Volume 38, Issue 6 | JUNE 2021

DISCLOSURE

A MONTHLY COMPLIANCE REVIEW PUBLISHED BY THE IOWA BANKERS ASSOCIATION

THE FORK IN THE ROAD

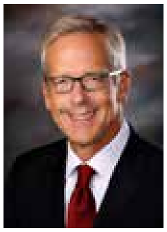
Secondary Market Mortgage Lending After July 1

IN THIS ISSUE:

WHAT'S NEW IN THE ACH WORLD — PART 2

SAFE AT HOME

IOWA BANKERS ASSOCIATION



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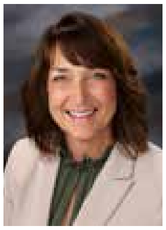

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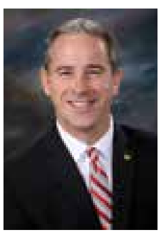

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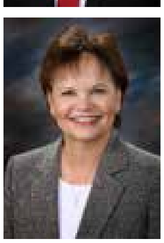

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DISCLOSURE

A MONTHLY COMPLIANCE REVIEW PUBLISHED BY THE IOWA BANKERS ASSOCIATION

HIGHLIGHTS

FEATURE

Despite the CFPB's recent delay of the July 1 mandatory compliance date of the revised price-based General Qualified Mortgage rule and sunset date for the GSE QM until Oct. 1, 2022, the conservator for Fannie Mae and Freddie Mac announced in early April they will only purchase loans with application dates on or after July 1, 2021, that meet the revised, priced-based General QM standards. So while creditors can still originate GSE QMs in compliance with Regulation Z until Oct. 1, 2022, GSE QMs with application dates on or after July 1 will not be purchasable by secondary market investors. This article details the decisions creditors must make as a result.

REGULATORY UPDATE

NOTES OF INTEREST

COMPLIANCE FORUM

WHAT'S NEW IN THE ACH WORLD — PART 2

JENNY GIRKIN, CRCM, AAP

The **Highlight article** in the February 2021 issue of Disclosure summarized ACH rule changes occurring the first half of 2021. In this issue, ACH rule changes scheduled for the second half of 2021 are detailed. This is a summary of the operating rules and guidelines and is not intended to replace a detailed analysis your organization should perform to determine the impact these changes may have on your ACH program.

Effective Aug. 1, 2021: ACH Contact Registry

Phase 1 required all ACH participating depository financial institutions (DFI) to register contact information for their ACH operations, fraud and/or risk management staff using Nacha's risk management portal. All participating DFIs were required to complete their initial registration by October 30, 2020, and to keep the information up-to-date.

Under Phase 2, all ACH participating DFIs that did not register their contact information or keep their contact registry current may be subject to a rules enforcement proceeding and fines at the class 2 violation level. In situations involving Class 2 rules violation, the ACH Rules Enforcement Panel may levy a fine against the participating DFI in an amount up to $100,000 per month until the problem is resolved.

Implement procedures to ensure registration contact information is up-to-date at all times going forward.

Effective Sept. 17, 2021: Meaningful Modernization

Nacha will implement five amendments to improve and simplify the ACH user experience by: defining the use of standing authorizations for consumer ACH entries; defining and allowing oral authorization of consumer ACH debits beyond a telephone call; providing greater consistency of ACH authorization processes; reducing certain administrative burdens related to providing proof of authorization; and clarifing an RDFI may obtain a consumer's WSUD electronically or orally.

STANDING AUTHORIZATION

A standing authorization is an advance authorization by a consumer for future debits at various intervals. Future debits may be initiated by the consumer through a future action. This differs from recurring payments as they occur at regular intervals and requires no additional action by the consumer and a single entry that is a one-time payment. The new authorization is a hybrid and will allow businesses and consumers to make more flexible payment arrangements that are on-going and will require action by the customer in the future. Standing authorizations may be obtained orally or in writing. The rule allows originators flexibility in the use of SEC codes for individual subsequent entries. Individual subsequent entries is an individual payment based on a standing authorization. For subsequent entries, the rules allow and originator to use the TEL or WEB codes for subsequent entries when initiated by a telephone call or via the internet/wireless network, regardless of how the initial standing authorization was obtained. The originator will not be required to meet the authorization requirements of TEL or WEB but will need to meet the risk management and security requirements associated with those codes.

The rule will allow optional formatting to identify an entry as a recurring entry, single-entry or standing authorization. The standard code value will be "R" for recurring, "S" for single-entry, and "ST" for standing authorization. The originator may choose to include these values in the payment type code field of a TEL or WEB entry or the discretionary data field of a PPD entry.

ORAL AUTHORIZATION

This rule will define and allow oral authorization as a valid authorization method for consumer debits outside of a telephone call. How cool will it be to initiate an ACH payment that starts with a command to Siri, Alexa or other type of virtual assistant? The concept of using voice technologies to initiate ACH payments is a very real possibility, and Nacha is making changes to allow oral authorizations more broadly.

