American Bankers Association
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Robert R. Davis
Executive Vice President
Mortgage Markets, Financial Management & Public Policy
(202) 663-5588
RDavis@aba.com

September 7, 2012

Submitted via Regulations.gov

Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Docket No. CFPB- 2012-0029; RIN 3170-AA12
High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Reg Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Reg X)

Dear Ms. Jackson:

American Bankers Association (ABA)[1] appreciates the opportunity to comment on the Bureau's proposed rulemaking to implement Truth in Lending Act (TILA) amendments pertaining to High-Cost mortgages, as well as statutory changes under TILA and the Real Estate Settlement Procedures Act (Regulation X), pertaining to homeownership counseling requirements. These comments are divided in two general parts, the first discussing impact and structural issues with the rulemaking and its process, and the second outlining a detailed list of technical concerns that remain outstanding in this proposed regulation.

Overview

ABA is extremely concerned about the impact and market consequences of these new HOEPA provisions and the proposed implementation proposals. ABA is also troubled by the pace and process of this rulemaking. We believe that the enormous expansions of HOEPA's application and coverage have not been properly calibrated, and unleashing them on the market—especially in conjunction with all the other mortgage-related changes—will cause disruptions across all market segments.

These rules are critically important to lenders and carry enormous repercussions for consumers. We strongly urge that deeper and more careful consideration be given to the proposed rules, and request that the Bureau engage in more analysis of the adverse impact that these rules will have on consumers and lending institutions. ABA fears that an overly hasty and unyielding sprint to ensure that deadlines are met come at the cost of ignoring crucially important considerations that must be factored into the regulatory process—considerations that Congress fully intended be weighed in the promulgation of these rules.

[1] ABA represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $165 million in assets.

Summary of Main Arguments

- This rulemaking requires deeper analysis to ensure that credit is not unduly restricted and to ensure that the regulation is more clearly directed toward those it is intended to protect.

- We respectfully recommend that the Bureau adopt an approach similar to the one proposed for the RESPA-TILA integration process. In that proposed rulemaking, the Bureau proposes to delay a number of related disclosure requirements under Dodd-Frank through a temporary exemption from the requirement to comply on January 21, 2013. Our suggestion stems from ABA's view that, in very crucial respects, the regulatory reforms (including the Proposed Rules) may be so imbalanced that they will do more harm than good. The Bureau has a responsibility to achieve regulatory balance by, among other things, informing their rulemakings with quantitative analysis where relevant and a holistic understanding of the consequences of their implementation. The Bureau must pause to consider the interplay of massive amounts of reform activities.

- ABA conducted a survey revealing that the proposed HOEPA triggers will have a measurable negative effect on already depressed lending levels. The survey confirms that HOEPA thresholds remain a virtual ceiling for mortgage lending activity. The proposal's rate triggers will cause some interruption in current lending, but the deeper impact will come from the points and fees threshold. The risks of the consequences arising out of the Proposed Rules and other regulatory reforms, taken together, are significant, which should argue persuasively for time to allow for a more considered approach.

- However long it takes the Bureau to finalize these rules, ABA is recommending a minimum 18-24 month period, from issuance, to implement these rules.

- ABA believes the Bureau should refrain from expanding the definition of finance charge ("FC"), which also affects the Annual Percentage Rate figure ("APR"). This proposal is ill-advised for various reasons, including questionable basis under current law, extreme compliance burdens it will pose, limited value to consumer understanding, and insufficient time allotted for proper analysis.

- ABA is concerned about reductions in credit available under these new rules and the effects on protected populations and persons with special credit needs. ABA asks that regulators make a conscious effort to rectify and clarify fair lending laws to fit the new realities of a post-Dodd-Frank world.

- The Bureau must still address a panoply of technical and definitional difficulties that remain in the proposed provisions. Proper compliance will depend upon clear and concise articulations of the rules that are finalized. ABA sets forth a list of technical compliance issues that are critical and require attention and resolution.

Part I. ABA Comments on Impact and Process

ABA appreciates that the Bureau is undertaking this regulatory proposal without an express mandate to do so. Given the vague statutory language, the need for uniform interpretation and application, and the fact that the statutory provisions must be incorporated into a complex web of new rules and regulations that are being enacted with unprecedented speed, the Bureau has an obligation to engage in rulemaking that attempts to reconcile inconsistent provisions and maintain a requisite degree of order and certainty.

We advise, however, that more careful analysis is needed to ensure that credit is not unduly restricted, and to ensure that regulation is clear and effective for those it is intended to protect. ABA does not recommend unnecessary delay, but urges caution, so that the impact of the proposal is properly understood before it is adopted.

Impact of HOEPA Generally

As described in the proposal's preamble, the Dodd-Frank Act generally expands the reach of the HOEPA protections, as well as the types of loans covered by HOEPA by including purchase money mortgage loans and HELOCs. The Bureau notes that "[n]otwithstanding this expansion, the Bureau believes that HOEPA lending will continue to constitute a small percentage of the mortgage lending market."

ABA confirms that HOEPA loans are extremely rare. Given the legal risks and liability for violation of HOEPA rules and the current negative connotation of the HOEPA label, the HOEPA thresholds constitute the outer boundaries of mortgage lending activity. As the Bureau recognizes, the HOEPA triggers have the effect of serving as an almost-solid ceiling for mortgage loans--our members report that they practically do not originate loans exceeding the thresholds—and will not do so in the future.[2] We understand that certain past market excesses give rise to arguments that HOEPA must be expanded to cover more loans. We warn that such efforts must be undertaken with extreme care--if the HOEPA regulation casts too broad a net and captures reasonably priced mortgage loans, there is a strong risk that creditors will abandon whole segments of mortgage lending, and others will limit credit availability, especially for those with limited or tarnished credit histories, low income or low asset levels.

Legislative Intent

ABA believes that the Bureau should stay true to the overall legislative intent and purpose of the Dodd-Frank Act amendments, including an intent to ensure people's access to credit. The specific legislative purpose under Subtitle C, related to high-cost mortgages, may be to strengthen the protections of HOEPA (though there is little if any legislative history on the reasons for this expansion), but the broader intent of Dodd-Frank reflects that Congress placed great importance on overall access to credit. Under new TILA Section 129C, for instance,

[2] The minute number of HOEPA loans that are originated are often one-off HOEPA loans to special customers, extended in very exceptional circumstances. Sometimes they are the result of errors made by lenders in calculating the triggers; once originated, these loans must be honored, and they remain on a bank's books, almost involuntarily.

Congress instructed that regulatory activity must occur under a finding that "economic stabilization would be enhanced by the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit, while ensuring that responsible, affordable mortgage credit remains available to consumers.'' Dodd-Frank Act Section 1402; TILA Section 129B(a)(1). Further, in the section that establishes the Consumer Bureau, Section 1021, Dodd Frank Act is explicit that the Bureau must seek to implement financial law for the purpose of ensuring that "all consumers have access to markets for consumer financial products and services, and those markets for consumer financial products and services are fair, transparent, and competitive."

The Congressional articulation of intent is therefore clear on two very important objectives. First, Congress intended that consumers be better protected. Second, it intended to ensure the availability of safe and responsible mortgage credit. As ABA has expressed in the past with respect to the "ability to repay" rules for mortgages, these statements of intent are unambiguous—Congress sets forth a command that there be careful and explicit balancing of goals, and expresses that the public will be best served by a careful consideration of all the interests at play in the implementation of the regulatory orders under Dodd Frank. The statute's dual purposes must be carefully balanced.

While Congress expanded HOEPA, we think it is clear that it did not intend that this goal come at the cost of unreasonably limiting financial options, especially in light of all the other protections being imposed under Title XIV. Responsible and affordable mortgage credit must remain available for all qualified borrowers. Over-expansive HOEPA rules would risk eliminating or severely reducing affordable and popular mortgage related products.

It is in this spirit that ABA offers these comments. We understand that Dodd-Frank has given the regulators very broad authority and discretion to shape new rules. Our members recognize the aforementioned dual responsibility facing policymakers as they implement these new statutory provisions. The views expressed in this letter are meant to ensure that we achieve a true balance of interests and that we construct a new legal system of solid consumer protections that are compatible with the ability to effectively satisfy the public's demands for mortgage financing.

Impact of the New HOEPA Proposals

In order to gauge the impact of the Bureau's Proposals among banks, ABA conducted a survey of its membership. Survey participants ranged the gamut of large to small institutions that engage in significant mortgage lending activities relative to their size. We believe our sample group constitutes a cross-section of banking activity in real estate lending, and our results reflect a realistic initial picture of the effects that these provisions will have on bank lending activities.

We caution that this survey was conducted in an uncertain environment. There is significant ambiguity that remains in the proposal regarding precise formulas and inclusion or exclusion of particular fees in the triggers. Due to these ambiguities and time limits, the survey process was not able to fully control for different assumptions and methodologies that affected responses. We nonetheless believe that this snapshot serves as an excellent preliminary assessment of mortgage lending once these rules are applied.

