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Practical Compliance

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MLA Interpretive Rule – Impact on Automobile Lending

On December 14, 2017, the Department of Defense (DoD) published a new interpretive rule under the Military Lending Act (MLA) in the Federal Register. The 2017 Interpretive Rule amends and replaces three specific questions and answers in the interpretive rules issued by the DoD in August 2016 (i.e., the 2016 Interpretive Rule), while also adding a new Q&A item. These changes were made in response to questions received by the Department regarding the 2016 Interpretive Rule. Although the 2017 Interpretive Rule clarifies some ambiguities in the regulation, the limited scope of these changes leaves many questions unanswered.

The DoD noted that the new Interpretive Rule does not change the regulation implementing the MLA, but merely states / clarifies its preexisting interpretations of the existing regulation. Therefore, the new Rule was exempt from the standard notice and comment requirements, and took effect upon its publication in the Federal Register.

Two of the items in the 2017 Interpretive Rule have a significant impact on consumer purchase credit transactions; amended Q&A #2, and new Q&A #20. We have received several questions on items; and more specifically, their impact on direct and indirect automobile lending. As such, this article will focus on these specific topics.

Purchase Credit Exemption - Loan Amount Exceeds Purchase Price

In amended Q&A #2, the DoD addressed the application of the MLA Rule's exemptions for credit transactions that are intended to finance the purchase of a motor vehicle or personal property when the credit is secured by the purchased motor vehicle or personal property. The amended question to which the DoD responded asked whether the exemptions would apply where the creditor simultaneously extends credit in an amount greater than the purchase price of the motor vehicle or personal property. The DoD's amended answer stated that the exemptions are available where credit beyond the purchase price of the object is used to finance any costs expressly related to the that object, provided it does not also finance any credit-related product or service.

Generally, financing costs related to the vehicle / personal property securing the credit will not disqualify the transaction from the exceptions, but financing credit-related costs will disqualify the transaction from the exceptions. To illustrate the distinctions, let's consider a loan made to finance the purchase of a motor vehicle, that is secured by that vehicle:

- If the loan finances only the purchase of the vehicle, it is eligible for the exemption;

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- If the loan includes financing for the cost of optional features within the vehicle, such as leather seats, and/or the cost of an extended service warranty, it is eligible for the exemption;
- If the loan includes financing for credit-related products or similar services, such as the cost of Guaranteed Auto Protection (GAP) insurance or a credit insurance premium, would not qualify for the exception, as they are not sufficiently “related” to the underlying purchase to be exempt.

The DoD’s position on financing credit-related products under the MLA has caused a range of reactions among dealers and lenders. Some dealers have reportedly opted to either no longer sell GAP insurance to active duty military members and their dependents, or stop selling GAP insurance altogether. Also, some large lenders are refusing to buy contracts with GAP if the buyer is an active duty military member or a dependent (e.g., Ford Motor Credit Co.), or will not fund GAP contracts for any customers. At the other end of the spectrum, some dealers and lenders are reportedly conducting business as usual, ignoring the latest interpretation.

Within the automobile industry, it has been reported that legal counsel for some dealerships have gone so far as to recommend that the dealerships avoid transactions with military members and their dependents for now because of this new interpretation, and because the industry may not yet have compliant forms. However, taking such an approach could lead to a greater issue; as excluding the military from being able to obtain automobile financing could result in claims of discrimination.

A few clients have raised similar questions. For example, we have been asked if a lender can offer vehicle loan financing to the general public that includes credit-related products (e.g., GAP, or Life & Disability insurance), but not offer such additional financing to covered MLA borrowers. In response, we have discouraged clients from taking such a position, as excluding covered MLA borrowers from obtaining and financing additional credit-related products, while allowing non-military borrowers to do so could be viewed as an unfair practice from a UDAAP perspective, or at the very least, have a negative impact on the institution’s reputation.

Safe Harbor Provision for Covered Borrower Status Check

The MLA Final Rule created a safe harbor for determining whether a consumer is a covered borrower if the creditor checks a consumer’s status against the DOD database or a nationwide consumer reporting agency. The MLA Final Rule specified that to meet the safe harbor, the determination based on the status check must be completed at the time the consumer applies for credit “or 30 days prior to that time.” The language of the MLA Final Rule could be interpreted as meaning that the status check must occur exactly at the time of application for credit, or exactly 30 days prior to such time.

