

I'M SUPPOSED TO DO WHAT FOR AN ASSUMPTION?

An *assumption* occurs when a creditor expressly agrees in writing with a subsequent consumer to accept that consumer as a primary obligor on an existing residential mortgage transaction. Before the assumption occurs, the creditor shall make new disclosures to the subsequent consumer, based on the remaining obligation. 12 C.F.R. § 1026.20(b).

That provision has caused confusion for lenders regarding (i) when do they actually have an assumption transaction, and (ii) how and when do you make disclosures?

On May 1, 2019 the Consumer Financial Protection Bureau published its *Factsheet: Are Loan Estimates and Closing Disclosures Required for Assumptions?*

The Factsheet provides some clarity with regard to assumptions, among which are the following:

A Loan Estimate and Closing Disclosure are only required under the TRID Rule if a transaction is a closed-end consumer credit transaction secured by real property or a cooperative unit and is not a reverse mortgage subject to 12 CFR 1026.33. 12 CFR 1026.19(e) and (f).

An assumption under § 1026.20(b) occurs when a creditor expressly agrees in writing to accept a new consumer as a primary obligor on an existing residential mortgage transaction. 12 CFR 1026.20(b). Generally, to satisfy this particular definition of assumption, a transaction must meet the following three elements:

1. **Include the creditor's express acceptance of the new consumer as a primary obligor.** The creditor must accept the new consumer as a primary obligor. The retention of the original consumer as an obligor in some capacity does not prevent the change from being an assumption under § 1026.20(b), provided the new consumer becomes a primary obligor.

For that acceptance to be express, the creditor must unequivocally agree to accept the new consumer as a primary obligor. The following events are not construed to be express acceptance of the new consumer: (a) approval of creditworthiness; (b) notification of a change in records; (c) mailing of a coupon book to the new consumer; and (d) acceptance of payments from the new consumer. Comment 20(b)-3.

2. **Include the creditor's express acceptance in a written² agreement.** In order for a transaction to be an assumption under § 1026.20(b), it must include a written agreement and that written agreement must include the creditor's express acceptance of the new consumer. Comment 20(b)-1.i. Other than expressly accepting the new consumer as a primary obligor (as explained above), the written agreement does not need to change any terms of the existing obligation. Comment 20(b)-1.ii.

² Regulation Z does not prohibit the "written agreement" from being in the form of an electronic record with an electronic signature. Generally, electronic signatures and electronic records are valid and enforceable if they meet certain criteria. See, for example, 15 U.S.C. 7001 *et seq.*

3. **Be a "residential mortgage transaction" as to the new consumer.** A "residential mortgage transaction" is a transaction: (a) in which a security interest is created or retained in the new consumer's principal dwelling; and (b) which finances the acquisition or initial construction of the

new consumer's principal dwelling. 12 CFR 1026.2(a)(24). For purposes of determining whether the transaction is a residential mortgage transaction, the creditor must look to the new consumer, rather than the original consumer. Thus, the creditor must determine if the transaction involves the new consumer's *principal dwelling* and whether the new consumer is *financing the acquisition or initial construction* of that dwelling.

The creditor must be taking or retaining a security interest in the new consumer's *principal dwelling*, and the new consumer must be financing the acquisition or initial construction of his or her *principal dwelling*. For purposes of determining whether the transaction is a residential mortgage transaction, it is not relevant whether the transaction involved the original consumer's principal dwelling. The transaction must be secured by and finance the acquisition or initial construction of the new consumer's principal dwelling in order to be a residential mortgage transaction. Thus, if the transaction is only secured by the new consumer's second or vacation home or other property that the new consumer does not use as a principal dwelling, the transaction is not a residential mortgage transaction, even if the dwelling securing the transaction is or was the original consumer's principal dwelling. Comment 20(b)-2. See also comment 2(a)(24)-3.

Moreover, a residential mortgage transaction does not arise if the new consumer is not *financing the acquisition or initial construction* of his or her principal dwelling. Thus, even if the transaction is secured by the new consumer's principal dwelling, a creditor must determine if the new consumer previously purchased or acquired some interest in the principal dwelling. If the new consumer takes on a debt obligation secured by a dwelling in which the new consumer previously had some interest (even if not full legal title), the transaction is not a residential mortgage transaction. Comment 2(a)(24)-5. For example, a residential mortgage transaction does not occur when a successor³ takes on a debt obligation that is secured by a dwelling in which the successor previously acquired an interest. Although these types of transactions may be commonly referred to as assumptions, they are not assumptions under § 1026.20(b) because they are not residential mortgage transactions as to the new consumer. See 79 *Federal Register* 41631, 41633 (July 17, 2014) available at <http://www.govinfo.gov/content/pkg/FR-2014-07-17/pdf/2014-16780.pdf>.

If the transaction is an assumption under § 1026.20(b), the creditor must provide a Loan Estimate and Closing Disclosure, unless the transaction is otherwise exempt from the requirements to provide a Loan Estimate and Closing Disclosure.⁴ For example, certain housing assistance loans are otherwise exempt from the requirements to provide a Loan Estimate and Closing Disclosure under 12 CFR 1026.3(h).

The creditor must make the disclosures in the Loan Estimate and Closing Disclosure based on the remaining obligation. For example, the amount financed is the remaining principal balance plus any arrearages or other accrued charges from the original consumer credit transaction.

Similarly, in determining the amount of the finance charge and the annual percentage rate to be disclosed, the creditor should disregard any prepaid finance charges paid by the original obligor, but must include in the finance charge any prepaid finance charge imposed in connection with the assumption transaction. If the creditor requires the new consumer to pay any charges as a condition of the assumption, those sums are prepaid finance charges as to that consumer, unless exempt from the finance charge under 12 CFR 1026.4. Comment 20(b)-6.

This new Factsheet is a welcome insight to dealing with Assumptions. If you have any questions regarding this memorandum, please contact any of our firm attorneys or representatives below.