

**LENDERS** SUMMER  
*One* A National Alliance of Mortgage Bankers CONFERENCE

# Lender's One Conference MDIA/HOEPA Presentation

AUGUST 3-5, 2009

# Understanding new consumer protections under TILA/HOEPA and UDAP Rules

- New Underwriting Requirements for Higher Priced Mortgage Loans
- A Brief MDIA Primer on fee limitations
- Advertising and Servicing Restrictions
- New FTC Proposals on Mortgage UDAPs
- A quick look at upcoming anti-predatory legislation



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# Mortgage Disclosure Improvement Act (MDIA)

Effective for all loan applications received on or after July 30, 2009

- Initial Fee Restrictions
- Early Disclosures
- “No Requirement to Complete” Statement
- Seven Business Days Prior to Consummation
- Three Business Days Prior to Consummation



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# MDIA – Initial Fee Restrictions

- No fees may be collected, except for a reasonable credit report fee, until consumer has received early disclosures.
- Applies to lender and to all other parties.



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# MDIA – Early Disclosures

- Early disclosure rules apply to all closed-end mortgage loans covered by TILA and RESPA, other than timeshares.
- No longer limited to only purchase-money transactions secured by principal dwelling.



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# MDIA – Early Disclosures

- Early disclosure must be placed in the mail or delivered both
  - No later than the third business day after the lender receives a written application, AND
  - No later than the seventh business day before consummation.



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# MDIA – Early Disclosures

- The general definition of “business day” is used for initial three-day period (e.g., all days in which lender’s offices are open to the public), BUT
- “Rescission” definition is used for seven-day, pre-consummation waiting period (e.g., all calendar days except Sundays and federal holidays).



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# MDIA – Early Disclosures

- If early disclosures are mailed, receipt is assumed three business days later (“rescission” definition)
- Fees may therefore be collected after midnight on third business day following mailing.



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# MDIA – “No Requirement to Complete” Statement

- “You are not required to complete this agreement merely because you have received these disclosures or signed a loan application.”
- Phrase must be “in conspicuous type size and format” and “grouped together with the disclosures required by” Regulation Z.



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# MDIA - Three Business Days Prior to Consummation

- If APR at consummation will differ by more than 1/8 of 1% (1/4 for irregular transactions) from the APR in the most recent disclosure, corrected disclosures must be received by the consumer no later than the third business day before consummation.
- If corrected disclosures are mailed, receipt is deemed to have occurred three business days after mailing (“rescission” definition).



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# MDIA - Three Business Days Prior to Consummation

- If APR at consummation will be overdisclosed because of an overdisclosed finance charge, then redisclosure may not be required.
- Some investors may still require redisclosure for both increased and decreased APRs beyond the applicable tolerances.



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# MDIA – “3-7-3” Requirements

- Both the seven-day and the three-day waiting periods must expire before consummation.



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# TILA – Higher-Priced Mortgage Loans

- A new category of “higher-priced mortgage loans” (“HPMLs”) created, with specific requirements relating to HPMLs;
- New rules for all closed-end mortgage loans secured by the principal dwelling, including rules in relation to origination and servicing; and
- New advertising rules to curb various practices the Federal Reserve Board considers deceptive, for both open-and closed-end mortgage loans.



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# TILA – Higher-Priced Mortgage Loans

- Rule and accompanying supplementary materials are over 400 pages long and there are many nuances yet to be discovered.
- Undoubtedly much will be learned as thousands of lenders and servicers across the country adjust their systems, policies and procedures to comply with the rule.
- Rule transforms TILA as applied to mortgages from principally being a disclosure regime to one with significant substantive restrictions.



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# Overview

- Broad new rule, adopted principally under the Federal Reserve Board's authority under Section 129 of the Truth in Lending Act
- TILA Section 129(l)(2): "The Board, by regulation or order, shall prohibit acts or practices in connection with—
  - (A) mortgage loans that the Board finds to be unfair, deceptive, or designed to evade the provisions of this section; and
  - (B) refinancing of mortgage loans that the Board finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower."



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# Overview

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# Effective Dates

- General effective date – October 1, 2009
  - Servicing rules effective for both new and existing loans as of that date
  - April 1, 2010 for escrow requirements on site-built homes
  - October 1, 2010 for escrow requirements on manufactured housing loans
- Retroactive effect of rule?



