

NOVEMBER 2022 FREE COMPLIANCE NEWSLETTER

COURT OVERTURNS HMDA REPORTING THRESHOLD FOR SMALL ENTITIES

We're starting off November on a major down note. You may or may not have seen the court ruling that basically says the Consumer Financial Protection Bureau (CFPB) needs to lower the HMDA loan origination threshold from 100 back down to 25 as required by law. As we understand, certain groups filed suit that roughly 1,700 lending organizations were not reporting HMDA data as a result of increasing the threshold from 25 to 100, and they felt that those organizations should be reporting. Politics aside, it looks like they likely got their way.

What does this mean for you? If you were exempt from HMDA reporting because you were under 100 the past two years, you may no longer be exempt. This means you likely will have to start collecting and reporting. We have talked to other experts in the industry, and here's what we can offer at this time. Many experts want to wait to see what the CFPB is going to do. Here are some questions that need to be answered:

- Will you have to start reporting if you're under 100 but over 25?
- When will you start reporting? 1/1/2023? Some other date?
- Do you have to go back and collect data for prior years?

I know this does not help you much now, but hopefully we get some good guidance and soon. We will keep you posted as we learn more. [Here](#) is a short ABA article on this topic.

CFPB ISSUES GUIDANCE TO HELP BANKS AVOID CHARGING ILLEGAL JUNK FEES ON DEPOSIT ACCOUNTS

If you charge returned deposit item fees, which I know many banks do, please pay attention. The CFPB recently issued guidance about two junk fee practices that are likely under UDAP. If you charge any of these fees below, you may want to consider stopping. Click [here](#) to read the CFPB Bulletin on this topic.

Surprise Depositor Fees

When a consumer deposits a check that bounces, banks sometimes charge a fee to the depositor, usually in the range of \$10 to \$19. However, a person trying to deposit a check has no idea or control over whether the check will clear, and sometimes, that person is the victim of check fraud. In fact, there are many reasons deposited checks can bounce, and the most common reason is that the check originator does not have enough money available in their account. Charging a fee to the depositor penalizes the person who could not anticipate the check would bounce, while doing nothing to deter the originator from writing bad checks.

Surprise Overdraft Fees

The circular provides some examples of potentially unlawful surprise overdraft fees, including charging penalties on purchases made with a positive balance. These overdraft fees occur when a bank displays that a customer has sufficient available funds to complete a debit card purchase at the time of the transaction, but the consumer is later charged an overdraft fee. Often, the financial institution relies on complex back-office practices to justify charging the fee. For instance, after the bank allows one debit card transaction when there is sufficient money in the account, it nonetheless charges a fee on that transaction later because of intervening transactions.



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In September 2022, the CFPB took action against Regions Bank for charging surprise overdraft fees known as authorized positive fees. As early as 2015 the CFPB, as well as other federal regulators, including the Federal Reserve, began cautioning financial institutions against charging certain types of authorized positive fees, such as the ones used by Regions to unlawfully penalize customers. Regions is required to, among other consequences, reimburse consumers all the funds it unlawfully charged since August 2018 and pay a \$50 million penalty.

The CFPB also found that Regions management was aware about the surprise overdraft fee practices, but they chose to wait while Regions pursued changes that would generate new fee revenue. You can find the press release [here](#) and the consent order [here](#).

NY DEPARTMENT OF FINANCIAL SERVICES (DFS) ANNOUNCES SETTLEMENT WITH RHINEBECK BANK TO RESOLVE FAIR LENDING VIOLATIONS CONCERNING AUTO LOANS

DFS investigation uncovered discriminatory dealer mark-ups in bank's indirect automobile lending programs and secure restitution for impacted borrowers. The investigation found that Rhinebeck's practices resulted in minority borrowers paying higher interest rates than non-Hispanic white borrowers for their automobile loans, without regard to their creditworthiness. You can read the press release [here](#).

FINCEN ISSUES FINAL RULE ON BENEFICIAL OWNERSHIP INFORMATION REPORTING REQUIREMENTS (BOIRR)

On September 30, 2022, FinCEN issued a final rule establishing a beneficial ownership information reporting requirement, pursuant to the bipartisan Corporate Transparency Act (CTA). The rule will require most corporations, limited liability companies, and other entities created in or registered to do business in the United States to report information about their beneficial owners—the persons who ultimately own or control the company, to FinCEN. Designed to protect U.S. national security and strengthen the integrity and transparency of the U.S. financial system, the rule will help to stop criminal actors, including oligarchs, kleptocrats, drug traffickers, human traffickers, and those who would use anonymous shell companies to hide their illicit proceeds.