The DoD clarified the safe harbor provision in new Q&A 20, stating that a creditor qualifies for the safe harbor when it makes a timely determination regarding the status of a consumer at the time the consumer either initiates the transaction, or submits an application to establish an account, or anytime during a 30-day period prior to such action by the consumer. Similarly, the DoD added that the timing provisions in § 232.5(b)(3)(i) and (ii) permit a creditor to qualify for the safe harbor when it conducts a qualified covered borrower check simultaneously with the initiation of the transaction or submission of an application by the consumer or during the course of the creditor’s processing of that application for consumer credit.

Thus, with respect to covered automobile purchase loans (direct and indirect), lenders and dealers have the opportunity and ability to perform an active duty status check on a covered loan within the safe harbor provisions, and to provide the appropriate MLA / MAPR and Payment Obligation disclosures where applicable. In the case of indirect lending transactions, lenders and dealers will need to ensure that processes are in place to ensure MLA compliance, with the responsibilities of both the lenders and the dealers clearly defined.

Unintended Consequences – Loans Made Prior to 2017 Interpretive Rule

While the 2017 Interpretive Rule was effective upon publication in the Federal Register on December 14th, the DoD noted that the rule only clarified its existing interpretations of the 2015 MLA Final Rule. Thus, it is unclear whether lenders and dealers will be considered in violation of the applicable provisions of the Final

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Rule for loans made between October 3, 2016 (the mandatory compliance date of the 2015 MLA Final Rule), and the December 4, 2017 Interpretive Rule; and if so, what is the impact of these violations on these affected transactions (e.g., are the contracts considered void?), and what can be done to address any such issues.

Reaction to the 2017 Interpretive Rule

Several trade groups have already sent letters to the DoD, concerned that the financing of GAP Insurance has been included in list of additional items that eliminates the transaction from the purchase credit exemption. These groups have requested that the DoD rescind or withdraw Q&A 2 from its 2016 interpretative rule for the Military Lending Act final rule (MLA Rule) and its December 2017 amendments to the interpretive rule; or that it further amend Q&A 2 to provide that a credit transaction that finances the purchase of a motor vehicle (and is secured by that vehicle) can also finance the purchase of GAP insurance without losing the MLA exemption for purchase money financing. If the DoD guidance were to be rescinded or withdrawn rather than amended, there would still be uncertainty over the application of the MLA exemption to purchase money transactions that also finance the purchase of GAP insurance.

As noted in the beginning of this article, the DoD's 2017 Interpretive Rule clarifies some ambiguities in the MLA Final Rule, and that its limited scope leaves many questions regarding the Final Rule unanswered. However, it appears that 2017 Interpretive Rule has raised some additional questions that the DoD will ultimately need to address.

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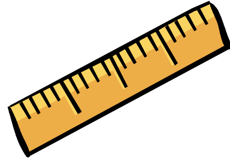
Short Clips



CFPB Finalizes Changes to Prepaid Accts. Rule

On 01/25/18, the Consumer Financial Protection Bureau (CFPB) issued a Final Rule regarding changes being made to its rule on prepaid products.

The changes adjust the error resolution requirements, provide more flexibility concerning credit cards linked to digital wallets, provide clarifications and minor adjustments to certain aspects of the rule, and extend the overall effective date of the rule by one year, to April 1, 2019.

NFIP Authorization Extended (Again)

On 01/22/18, the President signed legislation passed by both houses of Congress that extends the National Flood Insurance Program's (NFIP's) authorization to 11:59 pm on February 8, 2018. The legislation also authorized FEMA to honor all policy-related transactions inadvertently accepted between January 20, 2018, and January 22, 2018.

FFIEC Releases 2018 CRA Reporting Software

On 01/05/18, the Federal Financial Institutions Examination Council (FFIEC) released the latest version of the Community Reinvestment Act (CRA) software to be used in reporting CRA data due on March 1, 2019.