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# HPML Threshold

- APR of “average prime offer rate” – yet to be fully defined – plus 150/350 basis points for first/subordinate liens
  - Expected to be similar to the Freddie Mac Primary Mortgage Market Survey, but the Board will use the rate and points from the survey to calculate an APR for various loan types
  - Board is seeking comment on the average prime offer rate in the context of its Regulation C proposal – comments due August 29
- Calculated as of time of rate lock – so lenders will need procedures for filling in if the loan is identified as an HPML only at the time of rate lock
- Lenders need to analyze carefully whether FHA, jumbo, and PMI loans end up in the HPML category



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# Loan Categories

- HPMLs include only closed-end loans secured by the borrower's principal dwelling. This excludes
  - HELOCs
  - Loans on second homes and investment properties
  - Short-term construction loans
- Open question: Principal dwelling as of when?
- Unlike HOEPA, HPMLs will include purchase-money loans



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# Ability to Repay

- Requires lender to verify the consumer's repayment ability (e.g., verifying the consumer's income, assets and current obligations)



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# Practical Effect



- If a HPML goes to default or foreclosure, a plaintiff will likely claim that the lender did not comply with the underwriting requirements



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# Add'l Requirements on all Closed-End Loans Secured by Borrower's Principal Dwelling

- Appraiser anti-coercion
- Servicing



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# Appraiser Coercion

- Very broad anti-coercion rule that prohibits not only coercion but also any act that might influence the appraisal or “otherwise encourage” misstatement of value.
- The rule provides
  - examples of acts that are violations (e.g. “[t]elling an appraiser a minimum reported value of a consumer’s principal dwelling that is needed to approve the loan.”); and
  - examples of acts that are not violations (“[a]sking an appraiser to consider additional information about a consumer’s principal dwelling or about comparable properties.”).
- Lender must not extend credit if knows at consummation coercion occurred unless it documents diligence to ensure appraised value not misstated



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# Appraiser Coercion

- May be hard to defend against claims that the lender knew of appraiser coercion
- Because of section 129 liability, the penalties for claims of influencing the appraiser are high
- Like “ability to repay” claims, expect appraiser coercion counterclaims in foreclosures
  - What will plaintiffs have to plead to survive motion to dismiss?



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# Servicing Requirements

- Prompt response to payoff requests (5 days)
- Application of payments the same day as they are “received.”
  - Will create numerous operational difficulties for payments received other than in the ordinary course.
- No late fee pyramiding.
  - Already illegal – it appears that industry did not even bother to comment on this section.



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# Other Requirements on HPMLs

- First-lien HPMLs must be escrowed for at least the first year
  - Unclear how this interacts with state laws that prohibit escrow requirements. Preemption? After one year?
- Strict prepayment penalty restrictions
  - No prepayment penalties for loans where the payment may change in first four years; and
  - Prepayment penalties limited to a two year duration for other loans and may not be imposed in a same creditor refinance
- Anti-evasion provision to prevent creditors from structuring loan as an open end loan to avoid HPML status



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# Liability

- Most sections were promulgated under the Board's Section 129 authority. Liability under this provision includes:
  - The usual closed-end TILA liability (statutory damages of \$200-\$2000 capped at \$500,000 for a class action plus attorneys fees)
  - Plus two additional types of liability:
    - Actual damages are potentially available for violations of some of the new requirements
      - Actual damages are and have been available since the inception of TILA in 1968 but have almost never been proven because it is difficult to attribute actual losses to disclosure violations
    - “All finance charges” under section 130(a)(4) for violations of Section 129 (“materiality” requirement)
    - No explicit class action cap on either of these types of damages



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# TILA – Advertising Rules

Effective October 1, 2009, among other things,

- Credit terms advertised must be actually available
- If an advertisement shows a rate of finance charge, it must be expressed in terms of the annual percentage rate. The abbreviation “APR” may be used. The advertisement may also show a simple interest rate “in conjunction with, but not more conspicuously than” the APR.
- If an advertisement shows the amount of any payment, the number of payments or period of repayment (length of loan), or the amount of any finance charge, it must also show the (other) terms of repayment and the APR. This is referred to as the “trigger term” rule. (Requirements with respect to downpayments do not apply to mortgage loans other than sales finance.)



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# FTC – Mortgage Acts and Practices

- FTC proposes rules addressing activities that occur throughout the life-cycle of a mortgage loan
- FTC seeks to assess whether, and to what extent, the FTC should promulgate rules that would regulate (i) advertising and marketing, (ii) origination, including underwriting, loan terms, and disclosures, (iii) appraisals, and (iv) servicing.



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# FTC – Mortgage Acts and Practices

- FTC proposes to cover acts and practices that meet the FTC's standards for unfairness or deception under Section 5 of the FTC Act.
- Proposal would apply to entities over which the FTC has jurisdiction under the FTC Act – specifically, entities other than banks, thrifts, federal credit unions, and non-profits that engage in the conduct the rules would cover.



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# Other Federal Developments – “Skin in the Game”

- HR 1728: Mortgage Reform and Anti-Predatory Lending Act
- Among other things, HR 1728 would require creditors to retain at least 5% of the credit risk on mortgages transferred, sold, or conveyed.



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# Questions

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