Currently, only the TEL transaction has requirements and addresses risks specific to an oral authorization; these rules have not changed. Under the new rule, businesses will be able to use verbal interactions and voice-related technologies. For example, an oral authorization obtained over the internet that is not a telephone call will need to meet the risk and security requirements that currently apply to Internet-Initiated/Mobile (WEB) entries and will use the WEB standard entry class code. The rule will allow standing authorizations to be obtained orally and subsequent entries initiated under a standard authorization to be initiated through voice commands, instructions or affirmations. Originators who intend to use oral authorizations will need to consider if their current digital storage needs will be impacted.

OTHER AUTHORIZATION ISSUES

In conjunction with the rules on Standing Authorization and Oral Authorization, this rule includes other modifications of the general authorization rules to provide greater clarity, flexibility and consistency.

- Clarity — Reorganizes the general authorization rules to incorporate standing authorization, oral authorization and other changes. Defines "recurring entry" and the proposed new definition of "subsequent entry" to align with Regulation E.
- Flexibility — States authorization of an ACH payment can occur by any method allowed by law/regulation. Keep in mind only consumer debit authorizations require a writing that is signed or similarly authenticated.
- Consistency — Applies the standards of "readily identifiable" and "clear and readily understandable terms" to all authorizations. The rule will apply the minimum data standards that are currently only in the rules for TEL entries for all consumer debit authorizations (i.e. information that must be included in a consumer authorization).

Originators and ODFIs should review current consumer authorizations of debit transactions to ensure they are "readily identifiable" and include "clear and readily understandable terms." Revised Subsection 2.3.2.2 of the rules will require authorizations to include:

- Language regarding whether the authorization obtained from the receiver is for a single entry, multiple entries or recurring entries;
- The amount of the entry(ies) or reference to the method of determining the amount of the entry(ies);
- The timing (including start date), number, and/or frequency of entries;
- The receiver's name or identity;
- The account to be debited;
- The date of the receiver's authorization;
- Language instructing the receiver how to revoke authorization directly with the originator (including timing and manner in which the receiver's communication with the originator must occur). For a single entry scheduled in advance, the right of the receiver to revoke the authorization in advance must afford the originator a reasonable opportunity to act on the revocation prior to initiating the entry.

ALTERNATIVE PROOF OF AUTHORIZATION

This rule will allow an ODFI to accept the return of an entry as an alternative to providing proof of authorization. Some ODFIs reported when they expended resources to obtain and provide proof of authorization, debits were returned unauthorized anyway. To avoid this issue, the ODFI may simply accept the return of the entry.

In situations where the ODFI has accepted, or agreed to accept, a return in lieu of providing proof of authorization, but the RDFI still requests a copy of the authorization, the

RDFI retains the ability to request the authorization from the ODFI. The ODFI must provide proof within 10 banking days of the subsequent request. A copy of the authorization may be needed as part of a litigation process.

WRITTEN STATEMENT OF UNAUTHORIZED DEBIT (WSUD) VIA ELECTRONIC OR ORAL METHODS

Currently, an RDFI is responsible for obtaining a signed WSUD from a consumer prior to returning a debit entry as unauthorized. The rules have always allowed electronic records and electronic signatures in general, but didn't specifically address WSUD's. RDFIs wrongly assumed they needed to obtain a physical (wet) signature on the WSUD.

Subsection 3.12.4 on page OR57 of the rules state the WSUD must be "signed or similarly authenticated" by the receiver. Page OG71 (Chapter 16) of the rules provides examples of methods that can be used to "similarly authenticate" an authorization, including digital signatures, shared secrets, PINs, etc. While the "similarly authenticated" section is within the ODFI guidelines, RDFIs can use the same standards.

We contacted Nacha to obtain additional guidance on WSUDs received via "oral methods." Nacha stated an audio recording of the receiver's assertion of an ACH error is an example of a compliant method (same authentication method required for a TEL authorization).

We also discussed the possibility of posting a fillable PDF of the WSUD on the bank's website. If the bank has an application or program that can be used to obtain an electronic signature, this is an acceptable method of obtaining a WSUD authorization electronically. Subsection 3.12.4 states the similarly authenticated standards permits signed, written authorizations to be provided electronically. And, the writing and signature requirements are satisfied by complying with E-Sign. As such, if your bank has E-Sign capabilities, this method can be used to authorize a WSUD.

As a reminder, on March 27, 2020, NACHA provided relief to RDFI's on signature requirements for WSUDs. Until further notice, Nacha will not enforce the signature/authentication requirement. As such, RDFI's may accept reports of unauthorized debits via remote channels – e.g. online and telephone. Additional information on this relief can be found in **ACH Operations Bulletin #5-2020**.

