American Bankers Association
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Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1275 First Street, N.E.
Washington, DC 20002
By electronic delivery to: www.regulations.gov

Re: Docket No. CFPB –2017–0018
Amendments to Federal Mortgage Disclosure Requirements under the Truth in Lending Act (Regulation Z)

Dear Ms. Jackson:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the Bureau of Consumer Financial Protection's (CFPB or Bureau) proposal to clarify important aspects of the TILA-RESPA Rule, as implemented in Regulation Z, at 12 CFR Part 1026. The proposed amendments relate to when a creditor may compare charges paid by or imposed on the consumer to amounts disclosed on a Closing Disclosure (CD), instead of a Loan Estimate (LE), to determine if an estimated closing cost was disclosed in good faith. Under the proposed amendments, the rules would permit creditors to reset tolerances with corrected Closing Disclosures regardless of when the CD is provided relative to consummation.

General Comments:

ABA appreciates the Bureau's attention to resolving problems involving instances where delays caused by events outside the control of the lender force unnecessary, but often consequential, delays and postponements in settlements. ABA has consistently raised concerns about the so-called "black hole" effect in these regulations, where the TILA-RESPA rules block a creditor's ability to update fee changes for tolerance purposes after delivery of the Closing Disclosure (and particularly, in the four-day period preceding settlement). As stated in previous comments, our worries have consistently focused on two related elements—ensuring maximum consumer benefit and flexibility, and eliminating substantial and unwarranted liability and cost for banks.

In this sense, ABA is supportive of the Bureau's current proposal. We believe the changes and amendments set forth herein would clarify the so-called "black hole" problem and eliminate much of the unwarranted liability risk associated with this regulatory glitch. Specifically, the proposal to amend § 1026.19(e)(4) and associated commentary to remove the four-business-day

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.

limit for providing Closing Disclosures for purposes of resetting tolerances is an effective and very efficient approach to addressing the "black hole" problem while preserving adequate consumer protections that will avoid bait-and-switch tactics or unjustified fee increases.

To summarize ABA's understanding of the proposed rule, the TILA-RESPA regulations and accompanying commentaries would be amended to clarify that creditors may reset tolerances by providing a CD (including any corrected disclosures provided under § 1026.19(f)(2)(i) or (ii)) within three business days of receiving information sufficient to establish that a reason for revision applies. Importantly, the proposal would remove restrictions that creditors must reset tolerances with a CD (either initial or corrected Closing Disclosures) to the period of less than four business days before consummation. In short, the Bureau is proposing to allow creditors to reset tolerances using a Closing Disclosure, without regard to the current four business-day limit. As set forth in this description, this proposal achieves a simple and uncomplicated solution to a vexing problem in the regulations. ABA supports the approach advanced herein.

Additional Comments:

- Resetting Tolerances: Under the proposal, there would be no four business-day limit for resetting tolerances with initial Closing Disclosures nor for any corrected Closing Disclosures provided pursuant to § 1026.19(f)(2)(i) or (ii). As mentioned above, ABA believes that the use of CDs, whether initial or corrected, as a vehicle for correcting and "re-baselining" fee disclosures, is a straightforward approach to returning regulatory order and compliance clarity on this provision. ABA requests confirmation, however, that in instances where a CD is used to reset tolerances, there is no prerequisite that there be a preceding revised LE. Stated differently, where there are permissible cost variances due to valid changed circumstances (or consumer requested changes), the creditor can go from the initial LE to the final CD with full confidence that the CD resets the tolerances of the initial LE.

- Three-Day Disclosure: Under the proposal, as under the current rule, to reset tolerances with a Closing Disclosure, creditors would be required to provide the Closing Disclosure to the consumer within three business days of receiving information sufficient to establish a reason for revision. While the three day deadline for providing a revised Loan Estimate under § 1026.19(e)(4)(i) may be appropriate for a revised CD in situations when closing is delayed greater than three business days, in many situations a change occurs when closing is scheduled to occur less than three business days after the change. In such situations, ABA believes the CFPB should confirm and clarify that the revised CD can be provided at the closing table, and can reset tolerances, even if the closing occurs prior to the end of the three business-day period after establishing the changed circumstance.

