications under HMDA, the CFPB did offer some insight into how to analyze the issue. First, the Bureau noted that the definitions of “application” in both Regulation B and Regulation C are flexible and closely related, and both regulations’ official commentaries provide relevant guidance. In fact, the official commentary to Regulation C specifically states that “Bureau interpretations that appear in the official commentary to Regulation B . . . are generally applicable to the definition of application under Regulation C,” except that the Regulation C definition of application does not include prequalification requests.

Further, the Bureau stated that, consistent with Regulation B’s definition of the term “application,” “[w]hether pitch book requests would be considered applications under Regulation C would depend on how the specific financial institution treated such requests under its application process . . . .” The CFPB’s official commentary to Regulation B similarly indicates that whether an inquiry about available loan terms becomes an application triggering the regulation’s notification requirements “depends on how the creditor responds to the [applicant], not on what the [applicant] asks or says.”

According to the official commentary, the following are examples of credit-related inquiries that are not applications:

- A potential borrower asks about interest rates, the lender asks for down payment and collateral information and then communicates the rate;
- A potential borrower asks about loan terms, and discloses his/her assets and income and intended down payment, and the lender explains its LTV and other basic lending policies without indicating whether the potential borrower would qualify; and
- A potential borrower asks about loan terms, discloses his/her income and the purchase price for the desired property, and asks if he or she qualifies, and the lender responds by describing its general lending policies, explaining that it would need to review all of the potential borrower’s qualifications before making a decision, and offering to send the potential borrower an application.

In other words, if a lender responds to an inquiry by commenting generally on available loan terms and required qualifications, but does not specifically communicate whether the potential borrower qualifies or not, the situation does not constitute an application under Regulation B. Applying this analysis to Regulation C, institutions receiving pitch book requests potentially could avoid treating such requests as applications triggering HMDA reporting by responding to such requests with information about their lending terms and criteria, but not commenting on whether the proposed transaction would qualify.

III. HMDA Reporting When Multiple Entities are Involved

In multifamily lending, as in other types of lending, it is common for more than one entity to be involved in the loan origination process. For example, a credit application may be evaluated by multiple creditors, by an institution that is providing contract underwriting services to a creditor, or by an investor that pre-underwrites loans funded by a creditor from which it purchases closed transactions. In
conjunction with its amendments to Regulation C, the CFPB expanded existing guidance and provided several examples regarding which entity has the responsibility to report a transaction when multiple entities are involved.\textsuperscript{38}

**C. CFPB GUIDANCE UNDER AMENDED REGULATION C**

The general rule under the amended Regulation C is that the institution that makes the credit decision to approve or deny an application, or that was evaluating an application at the time that it was withdrawn or closed for incompleteness, is the entity that is responsible for reporting the transaction, even though that entity may not be the funding lender.\textsuperscript{39}

If an institution approves an application based on underwriting criteria provided by a third party (such as Fannie Mae or Freddie Mac), and the third party did not review the application and did not make a credit decision on the application prior to closing, then the first institution is generally responsible for reporting the transaction.\textsuperscript{40}

However, if more than one institution approved an application prior to closing, but only one of those institutions purchased the loan after closing, the institution that purchased the loan after closing generally reports the loan as an origination.\textsuperscript{41}

An exception to the above rules arises if there is an agency relationship between two institutions. If an agent made the credit decision on an application on behalf of a principal, it is the principal that is responsible for reporting the transaction. According to the CFPB, “[s]tate law determines whether one party is the agent of another.”\textsuperscript{42} Although many contract underwriting relationships specifically disclaim any agency relationship between the parties, institutions may still want to consider evaluating the features of such arrangements to ensure they do not qualify as agency relationships under applicable state law.

**D. EXAMPLES OF HOW TO REPORT**

The official commentary to the amended Regulation C provides a list of examples to help institutions understand how to report in complex situations:

i. **[Investor Makes Credit Decision (Application Approved)]** Financial Institution A received an application for a covered loan from an applicant and forwarded that application to Financial Institution B. Financial Institution B reviewed the application and approved the loan prior to closing. The loan closed in Financial Institution A’s name. Financial Institution B purchased the loan from Financial Institution A after closing. Financial Institution B was not acting as Financial Institution A’s agent. Since Financial Institution B made the credit decision prior to closing, Financial Institution B reports the transaction as an origination, not as a purchase. Financial Institution A does not report the transaction.

ii. **[Investor Makes Credit Decision (Application Denied or Withdrawn)]** Financial Institution A received an application for a covered loan from an applicant and forwarded that application to Financial Institution B. Financial Institution B reviewed the application before the loan would have closed, but the application did not result in an origination because Financial Institution B denied the application. Financial Institution B was not acting as Financial Institution A’s agent. Since Financial Institution B made the credit decision, Financial Institution B reports the application as a denial. Financial Institution A does not report the application. If, under the same facts, the application was withdrawn before Financial Institution
B made a credit decision, Financial Institution B would report the application as withdrawn and Financial Institution A would not report the application.

iii. **[Originator Makes Credit Decision and Sells Loan Post-Closing (Loan Approved)]**
Financial Institution A received an application for a covered loan from an applicant and approved the application before closing the loan in its name. Financial Institution A was not acting as Financial Institution B’s agent. Financial Institution B purchased the covered loan from Financial Institution A. Financial Institution B did not review the application before closing. Financial Institution A reports the loan as an origination. Financial Institution B reports the loan as a purchase.