There's always change happening in the ACH network, so it's important to stay on top of rule changes to ensure your ACH program is compliant and does not to incur a rules violation or delay transaction processing. For more information on rule changes see the 2021 Nacha Operating Rules & Guidelines manual, "Revisions" section beginning on page ORxxv. Nacha also summarizes all rule changes on their **website**. Finally, signing up for the e-mail notifications from Nacha is a good first step in ensuring your institution is aware of upcoming changes and is prepared. You can do that **here** (at the bottom of the webpage) by providing your name, email address and company name.

SAFE AT HOME

CHRISTY JOHNSON, PROGRAM ADMINISTRATOR

Editor's Note: *The June IBA Compliance Peer Group meeting on June 8, will feature Christy Johnson, program administrator of Iowa's Safe at Home program. Following her presentation, the impacts of Safe at Home on a bank's BSA Customer Identification Program will be discussed. For more information on IBA Compliance Peer Group meetings, please contact* ***John Goranson****.*

Survivors of assault and violence often live in constant fear. Their days are filled with anxiety, knowing that they may be located by their offender. Many of us know someone who is a victim or survivor of domestic violence, sexual assault, stalking or trafficking. In preparation for a presentation about the Safe at Home (SAH) program at the June Iowa Banker Association's Compliance Peer Group meeting, we would like to share information about the program.

Safe at Home is an address confidentiality program that provides survivors of domestic violence, sexual assault, trafficking and stalking with a substitute address, mail-forwarding, and confidential voter registration and absentee voting. The program, administered by the Iowa Secretary of State's office, has over 670 participants in 66 counties.

The public records law, Iowa Code Chapter 22, creates a safety concern for survivors of violent crimes. It creates easily accessible public records which can be used by their offender to find their physical location. Registering a vehicle, court hearings, participating in elections and other activities create a public record which may include a physical address. Safe at Home allows participants to live active lives without this fear.

BACKGROUND

In 2015, Representative Dean Fisher sponsored the SAH legislation after being contacted by a constituent who is a survivor of domestic violence. This individual desired to live in Iowa near family and friends, but felt she had no choice but to move to another state that had an address confidentiality program. She had been forced to use her physical address during court proceedings against her abuser. Once he knew her physical location, she no longer felt safe. She fled to California to join an address confidentially program to ensure her abuser would not be able to obtain her address again.

In May of 2015, Chapter 9E, Address Confidentiality Program, passed unanimously in both the House and Senate and was signed into law by Governor Branstad. The program was officially launched January 1, 2016. Today Iowa is one of more than 40 states with an address confidentiality program.

Records maintained by SAH are confidential and are an exception to Iowa code chapter 22. Addresses are only shared with emergency personnel in situations where the participant's physical location is required. Organizations and agencies may confirm whether an individual is a participant in the program, but no other information will be given. Iowa Code 9E.5 does not apply to documents or records related to real property.

PROGRAM ELIGIBILITY

Iowa code 9E lists the following requirements for eligibility in Safe at Home:

- Resident of the state of Iowa
- An adult, a minor, or an incapacitated person as defined in section 633.701
- A victim of domestic abuse, domestic abuse assault, sexual abuse, stalking or human trafficking as evidenced by the filing of a petition pursuant to section 236.3 or a criminal complaint or information pursuant to section 708.2A, 708.11 or 710A.2 or any violation contained in chapter 709

SUBSTITUTE ADDRESS

Each participant is assigned a substitute address. It includes a street address, a PO Box and a unique apartment number. Apart from the unique apartment number, the address is the same for all SAH participants. It is important for all parts of the address to be included when mailing a participant mail.

899 E. 12th Street, APT XXX
PO Box 959
Des Moines, IA 50304

MAIL FORWARDING

The confidential address will direct all participant mail to the Safe at Home office. Program staff will repackage and forward the mail to the participant. First-class mail, certified mail, checks, prescriptions/medical supplies, and packages that are sent by government agencies are forwarded. All other packages are returned to sender and magazines are donated to a local charity.

PARTICIPATION IS NOT CONFIDENTIAL

A participant's address, contact information and other personal information is confidential however their participation in the program is not confidential. This allows businesses, organizations, and agencies to verify participation when an individual uses the substitute address.

Participation cards are distributed to each participant, including children and dependents. Each card includes the participant's name, date of birth, apartment number and the expiration date for their participation within the program (participation in SAH is valid for four years, with an easy renewal process). Contact information for program staff is also available on the card, which can be used in the case of any questions. This card can be used to verify participation, or you can call the SAH office and staff can verbally verify their participation.

When residency within a district is required, a request for verification can be submitted to SAH staff. Staff will verify whether the participant resides within that district and their participation in the program.