We first asked whether any of our institutions engaged in HOEPA-covered lending. The prevalent response was negative—virtually every institution has a policy to refrain from Section 32 loans. There were some minor exceptions. One outlier stated that close to 10% of its lending may slip above the HOEPA thresholds. A small handful of other banks reported that they do not go above the 1% mark in terms of volume, and do not engage in HOEPA-covered lending in their normal lending activities. One institution stated that they do not have an explicit policy against HOEPA loans, but they don't engage in such lending because there is no secondary market outlet for such transactions. Overall, HOEPA thresholds remain a virtual ceiling for mortgage lending activity.

Second, we asked what percentage of the institutions' loans made in 1Q-2012 would have met the new HOEPA thresholds under the Bureau's new proposed interest rate trigger. The question was posed only in relation to calculations that did not include the expanded definitions of finance charge, and not based on the novel "transaction coverage rate." The vast majority—88% of respondents—stated that the loans made in this time period would not cross the new proposed triggers. The remaining institutions reported that close to 10% of their loans would have met the triggers. For these institutions, those transactions would not have been made with the rule in place.

Third, we asked what percentage of the institutions' loans made in 1Q-2012 would have met the new HOEPA thresholds under the Bureau's new proposed points and fees trigger. The results here were mixed, and reflect the true diversity of lending conducted by our banks. One third of respondents (35%) reported that none of their loans in this period would have crossed the proposed thresholds. The other respondents varied widely. Banks reported variances between 5% all the way up to 57% of loans that would fall into the high-cost segment, and would therefore have been denied. Various respondents expressed some level of uncertainty, however, because they were not sure about the effects of "Loan-Level Price Adjustment (LLPA) Fees" assessed by Fannie Mae and Freddie Mac.[3] These lenders warned that these LLPA fees are sufficient to tip loans into covered categories and vary so widely that it is difficult to ascertain precise levels. The inclusion of loan originator compensation into the trigger is also a source of extreme uncertainty because the rules surrounding the formulas for determining such compensation are so complex that it is impossible to accurately calculate the precise amount of such compensation on a loan-by-loan basis.

Some lenders expressed concern about the wording of the survey question because they are so vigilant to not cross the thresholds that they refrain from extending loans where points and fees reach the 4.5% level. These lenders expressed that the percentages they reported reflect a comparison to the absolute 5% trigger level, but in reality, they would halt lending at .5% below that number. If this cautionary measure is taken into account, the level of denials during the time period listed would be underreported—their true denials would have jumped upwards by 6-10%.

Fourth, we asked what percentage of the institutions' loans made in 1Q-2012 would have met the new HOEPA thresholds under the Bureau's new proposed prepayment fee trigger. In the

[3] LLPAs apply to loans delivered to Fannie Mae and Freddie Mac. LLPAs are assessed based upon certain eligibility or other loan features, such as credit score, loan purpose, occupancy, number of units, product type, etc.

responses received, only one lender reported that close to 3% of their loans would be affected. The rest would be unaffected.

One stark result of the survey is that almost every respondent expressed concern that, should these thresholds be finalized, they would seriously consider imposing very strict minimum loan amounts on their lending. Many respondents viewed this as a "very likely" possibility. One particular respondent offered more details on the impact of the points and fees test upon loan size, reporting that their analysis revealed that 100% of loans at or below $61,500 tripped the 5% points and fees threshold, approximately 60% of loans at or below $85,000 tripped the threshold, and approximately 67% of loans at or below $80,000 tripped the threshold. These loan amounts are not necessarily "small" or negligible—they constitute the "bread-and-butter" of mortgage lending in countless small communities.

ABA views these results as significant. Clearly, the points and fees trigger poses the more significant impact upon lending activities. Nearly 65% of our banks will see their mortgage lending activities significantly affected by this rule. Of these, a majority report that there will be dislocations in 10% or more of their current mortgage lending activities. We note that our members are heavily regulated banks that lend under strict safety and soundness principles, and their inability to serve populations with more special needs will therefore mean that borrowers will be forced to access less preferred options. One institution reported that of the transactions that they would have to deny under this proposal, over 80% are purchases, average LTV is 86.16%, 50% were single individuals, with 25% being single females, 20% being Non-White borrowers, and 41.67% being first time homebuyers. The impact to these populations will be real and merits serious consideration.

In the context of the dual legislative objectives identified above, the regulatory framework should recognize that regulation has costs and limits. We understand that these HOEPA changes reflect a legislative response to a severe financial crisis, and must therefore be sufficiently strong to protect against a future abuse. At the same time, we are concerned that, in some crucial respects, regulatory reforms (including the Proposed Rules) may be so imbalanced that they will do more harm than good. If the thrust of this legislation is that consumers have access to markets for consumer financial products and services, then there is a duty that the Bureau engage in deeper and more focused market analysis of the impact forecast by our survey. If the legislative goal is to ensure both the safety and the availability of mortgage products, then the Bureau must seriously consider the impact to those populations that will be left with no option.

ABA believes that it is critically important that the Bureau promulgate rules required or permitted under Dodd-Frank that achieve a reasonable degree of regulatory balance by, among other things, informing their rulemakings with quantitative analysis and a comprehensive understanding of the consequences of their implementation.

Cumulative Effect of Regulations

In the current mortgage regulatory setting—where ten major rulemakings are in various stages of development[4], which in turn build upon at least seven major final rulemakings in the previous 36 months[5]—it is exceedingly important that the Proposed Rules be analyzed holistically, not only with respect to the interplay among their subparts but also with respect to other coming reforms, both in the United States and abroad. We are urging the Bureau and the other U.S. banking agencies to consider and address the interplay among reforms in the context of considering individual reforms.

The full potential combined impact of financial services regulatory reforms, including the Proposed Rules, has not yet been comprehensively analyzed and, to our knowledge, no one in the regulatory or academic communities has asserted that it has. Public sector officials, including Federal Reserve Chairman Bernanke, have acknowledged that the aggregate impact of the current financial services regulatory reforms in the United States has not yet been fully analyzed (at least as of last summer).[6] Others in the regulatory community, including SEC Commissioner Troy Paredes and then Acting Comptroller of the Currency John Walsh, have expressed concern on this issue.[7]

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[4] These include, from our count, HOEPA, MLO Compensation, RESPA-TILA Integration, two Appraisal Rules, Basel III, Ability-to-Repay, Risk Retention, Escrow Requirements, Mortgage Servicing Rules. We may be overlooking others.

[5] These include RESPA Reform, HPML Requirements, two MDIA Implementation rules, Appraisal Reforms, Appraisal Guidelines, MLO Compensation. We may be overlooking others.

[6] See, e.g., Chairman Bernanke, Remarks at a Question and Answer Session Following Chairman Bernanke's

Speech on the U.S. Economic Outlook (June 7, 2011) (transcript available at http://video.cnbc.com/gallery/?video=3000026289).

[7] Commissioner Paredes commented in a September 2010 speech: "This builds to a straightforward but important point – that is, we need to use the regulatory authority Dodd-Frank has conferred upon us cautiously, carefully evaluating the intended benefits of our actions while giving due regard to the potential undesirable consequences of our regulatory steps. This should include assessing the cumulative impact of the entire package of new regulatory demands to anticipate the overall effect of the regulatory regime when viewed as a combined whole." (Remarks before the Security Traders Association 77th Annual Conference and Business Meeting (Sept. 24, 2010), available at http://www.sec.gov/news/speech/2010/spch092410tap.htm)

Then Acting Comptroller Walsh commented in a January 2012 speech: "Dodd-Frank…mak[es] very significant changes in the way business is done by financial institutions. There are so many moving parts that it is very hard to judge how these many approaches will interact, or what their cumulative effect will be." (Remarks before the Centre for the Study of Financial Innovation (June 21, 2011), available at http://www.occ.treas.gov/news-issuances/speeches/2011/pub-speech-2011-78.pdf) Then Acting Comptroller Walsh also commented in a June 2011 speech: "Nonetheless, it is also an undeniable quality of human nature that, in the frenzy of the moment, we can overreact in response to crisis. Describing this as a swinging pendulum may be a tired cliché, but it's worth asking ourselves: where is that pendulum right now? One of our OCC supervisors created the wonderful malapropism of 'trying to keep the pendulum in the middle of the road,' but that is surely not where we are today. To put it plainly, my view is that we are in danger of trying to squeeze too

The reality is that the cumulative effects of the Proposed Rules and other rulemakings and reforms, which are often individually complex and when considered together amount to an incredibly complex mosaic, are almost certain to have unintended consequences and potential economic costs, and are likely in some cases to create the potential for actually increasing instead of decreasing adverse consumer impact and systemic risks.