Fed Proposes Amendments to Regulation M

On 01/03/18, the Federal Reserve (Fed) issued a proposal to amend Regulation M, which implements the Consumer Leasing Act, to reflect the Dodd-Frank Act's transfer of regulatory authority to the Consumer Financial Protection Bureau. The Fed is proposing revisions to the rule to reflect that it covers entities not subject to CFPB oversight, including auto dealers that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. The Comment Period on the proposal ends March 5, 2018.

CFPB Makes New HMDA Tools Available

On 01/05/18, the CFPB launched new tools to support banks when reporting Home Mortgage Disclosure Act data, including a rate spread calculator and a check digit tool.

FDIC Publishes Resources on Partnerships with Minority Depository Institutions

On 12/22/17, the FDIC published a resource guide highlighting some of the ways that banks can engage in partnerships with minority depository institutions (MDIs). Such partnerships could include direct investment in an MDI, loan participations or shared servicing arrangements, the sharing of staff or other resources and information networking.

The agency noted that partnerships between banks and MDIs can help to better meet the needs of underserved communities, enhance existing product offerings to unbanked and underbanked consumers in low- to moderate-income areas and, in some cases, may be eligible for Community Reinvestment Act (CRA) credit.

CFPB Not to Assess Penalties for 2018 HMDA Data Submissions

On 12/21/17, the CFPB announced that it will not assess penalties with respect to errors in Home Mortgage Disclosure Act (HMDA) data collected in 2018 and reported in 2019, and will not require banks to resubmit data for that period unless errors are found to be material. Banks must begin submitting HMDA data collected in 2017 and beyond using the CFPB's new online platform.

Agencies Update CRA Asset–Size Thresholds

On 12/21/17, the Fed, the FDIC, and Office of the Comptroller of the Currency (OCC) announced the annual adjustment to the asset-size thresholds used to define 'Small Bank,' 'Small Savings Association,' 'Intermediate Small Bank,' and 'Intermediate Small Savings Association' under the CRA Regulations.

A "small bank" or "small savings association" will be defined as an institution that, as of 12/31 of either of the prior two calendar years, had assets of less than $1.252 billion. An "intermediate small bank" or "intermediate small savings association" will be defined as a small institution with assets of at least $313 million as of 12/31 of both of the prior two calendar years, and less

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than $1.252 billion as of 12/31 either of the two prior calendar years. These adjustments became effective January 1, 2018.

FFIEC Updates CRA and HMDA Websites

On 12/21/17, the FFIEC updated CRA Website and HMDA Website, making information about the new Metropolitan Statistical Area included in the 2018 FFIEC Census file available for review.

FFIEC Updates CRA Website with Corrected 2016 CRA Disclosure Reports

On 12/18/17, the FFIEC updated its CRA Website with reissued disclosure reports for 2016, which corrects a calculation error that caused the county loan totals to exceed the amount reported in tables 1-1, 1-2, 2-1, and 2-2 of the initial release. This update only applies to the 2016 disclosure reports. Years prior to 2016 were not impacted by the calculation error.

FEMA Publishes Guidance on Potential Lapse in NFIP Authority

On 12/15/17, The Federal Emergency Management Agency (FEMA) published guidance for Write Your Own private insurance companies on how to how to handle a potential lapse in National Flood Insurance Program authority.

The guidance provides information on new policies and renewals during a lapse period. In addition, the guidance includes frequently asked questions and a sample letter that may be used to help Write Your Own companies communicate the effects of a lapse to a prospective policyholder.

FinCEN Updates BSA FAQs

On 12/15/17, the Financial Crimes Enforcement Network (FinCEN) published answers to FAQs to provide financial institutions with guidance that will help them with Bank Secrecy Act compliance efforts. This is part of a broader transparency initiative. FinCEN said it will periodically update these FAQs.

DoD Amends MLA Interpretive Rule

On 12/14/17, The Department of Defense (DoD) published amendments to its 2016 interpretive rule clarifying certain provisions of the Military Lending Act regulation.

Among the amendments is a clarification that the exemption for purchase money loans includes loans that are used not only to purchase the item securing the loan but also to purchase related items, such as extended warranties on a car. They also offer clarifications about loans secured by a deposit account, the use of remotely created checks to make loan payments, the ability of lenders to use the right of offset and the timing of checking military status to qualify for the MLA safe harbor.