The reporting rule is one of three rulemakings planned to implement the CTA. FinCEN will engage in additional rulemakings to: (1) establish rules for who may access beneficial ownership information, for what purposes, and what safeguards will be required to ensure that the information is secured and protected; and (2) revise FinCEN's customer due diligence rule. In addition, FinCEN continues to develop the infrastructure to administer these requirements, including the information technology system that will be used to store beneficial ownership information in accordance with the strict security and confidentiality requirements of the CTA.

Unfortunately, it doesn't look like this part of the CTA will relieve the burden of collecting beneficial ownership information for financial institutions. This part only puts the burden of reporting on the business but does not take it away from the financial institutions. Once FinCEN gets to part number 2 above and revises the CDD rule, then we will have more information on what collection of beneficial ownership information will look like for financial institutions. You can read the press release [here](#) and the final BOIRR rule [here](#).



THE OCC RELEASED ITS FY 2023 BANK SUPERVISION OPERATING PLAN

The OCC released its bank supervision operating plan for fiscal year 2023. The four-page document provides the foundation for policy initiatives and supervisory strategies as applied to individual national banks, federal savings associations, federal branches, federal agencies, and technology service providers. The OCC staff uses the plan to guide supervisory priorities, planning and resource allocations. You can read the plan [here](#).

CFPB ISSUES AN ADVISORY OPINION ON FAIR CREDIT REPORTING; FACIALLY FALSE DATA

The CFPB is issuing this advisory opinion to highlight that a consumer reporting agency that does not implement reasonable internal controls to prevent the inclusion of facially false data, including logically inconsistent information, in consumer reports it prepares is not using reasonable procedures to assure maximum possible accuracy under section 607(b) of the Fair Credit Reporting Act (FCRA).

While it doesn't seem like there is a lot of new information in here, it's a good idea to take a few minutes to read through it and brush up on your requirements as a lender and provider of this data. Providers must have a program in place to ensure you are reporting fair and accurate data. You can find the opinion [here](#).

JUSTICE DEPARTMENT ANNOUNCES ACTIONS TO RESOLVE LENDING DISCRIMINATION CLAIMS AGAINST EVOLVE BANK AND TRUST

The DOJ announced it has secured an agreement to resolve allegations that Evolve Bank & Trust, which is headquartered in Memphis, engaged in lending discrimination on the basis of race, sex and national origin in the pricing of its residential mortgage loans from at least 2014 through 2019.

Specifically, the complaint alleges that, from at least 2014 through 2019, Evolve Bank's loan pricing practices resulted in Black, Hispanic, and female borrowers paying more in the "discretionary pricing" components of home loans than white or male borrowers for reasons unrelated to their creditworthiness. "Discretionary pricing" means the parts of a loan price that are left up to Evolve's loan officers and managers, including fees, charges or rate discounts that don't relate to the borrowers' credit qualifications or loan characteristics.

This complaint goes deeper than just the upfront interest rate that is much easier to test. It's a good idea to look at your discretionary practices to ensure you don't also potentially have this problem. You can read the press release [here](#) and the consent order [here](#).

AGENCIES ANNOUNCE THRESHOLD FOR SMALLER LOAN EXEMPTION FROM APPRAISAL REQUIREMENTS FOR HIGHER-PRICED MORTGAGE LOANS

The Consumer Financial Protection Bureau, the Federal Reserve Board, and the Office of the Comptroller of the Currency announced that the 2023 threshold for exempting loans from special appraisal requirements for higher-priced mortgage loans will increase from \$28,500 to \$31,000. The threshold amount will be effective January 1, 2023 and is based on the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers, known as CPI-W, as of June 1, 2022.



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The Dodd–Frank Wall Street Reform and Consumer Protection Act added special appraisal requirements for higher-priced mortgage loans, including that creditors obtain a written appraisal based on a physical visit to the interior of the home before making a higher-priced mortgage loan. The rules implementing these requirements contain an exemption for loans of \$25,000 or less, adjusted annually to reflect CPI-W increases. You can read the annual threshold adjustments [here](#).

AGENCIES ANNOUNCE DOLLAR THRESHOLD IN REG Z AND REG M FOR EXEMPT CONSUMER CREDIT AND LEASE TRANSACTIONS

Specifically, based on the annual percentage increase in the CPI-W as of June 1, 2022, Regulation Z and Regulation M generally will apply to consumer credit transactions and consumer leases of \$66,400 or less in 2023. However, private education loans and loans secured by real property, such as mortgages, are subject to Regulation Z regardless of the amount of the loan. You can read the Reg Z update [here](#) and the Reg M update [here](#).