POWERFUL IMPACT

The powerful impact of SAH was illustrated by the results of a recent survey of current participants. Results show that prior to enrollment in SAH, 54% of respondents never felt safe and 41% felt safe only sometimes. After enrollment 67% of respondents feel safe most of the time and 27% always feel safe. Safe at Home is a crucial piece to a survivor's safety plan; however when working with survivors it's important to understand it is only one piece of that plan.

ADDITIONAL RESOURCES

Applicants are encouraged to contact one of the following agencies to discuss their safety plan and to learn more about available resources — Iowa Coalition Against Domestic Violence: www.icadv.org or 515-244-8028; Iowa Coalition Against Sexual Assault: www.iowacasa.org or 515-244-7424; and the Iowa Attorney General's Crime Victim Assistance Division: www.iowaattorneygeneral.gov/for-crime-victims or 515-281-5044.

If you or someone you know would like more information or to fill out an application, visit the SAH website at www.safeathome.iowa.gov or call 515-725-SAFE (7233). If you would like materials or a program training for your agency or organization, please contact us. Brochures, removable stickers, palm cards, magnets and booklets are available free of charge.

For quarterly email updates, sign up for our newsletter at safeathome.iowa.gov. Thank you for all you do to help victims become survivors in the state of Iowa. Every Iowan deserves to be Safe at Home, and together we can make this a reality.

FEATURE

THE FORK IN THE ROAD

Secondary Market Mortgage Lending After July 1

On July 1, 2021, creditors originating loans for sale to Fannie Mae and Freddie Mac will be faced with a "fork" in the mortgage lending road. The impending fork is the result of action taken by Fannie Mae and Freddie Mac's conservator (FHFA) that for all practical purposes, ignores recent action taken by the Consumer Financial Protection Bureau. Despite the CFPB's recent delay of the July 1 mandatory compliance date of the revised price-based General Qualified Mortgage rule and sunset date for the GSE QM until October 1, 2022, the conservator for **Fannie Mae** and **Freddie Mac** announced in early April they will only purchase loans with application dates on or after July 1, 2021, that meet the revised, priced-based General QM standards. So while Regulation Z will still provide for use of the GSE QM until October 1, 2022, GSE QMs with application dates on or after July 1 will not be purchasable by secondary market investors.

As a result, creditors that originate and sell loans to secondary market investors have reached a fork in the road – a point where they essentially have to make a choice in regard to the direction of their mortgage loan offerings:

- Exit the secondary market mortgage lending business and underwrite mortgage loans to the basic Ability-to-Repay standards or any of the other QM standards available to them to retain the loans in portfolio; OR
- Continue to originate mortgage loans for sale to the secondary market and transition to the revised, price-based General QM standard no later than July 1.

THE ROAD UP UNTIL NOW

Prior to issuance of the revised, price-based General QM rule, if a loan otherwise met the GSE loan feature criteria,[1] creditors could simply provide evidence a loan was "eligible for sale" to Fannie Mae or Freddie Mac to evidence a borrower's repayment ability under the GSE QM standard. Thus, the creditor could produce a DU, DO or LP[2] finding of "Approved/Eligible" or "Accept" and essentially satisfy the QM rule requirements to evidence repayment ability — whether the DU, DO or LP finding was obtained by the creditor or the investor on the creditor's behalf. The process will not be quite that simple moving forward.

The revised rule squarely places the responsibility for evidencing a borrower's repayment ability with the creditor making the loan. So even if a creditor relies upon an investor's underwriting criteria or the DU, DO or LP finding, the creditor in whose name the loan is closed is tasked with the compliance responsibilities — not the investor, Fannie Mae or Freddie Mac. The "Approved/Eligible" DU or DO finding or "Accept" LP finding no longer guarantees QM status, instead going forward it solely is an indicator that the loan meets Fannie Mae's and Freddie Mac's Selling Guide criteria to be eligible for purchase. Further, the preamble to the final rule clearly states the DU, DO or LP finding alone does NOT meet the requirement to "consider and verify" a consumer's repayment ability. In fact, Fannie Mae and Freddie Mac remind creditors of this in their April Lender Letters, making it quite clear that compliance with the revised QM rule and other applicable laws is the responsibility of the creditor seller.

The rule does permit creditors to adopt specific verification standards that provide a safe harbor for compliance related to the requirement to consider and verify a consumer's repayment ability. These verification standards include relevant provisions[3] in specified versions of the Fannie Mae Single Family Selling Guide as well as Freddie Mac Single-Family Seller/Servicer Guide but the revised rule adds a new "prove it" requirement.

