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First Six Months of the New HMDA Rule - Common Issues and Challenges

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January 1, 2018, marked the official start of a new and complex regulatory era for financial institutions subject to the Home Mortgage Disclosure Act (HMDA) and Regulation C. On that day, the majority of the amendments to Regulation C under the Bureau of Consumer Financial Protection's October 2015 and September 2017 final rules took effect. Those amendments, collectively referred to herein as the "New HMDA Rule," were sweeping. They dramatically altered the coverage of institutions subject to HMDA, the loan transactions and applications that must be reported, and the data points that must be collected, recorded, and reported to the appropriate federal regulator.

In the six months that have passed since these changes went into effect, mortgage lenders and other covered institutions have faced a number of common implementation issues, from open questions and ambiguities not addressed by the New HMDA Rule to

challenges caused by the volume and complexity of the new requirements. We discuss some representative examples of these issues below.

MOVING TARGETS

One of the biggest implementation challenges presented by the New HMDA Rule results from the manner in which the Bureau is issuing instruction and guidance. Unlike the Bureau's other rules, the statute, implementing regulation, and official staff commentary do not provide all of the information HMDA reporters need in order to comply. Among various other documents and tools issued by the Bureau, HMDA reporters must also consult the Filing Instructions Guide (FIG), a 151-page document that provides the file, data, and edit specifications required for reporting HMDA data, including the possible values and other information that may be reported for each data point. Before the New HMDA Rule, Appendix

A to Regulation C and the related commentary contained much of this information, including the various “codes” that related to each data point.

Why is this shift in approach noteworthy? Removing this information from Regulation C allows the Bureau to issue and change this information without going through the time-consuming notice and comment rulemaking process. While this approach allows the Bureau to make adjustments timelier, which is beneficial, these adjustments are made without requesting public comments and without helpful explanation as to the purpose of the changes. In fact, the Bureau has revised the 2018 FIG seven times since it was first issued in January 2016, the most recent of which occurred in February. Is your HMDA team keeping up with each of these revisions and how it may impact your HMDA collection and reporting process?

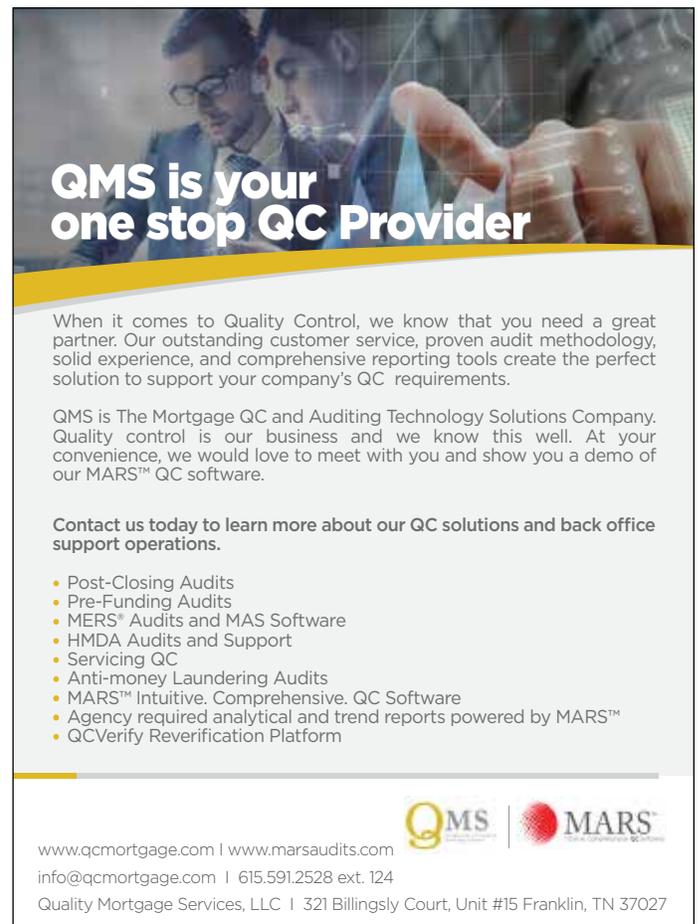
For example, under the New HMDA Rule, institutions must report the name of the automated underwriting system (AUS) used to evaluate the application and the result generated by the system, if applicable. In cases where a company uses more than one AUS to evaluate an application or the system or systems generate two or more results, the New HMDA Rule lays out a complex waterfall approach for deciding which results to report. Additional questions arise in the context of particular AUS types, such as the USDA’s Guaranteed Underwriting System (GUS). GUS results can be a challenge to report because GUS generates two separate results for each file, and those results may correspond to more than one code available (e.g., Accept/Unable to Determine), but an institution may report only one AUS result per AUS reported.

The Bureau changed the codes available for reporting AUS results in the most recent revision to allow lenders reporting GUS results to use “Code 16 – Other.” The FIG instruction to “Code 16 – Other” states that more than one AUS result may be entered in the free-form text field, as applicable. The Bureau’s only explanation of this change was: “Updated allowable codes for AUS results produced by the Guaranteed Underwriting System (GUS).” This comment fails to explain what prompted this change and what it means for reporters; this is

particularly troubling since the Bureau previously gave informal advice to report only one of the GUS results before it issued the February FIG revisions.

Will the Bureau continue to modify the FIG this year? All reporters must record the data collected for HMDA on a loan/application register within 30 calendar days after the end of each calendar quarter in which final action is taken. Therefore, if more changes are made to the FIG, each reporter will be required to update its recorded entries and revise its procedures (and/or systems) going forward for each change.