Fed to Publish Libor Replacement Rate in Q2

On 12/08/17, the Fed announced plans to publish three new reference rates for use in U.S. dollar derivatives and financial contracts starting in the second quarter of 2018. The rates will be published no later than 8 a.m. ET each day. The London Interbank Offer Rate *(the standard reference rate in use today, with more than $160 trillion in outstanding loans, derivatives and financial products pegged to it)* will be sustained only through the end of 2021.

The Fed will publish a Secured Overnight Financing Rate (SOFR), a broad measure of overnight Treasury financing transactions recommended by the Alternative Reference Rate Committee earlier this year as a replacement for U.S. dollar Libor. It will be calculated based on tri-party repo data.

The Fed will also publish a Tri-Party General Collateral Rate (TGCR) also based on tri-party repo data.

HUD Announces New FHA Loan Limits for 2018

On 12/07/17, HUD announced that maximum conforming loan limits for mortgages the Federal Housing Administration (FHA) will insure will increase in 2018. The new limits will align with those employed by Fannie Mae and Freddie Mac.

The loan limit in lower-cost areas will be $294,515, or 65 percent of the national conforming loan limit of $453,100. In high-cost areas, the limit will be $679,650.

CFPB Updates Guide to TRID Forms

On 12/06/17, the CFPB issued a revised guide to the TILA-RESPA integrated disclosure forms that reflects recent regulatory changes

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Good to Know

Send your questions to the
answerperson@mandm.consulting

Sending requests to the above address gets you a written response to your questions. Emails sent to the answer person are received and responded to five days a week.

Q: HMDA question: for a refinance that is subject to a right of rescission, is the action date the date that the rescission period ends?

A: The action date used can either be the closing date or the end of recession / funding date, as indicated in Appendix D, Page D-9, Item 6 in A GUIDE TO HMDA Reporting Getting It Right! I can't recall encountering an institution using the end of rescission date as the action date, however, it is permissible. If you chose to take this approach, I'd suggest you be consistent, and use it in all applicable situations.

Q: Our loan department wants to send out the initial credit score disclosure via eConsent (an email generated to the applicant that they can electronically consent to receiving). However, when we have two applicants and they provide only one email, are we able to do this? Or can we not do this because one applicant can potentially see the other applicant's disclosure (which contains their credit score) when they open the email?

A: The GLBA requires a financial institution to insure the security and confidentiality of customer records and information; to protect against any anticipated threats or hazards to the security or integrity of such records; and to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer. Nonpublic personal information may include individual items of information as well as lists of information. For example, nonpublic personal information may include names, addresses, phone numbers, social security numbers, income, credit score, and information obtained through Internet collection devices (i.e., cookies).

Based on the above, I would not advise combining disclosures and information for both applicants into one email.

Q: I have a question as to whether the loan described below qualifies as a community development loan (CDL).

Specifically, we approved a $825,000 CREM to an LLC to finance 75% of the acquisition of a six-family property. As a condition of the P&S agreement, the five current tenants, whose units are leased to (and rents paid by) Children's Services of Roxbury, will continue to live there under the current lease terms. The leases are for one year, and renewed annually up to three times. Children's Services provides services to economically-disadvantaged children, youth, families, and individuals.

Our CRE Department has this loan reported as HMDA reportable (which I agree with) and as a CDL. However, in my opinion, this does not qualify as CDL, as the loan is not made directly to or in conjunction with Children's Services. It just happens that the unrelated (non-affiliated) LLC leases the units to the agency that is providing community development housing/services.

What is your assessment/opinion regarding this loan qualifying as a CDL?

A: Community development loans, qualified investments, and community development services all must have a primary purpose of community development, a qualified investment or community development service that supports a community development purpose similar to the activity described in the context of the community development loan would likely receive consideration under the applicable test.

As you noted, the key issue involves the nature of the LLC and the purpose of the loan. If it is simply a coincidence that rent is covered by the Child Services, I can appreciate your hesitancy. If you have not already done so, you should determine if the LLC meets the any of the following criteria for community development loans:

- Borrowers that rehabilitate or construct affordable housing, including construction and permanent financing for multifamily rental properties serving LMI persons.
- Not-for-profit organizations primarily serving LMI housing or other community development needs.