THE ROAD AHEAD

As stated earlier, in the past the lender could produce the Approved/Eligible DU or DO finding or "Accept" LP finding to evidence compliance with the GSE QM. Now, under the new requirements, creditors using the revised, price-based General QM standard to evidence repayment ability must "prove" they have adequately considered and verified a consumer's repayment ability by adopting and implementing **written** policies and procedures for how they evaluate income, debt, and DTI or residual income as well as retain documentation of their evaluation of these factors. The revised, price-based General QM rule also specifically requires creditors to retain documentation evidencing the loan meets the priced-based threshold as well as evidencing how it took into account income or assets, debt obligations, alimony, child support, and monthly DTI ratio or residual income in its ability-to-repay determination, including how it applied its policies and procedures. The Official Staff Commentary suggests examples of adequate documentation include an underwriter worksheet or a final automated underwriting system certification, **in combination with** the lender's applicable underwriting standards and any applicable exceptions described in its policies and procedures that show how these required factors were taken into account in the creditor's ability-to-repay determination.

Creditors electing to continue to originate and sell loans to secondary market investors have some work to do before July 1. First and foremost, they need to develop, if they have not already done so, **written** policies and procedures for considering and verifying a consumer's repayment ability that meet the revised, price-based General QM standard. If the creditor currently has written policies and procedures, odds are they will need to be updated to include, at a minimum, a process for determining if the loan's APR is below the new priced-based thresholds outlined in the rule. The rule also requires creditors to calculate the payment and APR for variable rate loan products in which the rate can change during the first five years of the loan term, based on the highest rate possible during that same period. Creditors that offer variable rate products with rate changes during the first five years will need to update their procedures to reflect this new calculation requirement. Additional revisions may be required related to the manner in which the borrower's income, assets and debts are calculated for the purposes of the DTI. The final rule permits, but does not require, use of standards outlined in Fannie and Freddie's selling guides. If your institution decides to utilize one or both of these standards, your policies and procedures should reflect this fact.

Equally important as the written policies and procedures is developing documentation standards for evidencing your written policies and procedures were followed. Creditors that rely on secondary market investors to underwrite applications on their behalf will need to work with those investors to ensure the investor is providing the creditor with the documentation that supports their underwriting procedures (even those outlined in Fannie or Freddie's Selling Guides) are followed. Again, it is the creditor in whose name the loan closes that is responsible for the compliance with the revised, priced-based General QM rule, not the investor. Therefore, the creditor needs to retain the documentation to evidence compliance. The OSC indicates that a lack of documentation showing how the creditor took into account the required factors could result in loss of QM status (and likely loss of eligibility for sale on the secondary market). So the stakes are high to develop written policies and procedures and then maintain clear, concise documentation evidencing the policies and procedures were actually followed.

In developing (or updating) your policies and procedures, keep in close contact with your secondary market investors. Fannie and Freddie indicated in their joint **April 8 Lender Letter** they anticipate additional changes in documentation and verification requirements for loan originated under the revised, priced-based General QM standard. Those changes will need to be reflected in your own policies and procedures.

As you develop your procedures, work with your vendors to ensure your system reflects your processes and produces the documentation needed to evidence compliance. Many loan platforms populate an analysis which, based on the consumer's income, assets, debts, etc., determines if the loan meets the qualifications of a QM or meets the basic ATR underwriting requirements. It will be essential this analysis is now based on the underwriting specifications your institution has decided to utilize.

And finally, once you have the procedures and systems in place, properly train your staff not only on changes to the General QM standard, but more importantly on your written procedures and documentation standards.

ROAD ASSISTANCE

The task of creating a written policy and procedures may be overwhelming, especially with July 1 looming in the very near future. However, if you have decided to take advantage of the compliance safe harbor afforded in the rule and will be using Fannie Mae's or Freddie Mac's Selling Guide standards to "consider and verify" repayment ability, much of the work has been done for you. These guides provide specific, detailed instructions for verifying and calculating income, debts, DTI and more. The selling guides also describe when extenuating circumstances can be considered in a credit decision and still evidence repayment ability. So while your procedures will still need to provide steps for ensuring the loan will meet the price-based thresholds established in the rule, and documenting the procedures were followed, the underwriting procedures themselves are outlined in the Selling Guides.

While there is no "one size fits all" set of procedures, the IBA compliance team has drafted a sample policy statement and procedures IBA members can use as a starting point to update their current lending policy and underwriting procedures in preparation for the July 1 switch to the revised, price-based General QM. It is not our intent for this sample to replace your existing policy and procedures, rather the sample can be used to adapt your existing lending policy and procedures to meet the revised, priced-based General QM standard. It is important to note, member banks will need to customize the sample procedures to reflect their actual processes and documentation standards. The **sample policy statement** and **sample procedures** can be found on the IBA website.

Footnotes:

[1] GSE QMs loan must provide for regular periodic payments, cannot have interest-only or balloon payments, the loan term cannot exceed 30 years and the points and fees associated with the loan must be below the established annual thresholds.

[2] Desktop Underwriter (DU) and Desktop Originator (DO) are automated underwriting systems used by Fannie Mae. Loan Prospector (LP) is a similar solution used by Freddie Mac.

