

Client Alert

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CFPB, OCC, and Federal Reserve Propose Clarifications to Small Loan Exemption from HPML Appraisal Requirements

By Donald C. Lampe and Ryan J. Richardson

On August 4, 2016, the Consumer Financial Protection Bureau (“CFPB”), the Office of the Comptroller of the Currency (“OCC”), and the Board of Governors of the Federal Reserve System (“Federal Reserve”) (together, the “Agencies”) jointly published in the *Federal Register* a notice of proposed rulemaking (“NPR”) to amend the Agencies’ respective regulations exempting certain small loans from the special appraisal requirements that apply to lenders in connection with making higher-priced mortgage loans (“HPMLs”). Under the current HPML rules,¹ the small loan exemption threshold is adjusted annually based on any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (“CPI-W”), as calculated and published by the Bureau of Labor Statistics (“BLS”). The NPR proposes specifically to amend the official commentary to HPML rules to clarify how the threshold is calculated when the CPI-W does not increase in a given year.

The current HPML rules provide that the small loan threshold amount for exemption from the HPML appraisal requirements is adjusted each January 1 based on any annual percentage increase in the CPI-W, measured year-over-year as of the prior June 1. Thus, if BLS data as of June 1, 2017, showed an increase in the CPI-W since June 1, 2016, the small loan threshold amount would be adjusted accordingly, effective January 1, 2018. The Agencies’ current HPML rules likewise provide that annual adjustments in the threshold amount will be rounded to the nearest \$100 increment.

The preamble to the July 2013 proposed HPML rule that first included the small loan exemption from the HPML appraisal requirements explained that, “if the CPI-W decreases in an annual period, the percentage increase would be zero, and the dollar amount threshold for the exemption would not change.” 78 FR 48548, 48565 (Aug. 8, 2013). This preamble text explained how an annual adjustment would be handled in the case of an annual percentage decrease in the CPI-W. However, it did not explain how adjustment calculations in future years would account for such a decrease. The NPR proposes to bring this explanation from the July 2013 preamble to the commentary, and to fill in the gaps with respect to future calculations.

The NPR proposes to add a substantively identical, three-part comment to the small loan exemption provision in each of the HPML appraisal requirement rules. First, the proposed comment draws on the preamble to the July 2013 rule, clarifying that if the CPI-W on a given June 1 does not show an increase as compared to the prior June 1, the small loan exemption threshold amount for the following year will not change. Second, the proposed comment clarifies that, for the years that follow a decrease in the CPI-W, the small loan exemption threshold

¹ See 12 C.F.R. §§ 34.201 - 203 (OCC); 12 C.F.R. §§ 226.35, 43 (Federal Reserve); 12 C.F.R. § 1026.35 (CFPB). Notably, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Housing Finance Agency also maintain rules governing HPMLs, which are largely identical to the rules that the CFPB, the OCC, and the Federal Reserve propose to amend. For purposes of this publication, the rules of the respective Agencies are referred to as if there were but one rule.

Client Alert

amount is calculated based on the dollar amount that *would have resulted* if decreases and subsequent increases in the CPI-W had been taken into account. Third, the proposed comment provides that the small loan exemption threshold amount would only be adjusted if the calculation, accounting for decreases and subsequent increases in the CPI-W, results in a net increase in the threshold. However, as noted in part two of the proposed comment, all future increases would be calculated based on the dollar amount that *would have resulted* if decreases and subsequent increases in the CPI-W had been taken into account.

To illustrate, assume the small loan exemption threshold amount in effect for the year 2019 is \$27,500 and, on June 1, 2019, the BLS reports a 1.1% decrease in the CPI-W as compared to June 1, 2018. Thus, according to part one of the proposed comment, because the CPI-W has not shown an increase, as of January 1, 2020, the small loan exemption threshold amount will remain \$27,500. Further assume that on June 1, 2020, the BLS reports a 1.6% increase in the CPI-W as compared to June 1, 2019. Part two of the proposed comment clarifies that, in this circumstance, the 1.6% increase will not be based on the small loan exemption threshold amount currently in effect in 2020 (i.e., \$27,500), but instead will be based on the amount that would have resulted if the prior year's 1.1% decrease were taken into account (i.e., \$27,200). Thus, effective January 1, 2021, the small loan exemption threshold will be \$27,600 (i.e., \$27,200, increased by 1.6%).

Assume in the example above that on June 1, 2020, the BLS reports only a 0.6% annual increase in the CPI-W, instead of a 1.6% annual increase as described above. A 0.6% increase based on \$27,200 is \$27,400, which is still less than \$27,500. Thus, according to part three of the proposed comment, because the calculation would not result in a net increase to the threshold, as of January 1, 2021, the small loan exemption threshold will remain \$27,500. However, future calculations will be based on the amount that would have resulted if the 1.1% decrease and subsequent 0.6% increase were taken into account (i.e., \$27,400).

The proposed comment is cumbersome in that it contains two potential points of reference for determining the next year's small loan exemption threshold amount: (1) the small loan exemption threshold amount currently in effect, and (2) the amount that would have resulted if decreases and subsequent increases in the CPI-W had been taken into account. Nevertheless, the NPR brings clarity to the calculation by formalizing the common understanding that, while the small loan exemption threshold amount may never decrease, any increase must be based on a net increase in the CPI-W since the last adjustment.

The small loan exemption threshold amount in effect through December 31, 2016, is \$25,500. The BLS published June 2016 CPI-W data on July 15, 2016, reporting a 0.6% increase since June 2015. We expect that the Agencies will publish the adjustment to the small loan exemption threshold amount soon. In the meantime, comments on the NPR are due September 6, 2016.

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