- CD at Closing: CFPB should clarify that a revised CD could be provided for tolerance purposes pursuant to proposed comment 19(e)(4)(ii)-2 at the conclusion of settlement. We note that under the current rule, the good faith analysis takes into account the actual costs paid by or imposed on the consumer at the later of consummation or settlement, pursuant to comment 19(e)(3)(i)-2. Many legitimate, justified changes based on "changed

circumstances" or borrower requested changes can occur at settlement, when settlement occurs after consummation of the transaction, and a creditor should not be forced to absorb the costs of such legitimate changes.

- Interest Rate Dependent Charges: In previous comments, ABA had observed that there is lingering uncertainty as to whether the solution defined in proposed comments under 19(e)(4)(ii) would apply in instances concerning fee changes due to interest rate changes. ABA continues to believe there must be added clarity regarding whether the proposed solutions herein would also apply to interest rate dependent charges that change due to a rate lock that occurs after a Closing Disclosure is provided. Comments to 19(e)(4)(ii) must, we believe, explicitly incorporate a statement that any revised CD delivered pursuant to interest rate changes will reset tolerances based on § 1026.19(e)(3)(iv)(D).

- Interest Rate Dependent Charges: According to the recent final TILA-RESPA rule, published August 15, 2017[2], if the interest rate is locked on or after the date on which the creditor provides the Closing Disclosure and the Closing Disclosure is inaccurate as a result, then the creditor must provide the consumer a corrected Closing Disclosure, at or before consummation, reflecting any changed terms, pursuant to § 1026.19(f)(2) (referring to annual percentage rate, loan product changes, or prepayment penalties). According to the final rule preamble, if the rate lock causes the Closing Disclosure to become inaccurate before consummation in a manner listed in § 1026.19(f)(2)(ii), the creditor must ensure that the consumer receives a corrected Closing Disclosure "no later than three business days before consummation, as provided in that paragraph."[3] ABA would ask that the Bureau reconsider this 3-day wait as it applies to interest rate dependent charges. This new "no later than three business days" language sets forth unclear results. Absent some rectifying language that assures that fee variations caused by interest rate changes (often beneficial to the consumer) can be cured by a CD without any additional delay, we will remain subject to the "black hole" problem.

- Solicitation for Comments on Early Provision of CD: The Bureau is soliciting comments on the extent to which creditors are currently providing early Closing Disclosures to consumers so that they are received substantially before the required three business days prior to consummation, with terms and costs that are nearly certain to be revised. ABA members surveyed on this question generally observed that they do not engage in early provision of the CD. They assert that they will not accelerate the delivery of any final disclosure because of the multiple transactional factors that must still be determined at such early stages of the process. Member banks also opined that they do not gain any real compliance advantage

[2] 82 F.R. 37656

[3] 82 F.R. at 37779

from advancing disclosure deliveries in instances where there is a high probability that the forms will continue to undergo revisions. Multiple banks offered that their examiners have questioned this practice, and raise "red flags" when bank files demonstrate high propensity towards fee revisions and repeated changes to the CD.

Request for Additional Examples:

In the interest of assuring absolute clarity, ABA respectfully requests that the Bureau consider the addition of the following two examples to the Official Interpretations to Part 1026, Section 1026.19.

First, ABA recommends *Suggested Fact Pattern A* to illustrate three important elements in the application of this rule. First, the example cements the concept that corrections via revised disclosures can include delays greater than one or two days, as reflected in the other examples. Suggested *Fact Pattern A* would also illustrate the application of the mail box rule and its relationship to the proposed provisions. Finally, this fact pattern would better elucidate the inapplicability of the four day wait period set forth in § 1026.19(e)(4)(ii) when creditors are correcting disclosures pursuant to § 1026.19(f)(2).