[3] Chapters B3-3 through B3-6 of the Fannie Mae Single Family Selling Guide, published June 3, 2020 and Sections 5102 through 5500 of the Freddie Mac Single-Family Seller/Servicer Guide, published June 10, 2020

REGULATORY UPDATE

OCC PAUSES CRA REFORM

In a May 18 Bulletin (**OCC Bulletin 2021-24**), the Office of Comptroller of the Currency announced it will reconsider its June 2020 final rule that dramatically revised the Community Reinvestment Act. While this reconsideration is in process, the OCC will not object to the suspension of the development of systems for, or other implementation of, provisions with a compliance date of Jan. 1, 2023, or Jan. 1, 2024, under the 2020 CRA rule. The OCC announcement was the result of industry concern over the upcoming change in leadership at the OCC and the likely change in direction related to CRA reform under new leadership at a time financial institutions covered by the rule change would likely start incurring significant financial investments to meet the 2023 and 2024 compliance dates.

The OCC said it also does not plan to finalize the Dec. 4, 2020, proposed rule that requested comment on an approach to determine the CRA evaluation measure benchmarks, retail lending distribution test thresholds, and community development minimums under the June 2020 rule. In addition, the OCC is discontinuing the CRA information collection pursuant to the Paperwork Reduction Act (PRA) notice published in the Federal Register in December 2020.

NEW HOST LOAN TO DEPOSIT RATIOS

The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency issued the host state loan-to-deposit ratios that they will use to determine compliance with section 109 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. The updated host state loan-to-deposit ratios are located **here**.

In general, section 109 prohibits a bank from establishing or acquiring a branch or branches outside of its home state primarily for the purpose of deposit production. Section 109 also prohibits branches of banks controlled by out-of-state bank holding companies from operating primarily for the purpose of deposit production. Section 109 provides a process to test compliance with the statutory requirements.

- The first step in the process involves a loan-to-deposit ratio test that compares a bank's statewide loan-to-deposit ratio to the host state loan-to-deposit ratio for banks in a particular state. A second step is conducted if a bank's statewide loan-to-deposit ratio is less than one-half of the published ratio for that state or if data are not available at the bank to conduct the first step.
- The second step requires the appropriate agency to determine whether the bank is reasonably helping to meet the credit needs of the communities served by the bank's interstate branches. A bank that fails both steps is in violation of section 109 and is subject to sanctions by the appropriate agency.

TRID FAQ UPDATED

The Consumer Financial Protection Bureau has released updated information for lenders addressing housing assistance loans under the TILA-RESPA integrated disclosure rule. The CFPB added several new questions to its TRID FAQs regarding housing assistance loans, and how the Building Up Independent Lives and Dreams Act affects the TRID rule requirements for certain housing assistance loans. **Read the new FAQ.**

NOTES OF INTEREST

MORE IRS TAX REFUNDS

The Internal Revenue Service **has begun issuing refunds** to eligible taxpayers who paid taxes on 2020 unemployment compensation that the recently-enacted American Rescue Plan later excluded from taxable income. The IRS identified over 10 million taxpayers who filed their tax returns prior to the American Rescue Plan of 2021 becoming law in March and is reviewing those tax returns to determine the correct taxable amount of unemployment compensation and tax. This could result in a refund, a reduced balance due or no change to tax (no refund due nor amount owed) for impacted taxpayers.

The IRS will issue refunds resulting from this effort by direct deposit for taxpayers who provided bank account information on their 2020 tax return. If valid bank account information is not available, the refund will be mailed as a paper check to the address of record. The IRS will continue to send refunds until all identified tax returns have been reviewed and adjusted.

It is important to note these refunds are subject to normal offset rules, such as past-due federal tax, state income tax, state unemployment compensation debts, child support, spousal support or certain federal nontax debts (i.e., student loans). The IRS will send a separate notice to the taxpayer if the refund is offset to pay unpaid debts. The refund amounts are also NOT considered protected benefit payments under the federal garnishment rule; therefore amounts received may be subject to garnishment orders. Read more in the **IRS news release**.

2022 HSA CONTRIBUTION LIMITS

The IRS **announced** the Health Savings Act annual contribution limits for 2022 will increase $50 for self-only coverage and $100 for family coverage. The annual limit on HSA contributions will be $3,650 for self-only and $7,300 for family coverage, approximately a 1.4% increase. The IRS confirmed HSA contribution limits effective for 2022, along with minimum deductible and maximum out-of-pocket expenses for the High Deductible Health Plans with which the HSAs are paired.

HUD ACTION ON APPRAISAL DISCRIMINATION

The U.S. Department of Housing and Urban Development (HUD) approved a Conciliation Agreement between JPMorgan Chase Bank and an African-American woman, resolving the woman's claim that the mortgage lender, relying on an appraisal that she believed was inaccurate, valued her home at an amount lower than its actual worth because of her race.