iv. **[Originator Makes Credit Decision (Decline)]**
Financial Institution A received an application for a covered loan from an applicant. If approved, the loan would have closed in Financial Institution B’s name. Financial Institution A denied the application without sending it to Financial Institution B for approval. Financial Institution A was not acting as Financial Institution B’s agent. Since Financial Institution A made the credit decision before the loan would have closed, Financial Institution A reports the application. Financial Institution B does not report the application.

v. **[Originator Makes Credit Decision Using Investor Guidelines]**
Financial Institution A reviewed an application and made the credit decision to approve a covered loan using the underwriting criteria provided by a third party (e.g., another financial institution, Fannie Mae, or Freddie Mac). The third party did not review the application and did not make a credit decision prior to closing. Financial Institution A was not acting as the third party’s agent. Financial Institution A reports the application or origination. If the third party purchased the loan and is subject to Regulation C, the third party reports the loan as a purchase whether or not the third party reviewed the loan after closing. Assume the same facts, except that Financial Institution A approved the application, and the applicant chose not to accept the loan from Financial Institution A. Financial Institution A reports the application as approved but not accepted and the third party, assuming the third party is subject to Regulation C, does not report the application.

vi. **[Originator Makes Credit Decision Using Insurer or Guarantor Guidelines]**
Financial Institution A reviewed and made the credit decision on an application based on the criteria of a third-party insurer or guarantor (for example, a government or private insurer or guarantor). Financial Institution A reports the action taken on the application.

vii. **[Credit Decision Made By Agent of Originator]**
Financial Institution A received an application for a covered loan and forwarded it to Financial Institutions B and C. Financial Institution A made a credit decision, acting as Financial Institution D’s agent, and approved the application. The applicant did not accept the loan from Financial Institution D. Financial Institution D reports the application as approved but not accepted. Financial Institution A does not report the
application. Financial Institution B made a credit decision, approving the application, the applicant accepted the offer of credit from Financial Institution B, and credit was extended. Financial Institution B reports the origination. Financial Institution C made a credit decision and denied the application. Financial Institution C reports the application as denied.

E. CREDIT DECISIONS MADE BY INSTITUTIONS THAT ARE NOT SUBJECT TO HMDA

In the preamble to the amended regulation, the CFPB indicated that in some cases, loans originated pursuant to a state housing financing agency (“HFA”) program may not be reported because the HFA usually makes the credit decision but is not subject to HMDA reporting requirements. In response to this comment, the Bureau acknowledged that “some applications and loans will not be reported . . . if the institution making the credit decision is not . . . required to report HMDA data.” This comment may provide insight to institutions that make loans that are underwritten before closing by an investor that does not qualify as a financial institution for HMDA reporting purposes.

The rules on this topic are complex, however, and careful analysis of specific situations may be necessary.

IV. Other Issues that May Arise When Collecting and Reporting Data

The CFPB’s amendments to Regulation C will expand the types of data that financial institutions are expected to collect and report. A few issues are particularly relevant to multifamily housing.

First, there is a special reporting requirement starting in 2018 that applies only to multifamily lending, regarding affordable housing: “If the property securing the covered loan includes a multifamily dwelling, the number of individual dwelling units related to the property that are income-restricted pursuant to Federal, State, or local affordable housing programs” must be reported. A “multifamily dwelling” is defined as “a dwelling, regardless of construction method, that contains five or more individual dwelling units.” The CFPB has provided a non-exhaustive list of examples of federal, state, or local programs that would trigger this requirement.

Second, the CFPB has excluded multifamily housing from certain reporting requirements that are not suited to the multifamily context. For example, there are exemptions for loans secured by multifamily dwellings from reporting debt-to-income ratios, manufactured housing information, and applicant credit score, age, race, ethnicity and sex.

Finally, the CFPB’s amendments recognize that a single loan might be secured by multiple properties. The general rule is that, when Regulation C calls for property-specific data such as the property address, the institution should choose one of the properties and report its address in the entry for that transaction.

Conclusion

Amended Regulation C raises many challenging compliance questions for institutions making multifamily loans. Because both multifamily lending and HMDA compliance are an area of focus for the CFPB and other regulators, institutions making multifamily loans should consider evaluating their HMDA reporting processes for compliance with existing Regulation C and for future compliance with amended Regulation C.

Multifamily lenders also should be aware that the fair lending provisions of ECOA and Regulation B apply to commercial lending, and HMDA data can be used by regulators to identify institutions for fair lending enforcement. We will issue an article addressing the application of
ECOA and Regulation B to commercial multifamily lending soon.

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Endnotes

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.
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 an HMDA requirement continues, in addition to other forms of relief. 12 U.S.C. §§ 5481(12), (14), 5565.
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 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(Open-end line of credit). Note that for a non-depository, a “branch office” is “Any office … that takes applications from the public for home purchase loans, home improvement loans, or refinancings. A [non-depository] 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).
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 non-depository will be slightly changed to mean “Any office … that takes applications from the public for covered loans. A [non-depository] 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.


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).


27 12 C.F.R. § 1003.2.


29 Under Regulation B, an application “means an oral or written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit requested. The term application does not include the use of an account or line of credit to obtain an amount of credit that is within a previously established credit limit.” 12 C.F.R. § 1002.2(f).


31 Id.


34 Commentary to Regulation B states that “a creditor is encouraged to provide consumers with information about loan terms [but] if in giving information to the consumer the creditor also evaluates information about the consumer, decides to decline the request, and communicates this to the consumer, the creditor has treated the inquiry or prequalification request as an application . . .” 12 C.F.R. pt. 1002, supp. I, comment 2(f)-3.


39 Id.