There are at least two aspects of this HOEPA rulemaking that warrant reemphasizing the need for a holistic analysis of regulatory reforms, including the Proposed Rules:

First, a holistic analysis in the context of any particular regulatory reform has two prongs– namely, (i) what other reforms are targeted to the same objective and, hence, should be taken into account by rule makers in fashioning a particular set of rules (and in estimating the impact of those rules); and (ii) apart from the particular objective of a rule or set of rules, what are the impacts of combined rulemakings on customers for banking services and the economy more broadly. For purposes of the Proposed Rule, we do not see evidence that the Bureau has reflected on these points. The following factors illustrate the point—

- The Mortgage Loan Originator compensation rules seek to eliminate adverse incentives from originator compensation plans, allowing only certain types of compensation that are deemed as beneficial to the consumer or the process. Under the current HOEPA proposals, however, these "beneficial" compensation amounts must be counted toward the HOEPA triggers, thereby undercutting the value derived from the very payments that are deemed proper and suitable under that other rulemaking.[8]

- The RESPA-TILA Integration rule seeks to deliver detailed information containing guaranteed costs and fees to the consumer early in the transaction, along with a three-day pre-closing period to analyze the transaction. Notwithstanding such expanded shopping information and rational decision-making engendered by the advance notices, the HOEPA proposal would eliminate a consumer's considered decisions wherever the transaction is anywhere near HOEPA's lowered thresholds.

- The ability-to-repay rules are intended to ensure that HOEPA loans are fully repayable, but this ability to repay condition is overridden and made meaningless by HOEPA triggers.

Other examples abound.

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much risk and complexity out of banking as we institute reforms to address problems and abuses stemming from the last crisis." (Remarks at the American Securitization Forum Annual Conference (Jan. 24, 2012), available at http://www.occ.gov/news-issuances/speeches/2012/pub-speech-2012-11.pdf)

[8] The obvious result from the interplay of these two rules is that those originators that achieve a higher compensation tier because of experience, education, or language affinities are the ones that will be more subject to tripping the HOEPA triggers. This unintended consequence ignores consumer interests.

The Bureau does not acknowledge in the Preamble analysis of the impacts of combined rulemakings on customers and the economy more broadly. We believe the risk of severe consequences arising out of the Proposed Rules and other regulatory reforms, taken together, is too large. At some point on the regulatory reform spectrum, the multitude of efforts to reduce consumer risk will tip over into an undesirable reduction of credit availability for those otherwise eligible for credit and stall economic recovery. As we have consistently maintained in commenting on proposed reforms (including in this Comment Letter), the ABA's position is not that regulatory reform is unnecessary (indeed, we unequivocally recognize its need), but rather that it should be sufficiently balanced to avoid the risk of credit diminution adversely impacting consumers and the economy.

Second, any analysis of the impact of a proposed rulemaking, especially in the context of broad reforms, is incomplete without an accurate cost/benefit analysis. ABA is disappointed that the Proposed Rule reflects only a limited attempt by the Bureau to ascertain the actual market repercussions of this rulemaking, and no weighing of the proposal's negative effects against the likely benefits as measured by the goal of U.S. financial stability.

ABA believes the economic impact analyses included in the proposed rule are inadequate because they do not analyze actual impact data. The analyses completed by the Bureau look at possibilities, stating often that "it is possible that," and that market responses are "likely to be" any number of defined reactions. The mere listing of possible outcomes is insufficient—these analyses must be more thorough, and must be based upon more definitive numbers. In effect, the Bureau states that "[c]alculations of various categories of settlement and origination charges may help the Bureau calculate the various impacts of proposed changes to the definitions of finance charges and other aspects of the proposal, including proposed changes in the number and characteristics of loans that exceed the HOEPA thresholds, loans that would meet the high rate or high risk definitions mandating additional consumer protections, and loans that meet the points and fees thresholds contained in the ability-to-repay provisions of the Dodd Frank Act." (77 F.R. at 49139) We are sympathetic to the time constraints imposed by the rulemaking schedules, but this statement amounts to a confirmation of ABA concerns—the Bureau has not engaged in the necessary analysis, at the proposed rule stage, to more definitively understand the impact of these new rules. It also points to a deliberate prioritizing of goals, where the meeting of deadlines takes precedence over rule substance. ABA believes that this is dangerous and inadequate.

ABA commends the Bureau for its stated intention to "obtain a random selection of loan-level data from a handful of lenders," (49139) and that it will continue to analyze the impact during the months preceding January 2013. However, announcing the intent to do further analysis for possible refinements before finalizing the rule does not resolve the concern that such analysis must be done as part of the proposed rule, to allow for adequate consideration and public comment. As expressed above, we think the Bureau has an absolute obligation to better understand these impacts so as to blunt the unintended disruption they will cause. The responsibility to preserve viable and affordable credit is inherent in the legislative responsibilities entrusted to the Bureau by Congress.

There are other glaring problems in the Bureau's impact analysis—

- The Bureau inadequately interprets its own requirements for purposes of measuring impact. In discussing the effects of the "All-in" Finance Charge option, the Bureau states that additional burdens of using different metrics are mitigated by the fact that both Transaction Coverage Rate (TCR) and APR are easier to compute. This statement is entirely incorrect. Under the proposed rules, IF the Bureau adopts an "All-in" Finance Charge option, that "simplified" option would apply for disclosure purposes only. The proposed rules would retain the existing finance charge and APR definitions for purposes of HOEPA trigger computations. In effect, the proposal <u>retains</u> the current finance charge complexity as a full compliance burden. Stated differently, under the proposal, the creditor would have to calculate both, current APR and proposed APR, in order to meet all of its compliance requirements. The burdens and legal risks are therefore *doubled*, not simplified or "mitigated" as the Bureau suggests. Legal risk is multiplied by the augmented penalties attached to HOEPA violations

- The current definitional rules are unclear, thus eliminating the ability to calculate coverage with accuracy. As we lay out in the technical comments portion of these comments, it is extremely difficult to measure exactly how the new trigger definitions will affect lending because the definitions raise many questions that are crucially important in determining their precise reach. The real impact to consumers and covered persons is therefore unascertainable.

- The analysis of the impact of compliance burdens of HOEPA's "expanded coverage" is incomplete. We see no discussion of the palpable point that the expanded definitions of HOEPA will now subject all dwelling-secured loans to the HOEPA calculations. The Bureau states that "[d]espite expanding the types of loans potentially subject to HOEPA coverage, which likely would result in an increase in the number and share of loans that are classified as HOEPA loans, HOEPA loans are expected to continue to account for a small fraction of both closed-end mortgage loans and HELOCs. Thus, the proposed rule would be expected to have no direct impact on the vast majority of creditors, since, as noted above, at most about ten percent of creditors are predicted to make HOEPA loans under the proposed rule, and few creditors are expected to make significant numbers of HOEPA loans." (77 F.R. at 49133) This analysis fails to take into account that, even if lenders ultimately avoid making HOEPA loans, there is a huge compliance burden associated with the expansion of HOEPA to include not just closed-end non-purchase money mortgages, but also purchase money mortgage loans and HELOCs as lenders must review and understand the new triggers, develop systems to determine whether existing loan products are covered, and make adjustments to or eliminate those loans. They must conduct the same analysis with every new product potentially subject to HOEPA. In effect, the regulatory machinery to ensure compliance must be significantly enlarged.

These examples illustrate why ABA believes the proposal's analyses underestimate impact. The Bureau's analyses must be enhanced to better capture the actual effects of these new provisions.

In brief, the Proposed Rule disregards statutory and policy requirements to perform an analysis and reach reasoned determinations regarding the costs and benefits of a proposed rule, including the "costs of cumulative regulations," and the consideration of less burdensome alternatives. (See more detailed description below, regarding standing Administration Executive Orders and the Administrative Procedures Act.)

We respectfully recommend that the Bureau adopt an approach similar to the one proposed for the RESPA-TILA integration process. In that proposed rulemaking, the Bureau proposes to delay a number of related disclosure requirements under Dodd-Frank through a temporary exemption from the requirement to comply on January 21, 2013. Through the use of this exemption, the Bureau is in effect delaying the effective date of various required provisions. We believe the Bureau could do the same in the HOEPA context. The Bureau was given a broad array of tools to ensure that these rules are workable in terms of consumer protection and consumer access to credit. We note that much is at stake. The fact that the Bureau solicits comments on "whether to adopt specific measures that would approximately offset the impact on HOEPA coverage levels" means that there is a sense that the Dodd-Frank statute was inadequately calibrated, and that an unmodified application of the statutory thresholds will cause wide scale disturbances in credit access. We concur with the Bureau's vigilance, as serious repercussions are likely to ensue, and we stress that fuller impact analysis must be completed as a prerequisite to the necessary balancing act. ABA thinks that using the Bureau's authority to inject a temporary delay in the compliance requirements with the new HOEPA changes, pending more careful study, is justified and needed in these circumstances.