As reported by the **Chicago Sun Times**, the Chicago homeowner believes her home was appraised under market value due to her race and her neighborhood. The homeowner applied for a loan to refinance her condo and was surprised when the appraisal valued her home at $278,000; $1,000 less than she had paid for it six years earlier. The homeowner decided to apply at another bank and got a second appraisal, but this time did not disclose her race on the application form. The second appraisal was $62,000 higher than the first.

Under the Conciliation Agreement, JPMorgan Chase Bank will pay $50,000 to the woman and provide home lending advisors and client care specialists with mandatory training on the Reconsideration of Value process and fair lending issues related to appraisals, including specifics regarding how to handle complaints of discrimination in the appraisal process. **Read the agreement.**

UNDERSTANDING REG. Z'S ADVERTISING RULES

The latest issue of Consumer Compliance Outlook, a publication of the Philadelphia Federal Reserve System, features an article that discusses the key advertising provisions in Regulation Z for open- and closed-end credit, provides examples from recent examinations, and highlights sound practices for managing compliance risks associated with marketing and advertising. The issue also includes information on the importance of innovation in the banking industry, the Libor transition, a regulatory update and more. **Read Consumer Compliance Outlook.**

NOTES OF INTEREST

CFPB FAIR LENDING REPORT

The Consumer Financial Protection Bureau's Fair Lending Report to Congress was published in the **April 27, 2021 Federal Register**. The report describes CFPB fair lending activities in supervision and enforcement; guidance and rulemaking; interagency coordination; and outreach and education for calendar year 2020. The Fair Lending Report explains the CFPB's risk-based approach to fair lending supervision and enforcement, focusing on areas that present substantial risk of credit discrimination for consumers.

In 2020, the CFPB initiated 13 fair lending examinations/targeted reviews, issuing several fair lending-related Matters Requiring Attention, directing entities to take corrective actions that will be monitored by the CFPB through follow-up supervisory events. The CFPB also issued Supervisory Recommendations in 2020 relating to weak or nonexistent fair lending policies and procedures, risk assessments, and fair lending training. The CFPB signaled going forward its efforts would be focused on ensuring compliance with ECOA and Regulation B through rulemaking related to small business data collection related to minority- and women-owned businesses as well as HMDA data.

FDIC FAIR LENDING RESOURCES

The FDIC's **Banker Resource Center** provides supervisory information for banking professionals on a variety of topics, including a separate webpage devoted to **fair lending**. This page has links to applicable laws and regulations, supervisory statements and policies, videos, and archived webcasts and teleconferences. Recently, the fair lending page was updated to include a new article titled, "Identifying and Mitigating Potential Redlining Risks." Additionally, the fair lending page now includes a series of technical assistance videos on fair lending, ranging in length from 10 to 28 minutes that can be used to train staff as well the board of directors.

BRANCH CLOSURE BEST PRACTICES AND REGULATORY REQUIREMENTS

A recent Kansas City Federal Deposit Insurance Corp. Compliance Newsletter reviewed best practices and regulatory requirements related to branch closures. The article noted The **2020 Summary of Deposits** survey showed a 1.6 percent decrease in the number of offices of FDIC-insured institutions between June 2019 and June 2020, continuing an 11-year trend of decreases.

In the article, the FDIC offers strategies for mitigating potential negative impacts related to branch closures, such as sending notice early to impacted customers, considering new or existing alternative delivery options for customers, providing education and technical assistance to aid customers in transitioning to alternative delivery systems, and more.

The article also calls attention to the regulatory requirements banks must comply with when closing a branch. **Section 42 of the Federal Deposit Insurance Act** sets forth the timing and content requirements for the notices financial institutions must provide to the FDIC and their customers regarding their intent to close a branch. An interagency **Policy Statement Concerning Branch Closing Notices and Policies** provides additional guidance concerning these requirements. Branch openings and closures are also considered during Community Reinvestment Act (CRA) evaluations, so institutions will also want to consider the impact of branch closures on its CRA performance.

FDIC-supervised banks that wish to receive the Kansas City FDIC Compliance Newsletter directly are asked to send an email with your name and title along with the name and location of your financial institution to **KCDCPNewsletter@fdic.gov**.

COMPLIANCE FORUM

Q. At the time we receive an application to open a deposit account for a customer, we obtain a ChexSystems report. If the bank denies the account application due to negative information on the ChexSystems report, we provide the FCRA adverse action notice to the account applicant to alert them to the fact their application was denied due to derogatory information in the ChexSystems report. If the account is opened and handled according to account terms for 90 days, the account owner is eligible for overdraft protection. If the account owner requests overdraft protection, we obtain a new ChexSystems report.

