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To: Clients and Friends

From: David F. Dulock

Subject: CFPB Proposed Rule to Amend Higher Priced Mortgage Escrow Exemption

In the July 22, 2020 issue of the *Federal Register* (85 FR 44228, *click here*) the Bureau of Consumer Financial Protection (Bureau) published a proposed rule, with a request for public comment, that proposes to amend the higher-priced mortgage loan (HPML) escrow exemption in §1026.35 of Regulation Z to exempt any loan made by an insured credit union or insured depository institution and secured by a first lien on the principal dwelling of a consumer if (1) the institution has assets of $10 billion or less; (2) the institution and its affiliates originated 1,000 or fewer loans secured by a first lien on a principal dwelling during the preceding calendar year; and (3) certain of the existing HPML escrow exemption criteria are met.

Comments on the proposed rule must be received by the Bureau on or before September 21, 2020, be identified by Docket No. CFPB–2020–0023 or RIN 3170–AA83, include the Bureau's name and be submitted by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Email: 2020-NPRMEscrowExemption@cfpb.gov.* Include Docket No. CFPB–2020–0023 or RIN 3170–AA83 in the subject line of the message.

• *Mail/Hand Delivery/Courier:* Comment Intake—Higher-Priced Mortgage Loan Escrow Exemption, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552.

The proposed rule would make the following amendments to §1026.35 and its Official Interpretations in Supplement I to Part 1026:

• Amend §1026.35 by: adding paragraphs (a)(3) and (4); revising paragraphs (b)(2)(iii)(D)(*1*), (b)(2)(iv)(A), and (b)(2)(v); and adding paragraph (b)(2)(vi);

• Amend the Official Interpretations in Supplement I to Part 1026 by: revising paragraph 35(b)(2)(iii); adding paragraph 35(b)(2)(iii)(D)(*1*) and paragraph 35(b)(2)(iii)(D)(*2*); revising Paragraphs 35(b)(2)(iv) and 35(b)(2)(v); adding paragraphs 35(b)(2)(vi) and 35(b)(2)(vi)(A) and (B); and

• Under §1026.43—Minimum Standards for Transactions Secured by a Dwelling, revising paragraph 43(f)(1)(vi).

Below is a summary of the proposed rule taken from the above *Federal Register* publication:

§1026.35 paragraph (a): Paragraph (a) defines "Higher-priced mortgage loan" in paragraph (a)(1) and "Average prime offer rate" in paragraph (a)(2). The proposed rule would add a definition for "Insured credit union" in proposed paragraph (a)(3) and a definition for "Insured depository institution" in proposed paragraph (a)(4).

§1026.35 paragraph (b)(2)(iii): The dates in current paragraph (b)(2)(iii)(D)(*1*) between which creditors are allowed to maintain escrow accounts for first lien HPMLs without losing eligibility for the escrow account exemption in paragraph (b)(2)(iii) (*i.e.*, "on or

after April 1, 2010, and before May 1, 2016"), if applied to insured credit unions and insured depository institutions who would otherwise qualify under the proposed rule's escrow account exemption criteria in proposed §1026.35(b)(2)(vi), would cause many of these insured credit unions and insured depository institutions to be ineligible because they very likely have established escrow accounts for HPMLs after May 1, 2016, in compliance with the existing escrow requirements in §1026.35(b)(1). For this reason, the proposed rule would remove the escrow account exemption before date of "May 1, 2016" in paragraph (b)(2)(iii)(D)(*1*) and would extend the before date to a date before "[DATE 90 DAYS AFTER THE EFFECTIVE DATE OF THE FINAL RULE]". *(In the preamble to the proposed rule, the Bureau states it is proposing that the final rule "take effect for mortgage applications received by an exempt institution on the date of the final rule's publication in the Federal Register.")*

Official Interpretations Comment 35(b)(2)(iii): The proposed rule would make the following amendments to comment 35(b)(2)(iii):