Regulatory Environment and Implementation Time Frames

The Bureau seeks public comment on the time period that should be provided to implement the changes that will be required by the final rule. In the preamble, the Bureau expresses understanding about the difficulties regarding the large number of other regulatory reforms that are on the table, and requests specific comments on time periods. We agree that compliance time-frames are important considerations in this reform process, and we agree with the Bureau that ensuring that industry has sufficient time to make the necessary changes will ultimately benefit consumers through better industry compliance.

ABA recommends a minimum 18-24 month period to implement these rules. Our reasoning is multifaceted.

The vast majority of banks in our country are community banks—small businesses in their own right. In fact, more than 3,000 banks (41 percent) have fewer than 30 employees. For the past several months, as the regulatory onslaught of Dodd-Frank has intensified, some of our members are openly questioning their ability to maintain their independence in the face of exploding regulatory cost and strain. The banks raising such concerns are generally healthy banks, and yet there is an increasing pressure to abandon or greatly curtail mortgage lending, and in many instances, to explore sale or merger of the institution itself. Another increasingly appealing option is to suspend mortgage lending for some defined period of time, to allow the regulatory storms to settle, and to give compliance vendors an opportunity to create the necessary systems to ensure compliance.

Our banks report that they have branches in small towns, where there is only one traffic light, one grocery store, a hardware store, and the trusted bank. These institutions cannot handle the complex threshold provisions being posed under these reforms, and their deliberations to leave the market are very real. In such settings, the customers they leave behind cannot be otherwise served.

The broad picture, in all cases, is that the number of community banks, especially those offering a solid array of mortgage products, will shrink dramatically over the next few years. We certainly foresee a diminution of banking institutions that offer mortgage finance options, and more limited options for consumers. In addition to the near-term impact on the ability of community banks to support economic recovery, policy-makers should be very concerned about the ramifications for local economies and communities of industry consolidation driven not by economics, but by government regulatory policies.

In the preamble, the Bureau correctly notes that the changes in this rule alone will generate costs associated with software updates, legal expenses, and personnel training time. The largest issue, however, is that these HOEPA changes do not come alone—banks of all sizes have been facing immense difficulty integrating recently finalized changes to regulatory requirements under TILA, RESPA, Fair Lending, and mortgage-related state laws. The volume of changes over the past 36 months has been overwhelming, and banks' compliance activities and adjustments are still expanding. Even when regulators deem any one particular rule or set of rules to be finalized, banks must deal with a wide range of appurtenant issues dealing with unintended consequences, legal repercussions, and technical concerns. For banks, "getting it right" means identifying all possible variations in the transaction and constant vigilance over interpretive changes, informal legal pronouncements, market shifts, and interrelations with dynamic state and local regulatory developments.

Moreover, we are advised that loan origination technology systems are not likely to be modified as quickly as in previous timeframes, because of all the changes occurring across all other regulations. The technology systems that ensure proper compliance with regulations and that generate the disclosures are integrated rather than isolated; one change, regardless of how limited, affects other processes and results, and if not properly instituted, produces considerable difficulties across many product lines. In addition, information technology changes related to the proposal have to be integrated into the general information technology schedule. Interruptions in these schedules are very costly.

In various parts of the Proposed Rule's preamble, the Bureau states that changes would involve updates and expenses that necessitate only "one-time" costs or modifications to creditors" systems." ABA thinks that this statement significantly underestimates the effects and compliance burdens (both initial and continuing) of the numerous changes being made across the spectrum of mortgage-related laws. Analyzing only the changes to HOEPA triggers, banks will be required to make very broad system adjustments at many levels. Evaluating state-level high-cost laws that may be more stringent than the proposal also affects software vendors and increases the cost of implementation. As we have expressed before, the technology systems that ensure proper compliance with regulations and that generate the proper disclosures for individualized transactions are integrated rather than isolated. A change to the HOEPA triggers will force a change in compliance software. These changes must be identified, incorporated into existing systems, and tested to ensure that they respond adequately to all product lines. Alterations must be accompanied by training and educational costs. These proposed amendments will impose new guidelines with investors and lending partners, which will require an additional set of implementation resources. As described elsewhere, the HOEPA triggers will define the market segments that banks are able to serve, so these changes strictly redefine the scope of banks' product offerings—and their pricing. As addressed elsewhere in these comments, fair lending and CRA considerations also would have to be reanalyzed and adjusted.

In short, what the Board defines as a mere "cost" or a "one time modification" is, in reality, only the first shock that initiates ripples of change and implementation requirements. A more appropriate description is that this proposed change will begin a long process of separate but successive changes and adaptations. These will take months to complete, are very expensive, and significant in terms of impact to products and business models. In addition, there are continuing costs to train staff, monitor and audit third-party vendor due diligence, adjust existing products, and design new ones.

We cannot fully predict nor unravel the technical difficulties that the intertwined mortgage provisions under Dodd-Frank will create. When placed together, the full array of triggers, prohibitions and disclosure/timing strictures will combine to create countless categorizations of mortgage product segments, each defined by a different collection of restrictions, disclosures and thresholds. We urge that the Board understand that this HOEPA rule, when combined with all the ongoing mortgage reform initiatives and existing state laws for high-cost loans, will completely redraw the mortgage markets and force lenders to adapt their systems--and mortgage business-- in very profound ways. The compliance burdens are composed of much more than just reactions to ongoing tweaks in the regulatory fabric—the full burdens banks face are massive compliance responsibilities and brand new systems that are uncertain in shape, and unpredictable in market impact.

As a final note, we expect that compliance vendors will require a long time frame to construct new disclosure and compliance systems from scratch. The delays that compliance vendors will impose means that full compliance readiness for banks will come in three, or possibly four, stages. At the initial point, compliance vendors will have to develop systems. After development, the next stage will be for banks to review vendor systems for compliance with the rules and compatibility with their products and systems and to incorporate those systems into their own. Only at stage three would banks advance to the efforts we describe above—the integration of these compliance rules and workflows into individual product lines. Stage four would be to troubleshoot and test these systems, and their interface with other bank systems. This fourth stage would be combined with massive retraining and constant testing and quality control.

We note that each stage is dependent upon the completion of the previous stage—there is no way to advance to stage 3 without stages 1 and 2 as predicates. Stages 1 and 2 are likely to take a full 12 months, if not more. Such staggered progression means that time is a most important component for getting the rules properly integrated into lender systems.

Given the colossal changes on the table, and the need for wholesale changes to lending systems, we repeat our request for 18-24 months, at minimum, to implement the regulatory changes being proposed. ABA believes that shorter timeframes would be unworkable.

Broader Definition of Finance Charge & APR

ABA questions the purpose and practicality of the Bureau's proposed expansion of the definition of finance charge ("FC"), which also affects the Annual Percentage Rate figure ("APR"). In the course of Dodd Frank Act-mandated mortgage reform, with short and strict statutory deadlines to implement specifically prescribed regulatory changes, the Bureau is voluntarily proposing to re-vamp an established compliance requirement that has been largely untouched in decades, and would do so in a rush, without due consideration of the need for extended debate and little regard for administrative due process.

No Legal Requirement: We first note that there is no legal requirement to alter the FC or APR figures to attain the mandated reforms that the Dodd Frank Act imposes. In enacting the reforms under the Dodd Frank Act, Congress was extremely detailed regarding the precise changes it mandated. The legislation delved deeply into specific elements of underwriting, compensation schemes, affiliations, and other minutiae of mortgage lending and market structure. The Act never, however, ordered a wholesale revision of the Truth In Lending Act that the Bureau is proposing here. Had Congress been in any way inclined to reform TILA, a most fundamental pillar in consumer disclosure, it would have surely ordered it under such a comprehensive restructuring of mortgage finance activities.

The Congressional silence is important in many respects. First, Congress reshaped and added many triggered laws that are directly dependent upon the FC and APR calculations. Legislators understood, therefore, what they were amending, but still chose not to renovate or refurbish the existing components of TILA's FC and APR configuration. Although the legislative history of Dodd Frank is scant, the Bureau must tread with extreme caution in changing the very floor that sustains so many reforms explicitly mandated by this new statute.

Second, the formulas for calculating FC and APR are set forth in technical detail under the TILA statute. The existing formulation has been the subject of countless policy debates, economic and behavioral studies, and accommodations for state and local needs. The Bureau's "All-In" FC/APR proposal would literally overthrow these formulas, and replace them with a completely different methodology. We believe that more consideration should be given to whether the boundaries of the existing TILA statute constitute limits that the Bureau cannot, absent explicit Congressional permission, simply sidestep. In short, given the explicitness of the statutory FC formulas set forth in TILA, the Bureau's proposed inclusion of items into the FC definition that were Congressionally excluded from that definition may be entirely contrary to Congressional intent and would require legislative approval to achieve.