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- Borrowers that construct or rehabilitate community facilities that are located in LMI geographies or that primarily serve LMI individuals.
- Local, state, and tribal governments for community development activities.
- Borrowers to finance environmental clean-up or redevelopment of an industrial site as part of an effort to revitalize the community in which the property is located.
- Businesses, in an amount greater than $1 million, when made as part of the SBA's 504 Certified Development Company program.

Does the LLC fit any of those definitions? If not, I would agree with your assessment that this loan does not qualify as a CDL.

Q: It is my understanding that electronic funds (ACH) need to be made available immediately, even if an account is new (less than 30 days).

Does this still apply to accounts opened online and the initial funding is via ACH? I want to comply with the regulation, but also be able to sufficiently mitigate our risk.

A: You are correct. NACHA rules require electronic funds (ACH) be made available immediately, even for a new customer account. These rules also apply to accounts opened online and their initial funding.

Q: For open-end real estate secured variable rate loans, where the note clearly states that the interest rate is subject to change based on a publicly available index, is a disclosure required when the interest rate changes due to a change in the index (not by a change in margin determined by the bank?

A: For open-end credit secured by a dwelling, no disclosure is required. §1026.9(c)(2)(v)(C) states that notice is not required, "*When the change is an increase in a variable annual percentage rate in accordance with a credit card or other account agreement that provides for changes in the rate according to operation of an index that is not under the control of the creditor and is available to the general public.*"

Conversely, variable rate closed-end credit transactions, are subject to disclosure requirements under post-consummation events, as outlined in §1026.20.

Q: We have a cash-out refinance transaction where most of the proceeds were used to pay off the existing 1st mortgage and equity loan on the property, with the remaining proceeds used to reimburse family member of the borrowers for improvements that were already completed.

The Bank currently has the loan purpose reported as "2", Home Improvement. However, I'm thinking that as the funds were not directly used to make the improvements, but to reimburse the family member for improvements already made, the loan purpose should be reported as "3", Refinance.

How would you report the "Purpose" on the HMDA LAR in this scenario?

A: I agree with your conclusion that below referenced loan should be coded as a refinance and not a home improvement.

Q: Can you tell me what is required to be provided in the CRA Public file? It is my understanding that the file requirements have changed.

A: The only change in the contents of the public file as required under Part 345.43 relates to the requirements under 345.43 (b)(2) *(see below)*. All other public file content provisions remain the same.

> *§345.43 Content and availability of public file. * * * * * (b) * * * (2) Banks required to report Home Mortgage Disclosure Act (HMDA) data. A bank required to report home mortgage loan data pursuant part 1003 of this title shall include in its public file a written notice that the institution's HMDA Disclosure Statement may be obtained on the Consumer Financial Protection Bureau's (Bureau's) website at www.consumerfinance.gov/hmda. In addition, a bank that elected to have the FDIC consider the mortgage lending of an affiliate shall include in its public file the name of the affiliate and a written notice that the affiliate's HMDA Disclosure Statement may be obtained at the Bureau's website. The bank shall place the written notice(s) in the public file within three business days after receiving notification from the Federal Financial Institutions Examination Council of the*

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availability of the disclosure statement(s).

Q: Regarding the mandatory escrow requirements for loans that have rate spreads, the new rate spread calculator no longer asks for a lien position. As a result, the calculator produces many more rate spread results than the previous version.

Our question is with the new requirements, when is escrow mandatory on real estate loans? Is there a rate spread threshold which determines this?

A: Escrow accounts are required for higher priced mortgage loans under §1026.35(b), the definition and thresholds for which are provided in §1026.35(a), and for loans secured by dwellings that are located in a flood zone, under the July 2015 Loans in Areas Having Special Flood Hazards Final Rule.

Q: Are there are regulatory requirements on how much a deductible is required for commercial flood policies?

A: Please see Table 8A and Table 8B (pages Rate 17 & 18) of the October 2017 NFIP Flood Insurance Manual, 05 Rating section for minimum deductibles on commercial flood insurance policies.