- Comment 35(b)(2)(iii)–1.ii.C: In 2019 a sentence describing the definition of "affiliate" was inadvertently deleted from comment 35(b)(2)(iii)–1.ii.C. No change in interpretation was intended and the proposed rule would add the deleted sentence back into this comment: "'Affiliate' is defined in §1026.32(b)(5) as 'any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.).'"
- Comment 35(b)(2)(iii)-1.iv: The proposed rule would amend comment 35(b)(2)(iii)-1.iv by adding references to the insured credit union and insured depository institution escrow account exemption in proposed §1026.35(b)(2)(vi).
- Comment 35(b)(2)(iii)(D)(*1*)–1: In 2019 comment 35(b)(2)(iii)(D)(*1*)–1 was inadvertently deleted from the Official Interpretations. No change in interpretation of the associated regulatory provisions was intended. To correct this deletion, the proposed rule would reinsert comment 35(b)(2)(iii)(D)(*1*)–1 into the Official Interpretations as amended by the proposed rule to reflect the before date change in paragraph (b)(2)(iii)(D)(*1*) and to add references to the insured credit union and insured depository institution escrow account exemption in proposed §1026.35(b)(2)(vi).
- Comment 35(b)(2)(iii)(D)(*2*)–1: In 2019 comment 35(b)(2)(iii)(D)(*2*)–1 also was inadvertently deleted from the Official Interpretations. No change in interpretation of the associated regulatory provisions was intended. To correct this deletion, the proposed rule would reinsert comment 35(b)(2)(iii)(D)(*2*)–1 into the Official Interpretations with no changes made.

§1026.35 paragraph (b)(2)(iv)(A): The proposed rule would amend paragraph (b)(2)(iv)(A) by removing paragraph (b)(2)(iv)(A)(*3*) because by its own terms paragraph (b)(2)(iv)(A)(*3*) ceased to have any force or effect on December 4, 2017. *(Paragraph (b)(2)(iv)(A)(3) provided that a county or census block could be designated as rural pursuant to an application process under section 89002 of the Helping Expand Lending Practices in Rural Communities Act, Public Law 114–94, title LXXXIX (2015) and that this paragraph would expire on December 4, 2017).)*

Official Interpretations Comment 35(b)(2)(iv): The proposed rule would amend comments 35(b)(2)(iv)-1.i and -2.i, comment 35(b)(2)(iv)-1.ii and comments 35(b)(2)(iv)-1.iii.A and D:

- Comments 35(b)(2)(iv)-1.i and -2.i: The proposed rule would make conforming changes in comments 35(b)(iv)-1.i and -2.i by removing references to the application process described in paragraph (b)(2)(iv)(A)(*3*).

- Comment 35(b)(2)(iv)-1.ii: The proposed rule would remove the last two sentences from comment 35(b)(2)(iv)-1.ii because the Bureau's June 23, 2020 interpretive rule, which describes the HMDA data to be used in determining whether an area is "underserved," explains that certain parts of the methodology described in comment 35(b)(2)(iv)–1.ii became obsolete because they referred to HMDA data points replaced or otherwise modified by the 2015 HMDA Final Rule.
- Comments 35(b)(2)(iv)-1.iii.A and D: The proposed rule would remove from these comments references to publishing the annual rural and underserved lists in the *Federal Register*.

Official Interpretations Comment 43(f)(1)(vi): The proposed rule also would make the same conforming changes in comments 43(f)(1)(vi)-1.i and -1.i.A as made in comments 35(b)(iv)-1.i and -2.i .

§1026.35 paragraph (b)(2)(v): Paragraph (b)(2)(v) currently provides that, unless otherwise exempted by §1026.35(b)(2), the exemption to the escrow requirement will not be available for any first lien HPML that, at consummation, is subject to a commitment to be acquired by a person that does not satisfy the conditions for an exemption in §1026.35(b)(2)(iii) *(i.e.*, no forward commitment). The proposed rule would add references in paragraph (b)(2)(v) to the insured credit union and insured depository institution escrow account exemption in proposed §1026.35(b)(2)(vi).

Official Interpretations Comment 35(b)(2)(v)-1: The proposed rule would make conforming changes in comment 35(b)(2)(v)-1 by adding references to the insured credit union and insured depository institution escrow account exemption in proposed §1026.35(b)(2)(vi).