Consumer Testing: In terms of consumer benefit, ABA believes that the overhaul of the finance charge calculation is a pointless exercise, as most stakeholders recognize that this disclosure element is difficult for many mortgage shoppers to grasp. Regardless of how this figure is calculated, the finance charge number is extremely limited in assisting consumers to understand the terms of credit. The CFPB's own research shows that consumers are confused by the APR and finance charge and that consumers do not use the APR when comparing loans. The consumer confusion stems from the fact that it is a figure that differs from, and actually competes with, the interest rate figure, and from the fact that it is a composite or aggregated figure that consumers cannot fully comprehend absent some mathematical dissection.

It is important to understand that the consumer disconnect is not based on a faulty formulaic configuration inherent in the finance charge figure. The rearrangement of numbers that compose finance charge or APR will not alter the basis for consumers' misunderstanding of this figure. Whatever definition is finalized, this expanded FC/APR number will still compete with the interest rate figure, and cause dissonance in the consumers' shopping process. We note the Bureau's observations that its own consumer testing "indicates consumer confusion regarding the APR disclosure and that consumers do not use the APR when comparing loans." (77 F.R. 51224) As common sense and repeated testing confirms, the APR does not provide a substitute for the loan information the borrower needs or wants to know for undertaking a mortgage obligation. Nor is there any evidence that the limited value the APR serves in normalizing loan cost in an annual percentage rate form in the shopping context will be better understood or more accurately representative of the particular consumer's circumstances in the proposed revised formulation.

We also point out that, based again on the findings from its own consumer testing, CFPB has decided to move the APR from the very first page and most important disclosure location today, to the very final page of the model Loan Estimate. The APR now comes under the demoted header of "Additional Information About This Loan," and is not deemed to be a key disclosure element that would be listed on the first page of the shopping disclosure. ABA believes this placement decision is extremely important because it settles the point that APR has limited usefulness. Reconfiguring this item and reinserting such a blunt figure as a secondary or even tertiary disclosure is simply wasteful. The costs imposed by APR, in terms of implementation and future legal risks, hugely outweigh any benefit that this disclosure creates in terms of aiding consumers' understanding.

Compliance Burdens: According to the Bureau, the more inclusive definition of the finance charge for closed-end, dwelling-secured credit transactions, would be "simpler." (See, e.g., 77 F.R. 49093) Contrary to the Bureau's assertions in the proposed rule's preamble, the expanded definition of finance charge and APR will not lessen compliance burdens—as described above, ABA believes compliance complications will be multiplied.

ABA appreciates that there may be some added intelligibility in the newly proposed definition, but we reject the statement that the new configuration is discernibly "simpler." A quick reading of the proposed provisions bears this out. The proposal imposes the overall rule, for example, that finance charge would continue to exclude fees or charges paid in "comparable cash transactions." However, in transactions with no seller, since there is no comparable cash transaction, the exclusion from the finance charge for charges of a type payable in a comparable cash transaction does not apply. (See comments to Section 1026.4(g)) It is notable that the general rule comes with an immediate and simultaneous exemption to it. The proposal would also insert other so-called "narrow" exclusions, such as unanticipated late payments, and premiums for property and liability insurance, but only if very strict conditions are met and disclosures are made. Other exemptions exist.

In addition, there are various rules that will require clarification. We address many of these further in these comments, but for instance, can lender credits be used to reduce finance charge? How does one treat voluntary counseling fees? How do creditors treat cross-selling of non-mortgage items that may lower the rate on a loan? We raise these items, among so many others, because they pose compliance difficulties that may be entirely resolvable, but that combine to demand a full set of interpretive rules that will eventually complicate any simplicity that the Bureau intends to create.

Overall, the Bureau's proposal is not a pure "All-In" APR—rather, it is an "Almost All-In," with fairly strict and technical rules that will survive to threaten legal and compliance risks to lenders. ABA does not agree or disagree with the exemptions just mentioned—the point is that the very nature of this APR figure makes it impossible to truly simplify. The panoply of intricacies that would remain in the proposed expanded FC/APR system—along with the appurtenant legal risk—outweighs any putative benefits that the Bureau believes are created. The proposal's slight improvements, if any, do not justify the enormous impact that this proposal unleashes on the mortgage lending process.

An additional important consideration is that most state high cost loan laws are directly tied to Regulation Z definitions, and often explicitly cite to federal rules pertaining to FC/APR. The wholesale revision of the FC/APR definitions would therefore lead to very considerable confusion and dislocation. We suspect that it may take months or years for states to amend their provisions and/or clarify their regulations.

Most importantly, however, ABA rejects the notion that it will be in any way easier for lenders to have to calculate one metric for purposes of disclosure and another for purposes of regulatory coverage. Advancing with this proposal will mean that creditors will have to abide by the "simpler" APR measure that is being proposed here, but since all mortgage loans will have to be tested for HOEPA compliance, creditors will also be forced to continue to calculate FC under the existing formula in order to measure whether they meet the defined thresholds. The fundamental reality of this proposal is that compliance for creditors will double, with the full current set of complex and byzantine rules remaining applicable to every single transaction.

Complicating Consequences: The proposed expansion of finance charge and APR causes ripples of complicating effects all the way through the compliance process. The Bureau admits that the expanded FC proposal inflates the APR to such an extent that it must make significant accommodations to the structure of existing rules in order to ensure that this non-mandated proposal does not entirely disrupt other provisions in the statutory structure.[9] For instance, to

[9] See 77 F.R. 49094 ("The Bureau recognizes, as did the Board, that the proposed more inclusive finance charge could affect the coverage of higher-priced mortgage loan and HOEPA protections. The Bureau is also aware that,

ensure that the HOEPA interest rate threshold does not become overly inclusive, the Bureau is proposing to adopt an alternative new metric—the "transaction coverage rate" (TCR)—for determining coverage of the law's enhanced protections. In addition, to ensure that HOEPA's "points & fees" test is not overly inclusive, CFPB will have to remove from the new definition of finance charge all those charges that it is explicitly adding to FC through this proposal. (This is the dual calculation complication we describe above.)

We mention above that these complications must be explicitly calculated into the regulatory burdens analysis that the Bureau must conduct in connection with this rulemaking. It appears that the repercussions created by the expanded finance charge proposals are not deemed to be "burdens" by the Bureau. We think this is inaccurate. The so-called "simpler" methodology set forth by this proposal forces the need for very contrived regulatory structures that are complex and expensive—and again, not in any way mandated by law.

Timing and Conclusion: In light of the colossal changes underway, and with the heavy burdens on agencies, industry and consumers to accomplish Dodd-Frank required changes in the limited time allotted, initiating the extensive changes to APR for both open and closed end credit is an ill-advised detour on the main path of mortgage market reform. ABA understands the CFPB's aspirations to create a consumer-friendly way to represent loan costs in a single measure that is superior to the current APR. ABA does not categorically oppose this broad and perhaps constructive endeavor—but the prospects for doing so will entail a more extensive policy debate than can be conducted in the five months remaining before the DFA Title XIV deadline. With so much at stake in resurrecting the housing finance market, pursuing APR revisions within the Dodd-Frank Act's priority time-frame is a wasteful diversion of scarce agency and industry resources.

Fairness and the Administrative Procedure Act

ABA is very concerned about the rushed process that the Bureau is employing to thrust these rules onto the market. It is understandable that the Bureau feels pressure to meet the deadlines imposed by Dodd-Frank, and that there is a need to ensure that the public is properly protected from mortgage abuses. However, as detailed in other portions of these comments, the sheer magnitude of the regulatory changes being implemented at once has the potential to inflict enormous confusion and cost to both industry and the consumers they serve. The consequences of the current rules being implemented are enormous as these reforms will completely redraw the mortgage lending process, increase the liabilities that apply to real estate finance, and most assuredly affect availability of credit for all Americans.

Notwithstanding the unambiguous and enormous stakes, the Bureau shoe-horns these massive changes into extremely truncated comment periods. As mentioned above, ABA thinks it is unjustified that these important regulatory changes should advance without deeper analysis of the impact—but an equally critical concern is that this regulatory process should advance without

consequently, a more inclusive finance charge has implications for the HOEPA, Appraisals, Ability to Repay, and Escrows rulemakings identified above.")

following the customary and expected process that is set forth under the Administrative Procedures Act (APA) and existing Federal Government policy.

ABA recognizes that the APA does not explicitly specify a minimum comment period for proposed regulations. Under 5 U.S.C. 553(c), the law requires that after a proposed rule is issued in the Federal Register, the agency "shall give interested persons an opportunity to participate in rule making through submission of written data, views, or arguments with or without opportunity for oral presentations." Legal experts have advised that this and other requirements are generally interpreted as requiring a reasonable time period for comments. ABA believes that the Bureau must properly evaluate the scope of issues it is affecting in these rulemakings, and consider that a mere 23 days (or 16 days, if one excludes, as TILA does, weekends and holidays) between Federal Register publication and comment deadlines is woefully insufficient time to properly assess and allow for comments on the critically important issues involved.