We recently had a situation in which the ChexSystems report was fine at the time of account opening, but when we obtained a new report 90 days later, it contained derogatory information. The report was negative enough the bank decided to close the account due to information in the report. We sent notice to the borrower the account had been closed but did not provide an FCRA adverse action notice. Should we also have provided the FCRA adverse action notice?

The Compliance Forum is not intended to be a definitive analysis of the subjects discussed or a substitute for personal legal advice.

A. Yes, a FCRA adverse action notice should have been provided. Section 615(a) of the FCRA makes it clear that **anytime** any adverse decision is based in whole or in part on a consumer report, a FCRA adverse action notice is required. This includes a decision to close an account based on information that ChexSystems provided after account opening.

Q. After I provided the Loan Estimate for the purchase of a dwelling, the consumer brought in their purchase agreement. The purchase agreement states that the buyer agreed to pay an "administrative fee" to the realtor. The LE does not include the realtor fee because I didn't know about it at the time the LE was issued. Now that I know about this fee, do I have to provide a revised LE to include it? Where should this fee disclosed on the LE?

A. This fee is often referred to as "compliance fee" or "documentation fee' in addition to an "administrative fee". The fee paid to the realtor should be disclosed in section H, Other. This section is for fees the borrower has agreed to pay to third parties for services not required by the creditor as a condition of the loan. Regulation Z, § 1026.37(g)(4) describes the fees shown in section H, Other:

> *(4) Other. Under the subheading "Other," an itemization of any other amounts in connection with the transaction that the consumer is likely to pay or has contracted with a person other than the creditor or loan originator to pay at closing and of which the creditor is aware at the time of issuing the Loan Estimate, a descriptive label of each such amount, and the subtotal of all such amounts.*

Because the realtor's fee is not a fee associated with the loan, the TRID rule does not require a revised LE be issued for the sole purpose of adding the fee. If a revised LE is issued for another purpose, the fee must be added at that time, as each disclosure must be based upon the best information available. If a revised LE is not issued, the fee must be included on the Closing Disclosure at consummation.

Q. Since I did not show the realtor fee on the initial LE, is this a changed circumstance? Is the fee subject to the 10% or 0% tolerance?

A. Changed circumstance and the fee tolerances only apply to fees required by the creditor as a condition of the loan. Since the creditor does not require the fee charged by the realtor, the addition of the fee is not a changed circumstance and the fee is not subject to a tolerance limit.

Q. We have a few customers who have already received federal tax refund payments and now are receiving a second refund payment from the American Rescue Plan. Are these payments considered "protected funds" under the federal garnishment rule?

A. No, these payments are not protected funds. They are not federal benefit payments; rather they are additional refund amounts due to some taxpayers who received unemployment compensation. The funds can be garnished like other source of non-protected income.

The American Rescue Plan, signed on March 11, allows taxpayers who earned less than $150,000 in modified adjusted gross income to exclude a portion of their unemployment compensation from their 2020 taxable income. Those taxpayers who filed their tax returns prior to March 11 and figured their tax based on the full amount of unemployment compensation, may be due additional refund amounts. The IRS will recalculate amounts due to taxpayers. There is no need for taxpayers to file an amended return unless the calculations make the taxpayer newly eligible for additional federal credits and deductions not already included on the original tax return. **Learn more.**

Q. At this time it appears the temporary GSE patch will expire for secondary market mortgage applications taken on and after 7/1/21 per Fannie Mae and Freddie Mac announcements even though the CFPB extended the mandatory compliance date for the revised QM rules until 10/1/22. The agencies and investors have yet to update their guides as to what they will require for underwriting. I'm trying to figure out how to advise my underwriting team to prepare for this rule change with limited information. Any suggestions or advice would be appreciated.

A. Your assessment of the situation as it stands today is correct. It does appear that Fannie Mae and Freddie Mac will only purchase loans with applications on or after 7/1/2021 that meet the revised, price-based General QM standards. While Fannie and Freddie's lender letters have said they do anticipate making some changes to accommodate the price-based QM rules, for example, evidencing the loan meets the price-based APR thresholds and requiring the monthly P&I payment for ARM loans be calculated using the highest rate possible in the first 5 years of repayment when calculating DTI — it's likely if you are using Fannie and Freddie's general underwriting guidelines now, your underwriting processes are not likely to change much otherwise. The reason for this is because the priced-based General QM rule provides a safe harbor for "considering and verifying" a consumer's repayment ability if creditors use certain **established** underwriting standards, including:

- Chapters B3-3 through B3-6 of the Fannie Mae Single Family Selling Guide, published **June 3, 2020;** or
- Sections 5102 through 5500 of the Freddie Mac Single-Family Seller/Servicer Guide, published **June 10, 2020.**

So banks can continue to use the underwriting guidelines established by Fannie or Freddie (whichever their investor sells or underwrites to) in effect as of June 2020, likely the same underwriting guidelines you use today, because the CFPB is utilizing these existing standards as their safe harbor standards for underwriting.