Regardless, you should be expecting additional changes that may impact your recorded entries and your process. We are still awaiting the Bureau’s release of additional reporting tools, including the geocoding tool, which provides institutions that use it correctly with a safe harbor when reporting the census tract. In addition, the Bureau announced in December 2017 that it intends to ▶



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open a rulemaking to reconsider various aspects of the New HMDA Rule such as the institutional and transactional coverage tests and discretionary data points, and the latest regulatory agenda indicates that this process is not scheduled to begin until 2019.

RATE-SET DATE FOR CALCULATING RATE SPREAD

For loans and approved but not accepted applications that are subject to Regulation Z (other than an assumption, a purchased loan, or a reverse mortgage), institutions must report the Rate Spread, which is the difference between the loan's annual percentage rate (APR) and the average prime offer rate (APOR) for a comparable transaction as of the date the interest rate is set. A number of questions arise when trying to determine the appropriate rate-set date to use for purposes of this calculation.

For example, which rate-set date should an institution use for an approved not accepted application that had a floating interest rate? In

such cases, the interest rate was arguably never "set." While some institutions have concluded the most defensible approach is to use the date on which the applicant was provided the early disclosures required under Regulation Z, the New HMDA Rule does not directly address the question. Complications can also arise in identifying the rate-set date for "repriced" transactions and transactions in which a borrower changes from one loan program to another program that is subject to different pricing terms. The requirements for these situations are complex and potentially ambiguous and can trip up companies that have not sufficiently thought through their approach to such scenarios.

WHAT DATA TO REPORT

What data an institution must report often depends on the action taken on the file and whether the institution relied on the information as part of the credit decision made. In particular, the reporting requirements associated with counteroffers demonstrate the complexity involved in implementing this aspect of the New HMDA Rule.

Suppose an institution makes a counteroffer to lend on terms different from the applicant's initial request. If the applicant declines to proceed with that counteroffer or fails to respond, the institution reports the action taken as a denial based on the original terms requested by the applicant. On the other hand, if the applicant agrees to proceed with consideration of the counteroffer, the institution reports the action taken as the disposition of the application based on the terms of the counteroffer. In such cases, how the file is reported may also depend on whether the institution's conditional approval is subject to only customary commitment or closing conditions or also includes any underwriting or creditworthiness conditions. Companies must have procedures and systems that address all of the potential scenarios to ensure accurate reporting and update them as needed when unique scenarios arise.

COLLECTION OF EXPANDED GMI DATA

The New HMDA Rule significantly expanded and complicated the requirements for collecting Government Monitoring Information (GMI) data regarding an applicant's race, ethnicity, and sex.



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THOUGHT LEADER

As a result, institutions have faced certain issues in updating their collection procedures and forms to ensure they offer applicants appropriate options, such as the ability to select one or more race or ethnicity subcategories even if the applicant has not selected a race or ethnicity aggregate category. These requirements can pose challenges depending on how a company's existing systems or processes were designed, especially in the context of online applications, where forms may be coded to automatically trigger the selection of a main category when a subcategory is selected.

Does the New HMDA Rule require online application forms to allow an applicant to skip these questions entirely? Is it permissible to structure the electronic interface to require the applicant to make at least one selection in order to move on to the next page, even if only by checking a box to specifically indicate they do not wish to provide the information? The New HMDA Rule fails to directly address these questions, and institutions must make decisions on the best way to proceed based on their own operations and the regulatory language and then apply a consistent, reasonable approach.

MLO NMLSR IDENTIFIER

The New HMDA Rule added a requirement to report an individual mortgage loan originator's (MLO) National Mortgage Licensing System & Registry identifier (NMLSR ID) for a loan or application. Questions often arise in this context when multiple MLOs are involved in a single transaction because, for example, an MLO leaves the company or multiple MLOs work on an application together as part of a team. In those cases, which individual's NMLSR ID must be reported? The New HMDA Rule requires the company to report the NMLSR ID of the MLO with primary responsibility for the transaction as of the date of action taken. The regulation does not provide additional guidance with respect to what constitutes primary responsibility, but instead provides a company some discretion to develop reasonable policies to make that determination.

In order to address these situations, an institution should establish and follow a reasonable,

written policy for determining which individual MLO has primary responsibility for the reported transaction as of the date of action taken. When creating that policy, companies should also consider the requirements under various other federal and state laws that have requirements for identifying the MLO(s) for a transaction, such as Regulation Z's requirement to disclose the primary loan originator's name and NMLSR ID (if any) on certain loan documents, as those other requirements may influence this determination.

FINAL THOUGHTS

As the common issues described above illustrate, there is still much to consider and work through in implementing the New HMDA Rule during its first year. You should be putting in the extra time and dedicating extra resources to audit your information and to identify questions and pain points. Institutions should have already recorded their first quarter data for 2018 under the new requirements. Use this opportunity to carefully test and review that data and the relevant internal processes for the issues above as well as any other potential gaps or questions unique to your own operations.

In situations where there are open questions and multiple reasonable interpretations, the key is consistency. Develop a well-reasoned, consistent approach based on the language in Regulation C, the commentary, and the FIG. Review the other guidance available on the Bureau's website, submit questions to the Bureau, and consult with counsel. Document your analysis process to demonstrate your good faith efforts to comply. Any identified issues should be addressed as soon as possible so you can have a consistent approach moving forward and only have a few months of past entries to correct. If you wait until 2019 to review, you will have to correct an entire year's worth of entries retroactively should you find any issues. 

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