Moreover, current Federal Government policy instructs that there be extended time periods for proper consideration of issues. Executive Order No. 12,866 sets forth that rulemakings should generally provide for a comment period of "not less than 60 days." (See Section 6(a)) The Office of Management and Budget has requested that this policy be followed by all independent agencies. In addition, the current Administration has requested that independent agencies abide by Executive Order 13579 ("Regulation and Independent Regulatory Agencies"), stating its emphasis on "the importance of public participation… [and] … requir[ing] agencies to afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days."[10]

We ask that the Bureau consider the stated policy objectives of Executive Order 13579, that—

> Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking. To the extent permitted by law, such decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).

Clearly, the prevailing Federal Government policies must be viewed as applicable to independent regulatory agencies, and they, no less than executive agencies, should promote the stated goals. The current prioritizing of deadlines over substance has placed this rulemaking in a collision course with accepted and honored administrative rulemaking practices. We therefore repeat the request made above, that the Bureau adopt an approach taken under the RESPA-TILA integration process, where the Bureau suggests a delay to certain requirements under Dodd-Frank through a temporary exemption from the mandated compliance deadline of January 21, 2013.

[10] See Memorandum M-11-28 at http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf

Fair Lending

By design and legislative intent, these new HOEPA provisions are meant to confine access to properly-defined higher cost transactions, and therefore narrow the alternatives that lenders have to create financial products. As described above, there is good evidence that the new HOEPA provisions will generally reduce credit availability across all markets. Although ABA is worried about credit constriction in general, ABA is more keenly concerned that in all instances of reduced credit, the greatest impact necessarily falls upon credit-challenged and less affluent populations. These new HOEPA provisions will establish lending boundaries that will directly impact many in need of credit. As one example, the ABA's survey reveals that many lenders will be forced to place strict minimum loan amounts on their lending—this is worrying because low principal loans may be more prevalent in certain communities, and it would be unfortunate to deprive such communities of this needed financing while subjecting lenders to disparate impact enforcement because they are no longer able to offer loans in such communities.

Going forward, ABA asks that regulators be cognizant of this point and remain vigilant of the real world impact that these new provisions will have on communities all across America. Our members have expressed great worries about the fair lending implications brought about by these additional laws; they understand that low-to-moderate income families and minorities are likely to suffer disproportionately. Both lenders and policymakers must remain alert to this point.

Part B. Technical Comments on Individual Provisions

For the second portion of these comments, ABA submits the following set of technical points, developed jointly with *Consumer Mortgage Coalition* (CMC).

I. The Proposed Points and Fees Definition is Too Broad

The proposed HOEPA rule would define points and fees very broadly. We believe this should be amended to prevent excessive lending constraints. If points and fees on a loan reach three percent of the loan amount, the creditor will need to reject the application on that basis to prevent TILA liability under the ability-to-repay rule. It is doubtful that Congress understood that this would be a result of the Dodd-Frank Act, and it is clear Congress wanted to continue credit availability in appropriate circumstances. Where the statutory definition of points and fees would inappropriately constrain credit, the CFPB should not mimic the statute, but should make reasonable exceptions to enable the housing markets to recover.

The closer the points and fees get to a threshold, the less opportunity borrowers would have to buy down the rate by paying discount points. Buying down the rate through discount points benefits consumers.

A. Section 4(c)(7) Fees

The proposed rule would include in points and fees 4(c)(7) real estate-related fees unless they are paid to a non-affiliated third party and are reasonable. Congress set a bona fide standard, not a reasonableness standard. This should be the applicable standard because creditors are prohibited from setting third-party charges and, therefore, should not be responsible for them.

When a creditor permits the borrower to shop for a required service and the borrower chooses a provider that was not on the Written List of Providers, the borrower, not the creditor, decides what services to obtain. The borrower negotiates and agrees to the fee for those services. For example, if the creditor's Written List of Providers gives the name of a settlement agent and lists a reasonable charge for that service, the borrower may choose a settlement agent not on the list and agree to pay a higher price for the closing service. The borrower may also agree to purchase from the agent additional services the creditor does not require, for additional fees. The amounts of these fees should be excluded from points and fees because the creditor cannot control them. They should be deemed reasonable and bona fide and excluded from points and fees.

TILA § 106(a) excludes from the finance charge fees for third-party closing agents when the creditor does not require the charge or the service, and does not retain the charge. Consistent with this intent, creditors should not bear liability for third-party charges they neither require nor retain. These charges should be deemed reasonable and bona fide and excluded from point and fees.

The proposed approach would require creditors to select the lowest cost third-party service or service provider above all other considerations, which is inappropriate.

Recommendation

Fees included in 4(c)(7) that are paid to a third party should be excluded from points and fees if they are bona fide. If the consumer selects either the service provider or the service, the fee should be deemed bona fide because creditors should not bear TILA liability for charges that Regulation X prohibits them from controlling.

B. Employee Compensation Should be Excluded

The proposed rule would include employee compensation in points and fees. This would overly constrain credit, would vastly complicate compliance, and is unnecessary in light of other rules.

It is unnecessary because several other Dodd-Frank rules prevent inappropriate steering, yield spread premiums, compensation based on loan terms, and dual compensation.

Including employee compensation introduces a number of compliance problems including how to calculate the amount of compensation and the fact that the total amount of compensation may not be known at consummation.

Including compensation in points and fees would subject compensation to discovery, making it public. This would be a breach of the financial privacy employees reasonably expect. Making employee compensation public also would be inconsistent with the proposed RESPA servicing rule, which is clear that servicers may maintain the confidentiality of confidential or proprietary information even if a borrower requests such information. Protected information would specifically include "Compensation, bonuses, or personnel actions relating to servicer personnel, including personnel responsible for servicing a borrower's mortgage loan account." We support the proposed Regulation X protection of employee income information as an important employee protection. We urge the Regulation Z treatment be the same, and that employee compensation not be included within points and fees.

Recommendation

Employee compensation should be excluded from points and fees in all cases.

C. Fees Paid to Affiliates

The CFPB proposes to include within points and fees many fees paid to the creditor's affiliates. Affiliated business arrangements are already regulated, and appropriate disclosures of affiliated arrangements are already required, so we do not believe this is necessary.

There is no indication that the CFPB has identified a problem with fees paid to affiliates, and in many instances the consumer is better served. For example, if a creditor permits a consumer to shop for a settlement arrangement, the consumer does not have a reliable way to determine if the settlement agent will conduct an honest closing. The lender does know, from past experience, which settlement agents provide the best services, and is in a position to assist the borrower. Moreover, affiliated service providers provide the convenience of one-stop shopping, which many consumers prefer.

Recommendation

The final rule should not distinguish between fees paid to affiliates and fees paid to non-affiliates.

D. Double Counting

The proposed points and fees definition would include "[a]ll compensation paid directly or indirectly by a consumer or creditor to a loan originator[.]" If a consumer pays a creditor $100, and that creditor pays its originator employee $50, the rule would count $150 towards points and fees. The proposed commentary intends to exclude this double-counting, but is not effective in doing so. It says, "[l]oan originator fees already included in the points and fees calculation . . . need not be counted again[.]" "Need not" can mean "may be." This language is not binding on the courts.

Recommendation

If employee compensation is included in points and fees, the rule should definitively exclude double counting. "[N]eed not" should be changed to "must not[.]"

E. Hourly Pay

The proposed Commentary states that compensation includes items "such as a bonus, commission, yield spread premium, award of merchandise, services, trips, or similar prizes, or hourly pay for the actual number of hours worked on a particular transaction." This language indicates that compensation includes all compensation including, but not limited to, hourly pay.

Including hourly pay would:

- Create a perverse incentive for the creditor to try to minimize the amount of time a loan originator spends on a loan. This would be at odds with the the purpose of the Dodd-Frank ability-to-repay rule, which requires improved underwriting.

- Require loan originators to track how much time they spend on each loan. This would be unnecessarily costly.

- Require rejection of the loan at the point the hourly pay causes a loan to reach the points and fees cap.

- Not be known until after consummation, or until after final disclosures are prepared.

- Disincentivize loans designed to assist lower-income borrowers or loans under the Community Reinvestment Act, which can involve more time to originate.

Recommendation

Hourly pay should be excluded from points and fees.

F. Base Salary

The proposed commentary would include hourly pay in points and fees. It is unclear as to whether it would include base salary. The commentary states, "Loan originator compensation includes amounts the loan originator retains and is not dependent on the label or name of any fee imposed in connection with the transaction." It also states that compensation "excludes compensation that cannot be attributed to a particular transaction at the time of origination, including, for example . . . [t]he base salary of a loan originator who is also the employee of the creditor[.]"

The difference between hourly pay and base salary is a difference in how the compensation is labeled. If base salary is a flat salary of $X annually, $X / 2000 hours would be hourly pay.

Recommendation

The rule should clarify that it excludes base salary because it has no bearing on protecting consumers.