Second, ABA recommends *Suggested Fact Pattern B* to clarify rate-lock-related revisions. Note that current comment 19(e)(3)(iv)(D)-2 only addresses situations where the rate is locked on or after the date the initial CD is sent. The proposed revisions to § 1026.19(e)(4)(i) would appear to permit the CD to be used in lieu of a revised LE if the rate lock causes charges to exceed the tolerance and a revised disclosure is needed for the purpose of determining good faith for fee tolerances under§ 1026.19(e)(3) (i) and (ii). Note, however, that nothing explicitly addresses the requirements when the rate is locked before the initial CD is provided and the lock causes no change in terms or charges. In our suggested example under *Fact Pattern B*, below, if the creditor were required to issue a revised LE and did not have sufficient time to prepare and send it on Monday April 30th (which would usually be the case if the borrower locked in the late afternoon or evening after the mail "cut off"), the creditor would be forced to delay consummation because the revised LE would not be received at least four business days before consummation.

Suggested Fact Pattern A

Consummation is originally scheduled for Tuesday, May 8th. On Tuesday, May 1st, the creditor mails the disclosures required by § 1026.19(f)(1)(i) . On Monday, May 7th, the consumer reschedules consummation for Tuesday, May 15th, and requests a revision that causes charges to increase beyond the limits permitted by § 1026.19(e)(3)(i) and/or (ii). The consumer-requested revisions do not result in a change under § 1026.19(f)(2)(ii)(A) through (C). The creditor agrees to the consumer-requested revisions. On Thursday, May 10th, the creditor mails revised and corrected disclosures under § 1026.19(f)(2)(i) reflecting the increase in charges caused by the consumer-requested revisions. The revised and corrected disclosures are considered to have been received by the consumer on Monday, May 14th. Consummation occurs on Tuesday, May 15th, and final corrected disclosures are provided under § 1026.19(f)(2)(i) at that time. The creditor has complied with the timing requirement of § 1026.19(f)(1)(ii)(A) by mailing the disclosures required

by § 1026.19(f)(1)(i) on Tuesday, May 1st so that the disclosures were considered received by the consumer no later than three business days before consummation. Pursuant to § 1026.19(e)(4)(i), the revised and corrected disclosures provided under § 1026.19(f)(2)(i) and mailed on Thursday, May 10th, will be used for the purpose of determining good faith under § 1026.19(e)(3)(i) and (ii). The requirement of § 1026.19(e)(4)(ii) that the consumer must receive any revised version of the disclosures required under § 1026.19(e)(1) not later than four business days prior to consummation is not applicable in this instance because the revised disclosures were provided under § 1026.19(f)(2)(i).

Suggested Fact Pattern B

Consummation is scheduled for Tuesday, May 8th. On Monday, April 30th, before the creditor has provided the disclosures required by § 1026.19(f)(1)(i) the consumer locks the rate. The rate lock does not cause charges to increase beyond the limits permitted by § 1026.19(e)(3) or change the terms of the transaction. On Tuesday, May 1st, the creditor mails the disclosures required by § 1026.19(f)(1)(i) to the consumer and the consummation occurs as scheduled on Tuesday, May 8th. Section 1026.19(e)(3)(iv)(D) generally requires a creditor to provide a revised disclosure under§ 1026.19(e)(1)(i) after the rate is locked even if the term and charges disclosed are the same. However, pursuant to § 1026.19(e)(4)(i) a creditor may provide the disclosures required by § 1026.19(f)(1)(i) instead of the disclosures required by § 1026.19(e)(1)(i) after the rate is locked, even if the disclosures are not necessary for the purpose of determining good faith under § 1026.19(e)(3)(i) and (ii) .

Conclusion

ABA members appreciate the Bureau's continued focus on the mortgage disclosure rules, and the opportunity to comment on these proposed amendments to the TILA-RESPA rule. We look forward to working with CFPB staff as it advances in this rulemaking. Please contact the undersigned if you have any questions regarding our comments on the proposal.

Sincerely,

Rod J. Alba