Q: We're offering prime -.25% based on an index and margin for the life of the loan. If II understand the regulation correctly, this rate would not be considered a discounted rate. Therefore, the discounted rate section, which is currently listed on our disclosure, isn't applicable in this case. Am I interpreting this correctly?

A: Yes. This would not be considered a discounted rate, as the initial rate is the same index and margin used for future adjustments.

Q: I am looking at foreign wires for purposes of determining if we have exceeded 100 remittance transfers and I just want to make sure I have this right. If the wire transfer was initiated by a business, it is not covered by the regulation and therefore, I would not count it when determining whether we have more than 100 remittance transfers. Is this correct? Also, are sole proprietorships considered businesses for the purpose of this regulation?

A: You are correct that wire transfers initiated by a business are not included. §1005.30(g) defines a "Sender" as *"a consumer in a State who primarily for personal, family, or household purposes requests a remittance transfer provider to send a remittance transfer to a designated recipient".*

Comment 5.30(g)-3 clarifies that sole proprietorships are considered business entities under the regulation, and as such, a consumer requesting a transfer from a sole proprietor account is not considered a sender under §1005.30(g)."

Q: One of our customers paid off their mortgage at the end of December 2017. The Bank has been trying, to no avail, to get the funds from the customer to complete the mortgage discharge. Our Loan Servicing Department would like to send the required documents to the customer and have them complete the discharge themselves.

Our question is, to be compliant with MGL Ch. 183 Section 55, are we required to provide the funds ($75 to be paid to Bristol County MA) to the customer in order to have them complete the discharge?

A: Based on my review of MGL Ch. 183 Section 55, it appears that it is the unconditional obligation of the Bank to ensure that the mortgage payoff is recorded and discharged. The Bank is entitled to a fee for this activity; however, the Regulation requires the Bank to fulfill this obligation *"irrespective of whether the mortgagee, mortgage servicer or note holder has withheld the fee for recording the discharge"*, which in my opinion, means that the Bank complete and record the discharge of the mortgage even if the borrower has not paid for recording the discharge.

As to your specific question, in my opinion, MGL Ch. 183 Section 55 does not allow the Bank to transfer the responsibility for completing the discharge to the borrower.

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Important Dates– Don't Forget!

Generally, we retain the prior month, and go forward for at least a year as known. Dates are either effective dates of Final Rules, or end of the comment period for proposed rules.)

01/01/2018 CFPB, Regulation B. Effective date for Amendments to Ethnicity and Race Information Collection requirements.
01/01/2018 HMDA, Regulation C. Effective date for revised transaction coverage and expanded fields.
01/01/2018 CFPB, Regulation Z. Effective date of 2018 dollar thresholds for several Reg. Z provisions.
01/01/2018 CFPB, HPML Loan Appraisal Requirements. Effective date for 2018 smaller loan exemption threshold.
03/05/2018 CFPB, Regulation M. End of Comment Period for proposed revisions to Consumer Leasing regulation.
04/19/2018 CFPB, 2016 Mortgage Servicing Rules. Mandatory compliance date for sections of the Final Rule relating to Successors in Interest, and Periodic Statements.
05/11/2018 FinCEN, CDD / Beneficial Ownership Rules. Mandatory compliance date.
07/01/2018 Federal Reserve, Regulation CC. Effective date of Final Rule reflecting a virtually all-electronic check collection and return environment.
10/01/2018 CFPB, Amendments to the TRID Rules. Mandatory compliance date.
10/01/2018 CFPB, Prepaid Accounts Rule. Mandatory compliance date regarding electronic transaction histories, and for submitting prepaid account agreements to the CFPB.
12/31/2018 FHFA, HARP Extension. Program extended beyond original September 2017 end-date.
01/01/2019 HMDA, Regulation C. Effective date for changes to enforcement and reporting provisions.
04/01/2019 CFPB, Prepaid Accounts Rule. Mandatory compliance date for most Reg. E & Reg. Z changes originally scheduled to become effective on 10/01/17, and for which the mandatory compliance date has twice been extended.
10/01/2019 CFPB, Prepaid Accounts Rule. Mandatory compliance date for providing the full 24 months of written account transaction history upon request.
01/01/2020 HMDA, Regulation C. Quarterly reporting for high volume reporters starts.

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