G. Definition of Loan Originator

The proposed regulation would include in points and fees compensation to loan originators, referring to the definition of originator in § 1026.36(a)(1). Apparently, this refers to the definition in the proposed loan originator compensation regulation. In that proposal, the definition includes anyone who, for compensation, "takes an application, arranges, offers, negotiates, or otherwise obtains an extension of consumer credit for another person[.]" While this clearly includes a broker and a loan officer who interact with the applicant directly during the loan process, it is not limited to them. It could include those who participate in any of the following:

- Underwriting;
- Appraising the property;
- Reviewing the file quality post-closing;
- Preparing for or conducting a settlement;
- Preparing loan disclosures;
- Helping the applicant select a lender, such as property sellers; and
- Real estate brokerage, if the creditor pays the real estate agent.

Compensation creditors pay to real estate agents when the creditor is selling a property it acquired through foreclosure ("REO") should be excluded. Creditors should have an incentive to sell REO by offering favorable financing. This benefits consumers.

It would also include "producing" managers of any of the above. That term is undefined. This appears to be different than a "manager" but the difference is not clear.

This is too broad and unworkable. Creditors cannot determine how to calculate this compensation. It would require the creation of a company-wide system of tracking how much time each person spends on a loan, which would be a massive undertaking. Again, this would create a perverse incentive to spend as little time as possible on underwriting loans, which contradicts the purposes of the ability-to-pay rulemaking.

The commentary to § 1026.36(a)(1) (in the proposed compensation rule) does not narrow the definition. It reinforces the broad reach of the definition by stating that loan originator "includes employees of a creditor[.]" It also states:

For purposes of §1026.36, managers, administrative and clerical staff, and similar individuals who are employed by a creditor or loan originator but do not arrange, negotiate, or otherwise obtain an extension of credit for a consumer, or whose compensation is not based on whether any particular loan is originated, are not loan originators.

The phrase "For purposes of § 1026.36" may make this comment inapplicable to the regulation that includes compensation in points and fees, which is § 1026.32(b)(1)(iii). We recommend clarifying that it applies, such as by adding a reference to § 32(b)(1).

Under this comment, managers and clerical and administrative staff are included within the definition of loan originator if they either:

- "arrange, negotiate, or otherwise obtain" loans for consumers; or
- Do not do so but are compensated based on whether particular loans are originated.

Any employee of a creditor whose compensation is tied to lending volume, lending profits, or even company profits, is a loan originator for purposes of defining loan originator compensation within the definition of points and fees under the proposed rule. This definition is too broad, and may actually harm consumers if their loan hits the cap on points and fees.

Recommendation

We recommend defining loan originator using the same definition as in 12 C.F.R. § 1007.102 and its appendix (under the SAFE Act), which includes those who take an application and offer or negotiate loan terms, and excludes those who perform purely administrative or clerical tasks for loan originators.

H. Points and Fees Unknown at Consummation Need to Be Excluded

Creditors need to know the amount of points and fees far enough in advance before the closing to make the origination disclosures. Closing Disclosures are required to include costs paid at or before consummation; therefore, those costs must be known at consummation.

Creditors need to decide whether to go through with the loan. If points and fees increase above 3%, the creditor needs the ability to reject the loan application on that basis. Potential assignees need to use origination disclosures to determine TILA compliance, so the disclosures need to include all points and fees. Mortgage loan originators also need to use origination disclosures to determine points and fees so they can comply with the prohibition on steering a consumer who qualifies for a QM loan into another loan.

The CFPB states that it includes points and fees payable "in connection with the transaction" because Congress removed the phrase "payable at or before closing" from TILA § 103(aa)(1)(B). This statutory change was necessary to prevent evasion of the cap on points and fees by making them payable one minute after closing. The CFPB similarly prevents evasion in open-end credit in § 32(b)(4), which includes in points and fees amounts waived at closing and charged thereafter. There is no indication that Congress intended points and fees not to be known at closing. This would be especially disruptive to lending if it were to mean that creditors and investors could not determine whether a loan crosses one of the high-cost thresholds, or is a QM or QRM loan, until after closing.

The regulation includes compensation in points and fees without regard to when the amount becomes known. The commentary states:

Compensation paid to a loan originator for a closed-end mortgage loan must be included in the 'points and fees' calculation for that loan whenever paid, whether before, at, or after closing, as long as that compensation amount can be determined at the time of closing.

The commentary gives examples of compensation paid after closing, such as an annual bonus based on the number of loans closed. However, this does not address the common practice of paying annual bonuses only on the condition that the recipient remain an employee of the employer when bonuses are paid. Who will remain at the employer weeks or months into the future is unknown at closing. For that reason, bonuses contingent on the occurrence of an event unknown at closing should be excluded.

The commentary states that "compensation includes amounts the loan originator retains[.]" This could mean that contingent bonuses that might not be paid are excluded from points and fees.

Recommendation

Any amounts unknown when closing disclosures are prepared should be excluded from points and fees to prevent unnecessary marketplace turmoil. Creditors should be permitted to disclose the amount of points and fees.

I. Discount Points Paid by Third Party

The proposed rule would in some circumstances exclude bona fide discount points "paid by the consumer" from points and fees. It would define discount points as proposed in the ATR rule. Sometimes a third party pays the discount points directly, such as a seller or an employer. In these instances, the consumer pays the discount points indirectly, through a higher purchase price or lower employment compensation.

Recommendation

Discount points should be excludable without regard to who pays them, for the HOEPA and ATR rules both.

II. Prepayment Penalties

A. FHA loans

The proposed rule would define as a prepayment penalty amounts paid on FHA loans as a result of the FHA's amortization method. While we agree that the FHA method is disadvantageous to consumers, the CFPB should resolve the matter with FHA. The CFPB should define the FHA method as a prepayment penalty only to loans originated after FHA changes its method, and implements the changes. The CFPB's approach of making the change unilaterally would cause serious disruption that is disproportionate to the importance of the issue.

FHA loans use a monthly interest accrual amortization method, under which interest may accrue for a partial month after a full payoff. The proposed regulation would define a prepayment penalty on a closed-end loan as a "charge imposed for paying all or part of the transaction's principal before the date on which the principal is due." The proposed comment gives an example of an FHA loan paid in full April 20 on which the consumer owes interest for all of April. In this example, the April interest would be payable even if the loan payoff were May 10. A May 10 payoff would not be a prepayment. Therefore, the charge in this example is not a "charge imposed for paying all or part of the transaction's principal before the date on which the principal is due" within the language of the regulation. It is a charge imposed even in the absence of a payment before the scheduled due date. It is merely a charge for FHA's accounting method.

1. Inconsistent with other laws

If the CFPB were to treat FHA's interest accrual amortization method as a potential prepayment penalty, it would make all FHA loans HOEPA high-cost loans because high-cost loans include any loan with a prepayment penalty permitted after 36 months. This would shut down FHA lending at a time when the market is dependent on it. It would also require all FHA loans to be QMs because only QM loans may have prepayment penalties. Moreover, prepayment penalties are permitted on QM loans only during the first three years. FHA loans may be paid off after three years, so all FHA loans would be non-QM loans.

Non-QM loans "may not contain terms under which a consumer must pay a prepayment penalty[.]" That is, even if a servicer did not charge the interest, a non-QM FHA loan would violate TILA because of the language in the note permitting the charge. Defining each FHA loan as a TILA violation would create a major disruption based on federal policy.

By contract, servicers can permit FHA borrowers to pay off their loans after three years, on any day of the month the borrower chooses; servicers are required to pass through the interest to Ginnie Mae; and servicers have the right to collect the interest from borrowers. The proposed treatment would unconstitutionally interfere with existing, valid contracts.

Under existing § 1026.23(a)(3), the rescission period is extended if the creditor does not deliver material disclosures. Material disclosures include § 1026.35(b)(2) items, which are prepayment penalties. The 2010 proposal would redefine material disclosure to include prepayment penalties required to be disclosed under § 1026.38(a)(5). There is no § 1026.38(a)(5) today and the 2010 proposal does not contain one. However, the 2010 preamble says:

The August 2009 Closed-End Proposal would require all mortgage loans to indicate the amount of the maximum prepayment penalty and the circumstances and period in which the creditor may impose the penalty. See proposed § 226.38(a)(5). Therefore, the Board proposes § 226.23(a)(5)(i)(F) to include the prepayment penalty disclosed under § 226.38(a)(5) in the definition of 'material disclosures.'

The 2009 proposal in § 1026.38(a)(5) would require disclosure of a prepayment penalty:

(5) Prepayment penalty. If the obligation includes a finance charge computed from time to time by application of a rate to the unpaid principal balance and permits the creditor to impose a penalty if the obligation is prepaid in full, a statement indicating the amount of the maximum penalty and the circumstances and period in which the creditor may impose the penalty.

If the final rule defines an FHA accounting method as a prepayment penalty, it should not apply retroactively to extend the rescission period on existing FHA loans on which creditors complied with Regulation Z.