§1026.35 paragraph (b)(2)(vi): In proposed paragraph (b)(2)(vi), the proposed rule would add the insured credit union and insured depository institution escrow account exemption from the HPML escrow requirement in paragraph (b)(1), as follows:

> (vi) Except as provided in paragraph (b)(2)(v) of this section, an escrow account need not be established for a transaction made by a creditor that is an insured depository institution or insured credit union if, at the time of consummation:
> (A) As of the preceding December 31st, or, if the application for the transaction was received before April 1 of the current calendar year, as of either of the two preceding December 31sts, the insured depository institution or insured credit union had assets of $10,000,000,000 or less, adjusted annually for inflation using the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each 12-month period ending in November (see comment 35(b)(2)(vi)(A)–1 for the applicable threshold);
> (B) During the preceding calendar year, or, if the application for the transaction was received before April 1 of the current calendar year, during either of the two preceding calendar years, the creditor and its affiliates, as defined in §1026.32(b)(5), together extended no more than 1,000 covered transactions secured by a first lien on a principal dwelling; and
> (C) The transaction satisfies the criteria in paragraphs (b)(2)(iii)(A) and (D) of this section.

This proposed new exemption from the HPML escrow requirement in paragraph (b)(1) would be narrower than the existing exemption in paragraph (b)(2)(iii) in the following ways:

1) It is limited to insured credit unions and insured depository institutions that meet the statutory criteria, whereas the existing exemption applies to any creditor (including a non-insured creditor) that meets the criteria in paragraph (b)(2)(iii).

2) Its covered transactions limit is specified to be no more than 1,000 covered transactions secured by a first lien on a principal dwelling, whereas the existing exemption's transactions limit is no more than 2,000 covered transactions (excluding portfolio loans – *see* paragraph (b)(2)(iii)(B)) secured by a first lien on a dwelling.

3) Its asset size threshold is $10 billion "or less" (not including affiliates), whereas the existing exemption's asset size threshold is "less than" $2 billion (including affiliates).

Despite the above, this proposed new exemption from the HPML escrow requirement in paragraph (b)(1) would have the following provisions in common with the existing exemption in paragraph (b)(2)(iii):

1) It is subject to the forward commitment bar in paragraph (b)(2)(v).

2) It has the same three-month grace period as paragraph (b)(2)(iii) – *i.e.*, "before April 1 of the current calendar year".

3) It has the same "'rural' or 'underserved'" area test as set forth in paragraph (b)(2)(iii)(A).

4) It has the same definition of affiliates as defined in §1026.32(b)(5).

5) It has the same application of the non-escrowing time period as set forth in proposed revised paragraph (b)(2)(iii)(D)(*1*).

Official Interpretations Comment 35(b)(2)(vi): The proposed rule would add proposed comments 35(b)(2)(vi)-1, 35(b)(2)(vi)(A)-1 and 35(b)(2)(vi)(B)-1 summarized below:

- Comment 35(b)(2)(vi)-1: Proposed comment 35(b)(2)(vi)-1 would explain that for guidance on applying the grace periods for determining asset size or transaction thresholds under paragraph (b)(2)(vi)(A) or (B), the rural or underserved area requirement under paragraph (b)(2)(vi)(C), or other aspects of the exemption in paragraph (b)(2)(vi) not specifically discussed in the commentary to paragraph (b)(2)(vi), an insured credit union or insured depository institution may, where appropriate, refer to the commentary to paragraph (b)(2)(iii).
- Comment 35(b)(2)(vi)(A)-1: Proposed comment 35(b)(2)(vi)(A)–1 would explain the method by which the asset size threshold will be adjusted for inflation, that the assets of affiliates are not considered in calculating compliance with the threshold, and that the Bureau will publish notice of the adjusted asset threshold each year by amending this comment.
- Comment 35(b)(2)(vi)(B)-1: Because there are differences between the 2,000-loan transaction threshold in paragraph (b)(2)(iii)(B) of the existing exemption and the 1,000-loan transaction threshold in proposed paragraph (b)(2)(vi)(B) of this proposed new exemption that would go beyond the number of loans, proposed comment 35(b)(2)(vi)(B)–1 would explain the differences between the transactions to be counted toward the two thresholds for their respective exemptions.