Again, the impact of retroactively determining that all FHA loans are in violation of TILA would be a major disruption at a time when FHA loans are the only loans available to many borrowers.

2. CFPB does not have authority to define FHA QM loans

HUD is required by statute to "prescribe rules defining the types of loans [FHA insures] that are qualified mortgages[.]" HUD, not the CFPB, must define which FHA loans are QM loans. The CFPB does not have authority to define all FHA loans to be in violation of the QM rule.

The CFPB's preference would be for HUD to revise its accounting method, a major undertaking that would take time and resources. Alternatively, it would mean servicers would need to prohibit FHA payoffs at certain times, which could be a serious interference for consumers who are refinancing or selling their home. Servicers do not have authority to do this. The CFPB's rule would require servicers of FHA loans to violate Regulation Z when they comply with FHA standards.

The CFPB does not discuss the havoc this approach would wreak with FHA lending. It states that it intends to coordinate the § 32(b)(8)(i) definition of prepayment penalty with the definition in other CFPB rulemakings. We suggest it is equally important to coordinate the definition with HUD's rules.

Recommendation

We suggest:

- At a minimum, any rule defining FHA's accounting method to constitute prepayment penalties should apply only to loans originated after HUD has implemented the changes to its accounting method so that paying off an FHA loan does not create a prepayment penalty based on the amortization method.
- The CFPB and HUD should discuss any consumer harm from the accounting method FHA has been using for years and how best to resolve any harm; and
- The CFPB should not define FHA's accounting method as resulting in prepayment penalties, in this or other rulemakings.

B. Charges Waived at Closing

The proposed ATR definition of prepayment penalties excludes payoff-related fees. The HOEPA Commentary includes in prepayment penalties, and thereby in points and fees, on a closed-end loan a closing or origination cost the creditor waives if the consumer does not prepay the loan. The HOEPA Commentary would also include as a prepayment penalty on HELOCs a waived closing cost that is reimposed upon early termination, but, unlike for closed-end loans, would exclude a waived bona fide third-party charge that is imposed if an open-end credit plan is terminated within 36 months.

This distinction between closed-end and open-end transactions should apply to closed-end subordinate loans because creditors commonly waive third-party fees on these loans. If the closed-end subordinate loan is prepaid within 36 months and the fee is owed, the fee should not be a prepayment penalty. Alternatively, a fee that would have been excluded from points and fees for high-cost purposes if the consumer pays it at closing should not be a prepayment penalty under the HOEPA rule because of the high-cost limit on prepayment penalties.

The proposed definition of high-cost loan includes loans on which prepayment penalties can exceed two percent of the amount prepaid or may be charged after 36 months. In some states, mortgage taxes can exceed two percent. If the consumer pays the taxes at closing, that fact would not make the loan a high-cost loan. However, if the creditor paid the taxes at closing and recoups them if the loan is prepaid within 36 months, it would be. This will create an incentive for lenders not to waive taxes, and it will impose a cost that consumers may not be prepared to pay.

Recommendation

Prepayment penalties should exclude closing costs the borrower reimburses to the lender for early payoff within 36 months for both open-end credit and closed-end subordinate loans. Charges not included in points and fees if the consumer pays them at closing should not be treated as prepayment penalties, and thereby included in points and fees, if the creditor waives them at closing.

III. Settlement Agents and Third-Party Service Providers

A. Settlement Agent Fees

The current special rule for settlement agent fees derives from TILA § 106(a), which states that "The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges." This provision clearly recognizes that creditors do not control third party settlement agents, and should not be responsible for services that the creditor does not require and for which the creditor does not retain a portion of the charge.

Recommendation

If the final rule includes all settlement agent fees in the finance charge, the rule should also take appropriate steps to prevent the creditor from being exposed to additional liability for those charges, consistent with the intent of TILA.

B. Responsibility for Accuracy of Settlement Charges

RESPA makes settlement agents responsible for providing an accurate HUD-1. The proposed rules would remove any responsibility under RESPA for settlement agents to coordinate the closing by gathering accurate financial information on the purchase and sale transaction or on title services or other services that the settlement agent arranges.

The proposal would add many more charges to the finance charge, including third-party charges, but would have a tolerance of only $100. However, the proposal would not require any service provider, other than the creditor, to be responsible for the accuracy of the charges. If creditors are to be held responsible for the accuracy of the charges and if they are to disclose those charges accurately, they will need a mechanism to ensure that the service providers give the creditor accurate fee information so that the Closing Disclosure may be prepared both accurately and on a timely basis.

Recommendation

Settlement Agents, providers of optional services, and providers of required services where the borrower shops and selects a provider not on the lender's Written List of Providers should be required to provide to both the lender and the consumer:

- An identification of the services that will be provided; and
- A firm price for those services, which may change only if there is a changed circumstance or a borrower-requested change. If there is a changed circumstance or borrower-requested change, the settlement agent or other provider must notify the both the borrower and the creditor within three business days.
- The creditor should be permitted to rely upon the services identified and charges provided, and should never be liable for differences between the quoted amounts of the fees and the actual fees.
- Even if the creditor is made responsible for the Closing Disclosure, if the creditor provides a draft Closing Disclosure to the settlement agent before the disclosure is provided to the consumer, the settlement agent should remain responsible for the accuracy of the fees for such services.

IV. Ability to Correct Unintentional Violations Should be Available

The Dodd-Frank Act includes a provision governing corrections of unintentional violations. The ability to cure errors benefits consumers because consumers would get any funds mistakenly charged to them refunded without the expense and inconvenience of unnecessary litigation. TILA compliance is complex, especially with unclear regulations, and unintentional violations do occur.

The CFPB solicits comment on the extent to which creditors or assignees are likely to invoke this provision and whether regulatory guidance would be useful. The likelihood that creditors or assignees would use this provision is low because it would in effect be punitive.

It would permit correction of unintentional violations within 30 or 60 days, but in either case only "prior to the institution of any action[.]" Putting a cure into place would require giving the consumer a choice of remedies. That is, the creditor or assignee would need to communicate with the consumer. The consumer could then institute an action, and the creditor or assignee would lose the protection of the ability to cure the violation.

Unfortunately, the cure must be put into place in as little as 30 days, but the consumer may, quite reasonably, request more than 30 days to make an informed decision.

Moreover, "the institution of any action" is not limited to actions by the consumer. If there were two similar unintentional violations and a consumer in one brought an action, the creditor may have lost the ability to cure the second loan. An action by the CFPB or a state attorney general may also eliminate the right to cure. The term action is not defined, and could include a subpoena, a civil investigative demand, an examination, or even filing a complaint with a regulator.

We support CFPB efforts to prevent evasions of the federal consumer financial laws, such as its proposed strengthening section 1026.34(v). As amended, it would prohibit structuring transactions that should be high-cost loans so as to evade the high-cost loan restrictions. This will prevent consumers from potential harm. For the same reason, the ability to cure errors should be available.

Recommendation

We recommend that the CFPB implement some definitions and timing procedures so that creditors and assignees will be able to cure unintentional violations:

- The 30-day and 60-day time limits should refer to the time in which the creditor or assignee must notify the consumer about the potential unintentional violation, or error, or the consumer notifies the creditor. It should not measure the time by which the cure must be in place.
- Creditors should have another 30 days to offer any cures to the consumer.
- Consumers should have 60 days from receiving the offer to make a decision.
- The term "any action" should be limited to judicial action by a borrower on the loan in question.

V. The Proposed Points and Fees Definition is Unclear

We note some areas where the proposed points and fees definition could be clarified to prevent unnecessary litigation, and to prevent different courts from deciding the same question in different ways.

Lack of clarity in Regulation Z will unnecessarily constrain credit in today's environment where credit is already far too constrained. Potential new credit constraints caused the CFPB to reopen the comment period in the ATR rulemaking to solicit additional input on the costs of litigation under that rule. Litigation risks and costs arise from the HOEPA rule as well. An unclear rule poses more litigation costs than a clear rule.

The HOEPA caps on rates and the QM cap on points and fees together limit creditors' ability to pass their costs through to consumers. When the costs meet the HOEPA and QM caps, lending will cease. Any lack of clarity in the rules, and particularly in TILA rules, will curtail credit in this manner. The proposed definition of points and fees is needs substantial clarification to prevent unnecessary litigation risk.

A. Closed-End Loans

1. Interest

The definition contradicts itself on whether interest is included in points and fees.

- Interest is excluded.
- Points and fees include "All compensation paid directly or indirectly by a consumer or creditor to a loan originator," which can include the lender. Interest is compensation directly to the lender.

Recommendation

Interest should be explicitly excluded from points and fees.

2. Real Estate Agents' Fees

The definition contradicts itself on whether real estate agents' fees are included.

Points and fees exclude charges payable in a comparable cash transaction. Existing § 1026.4(a) excludes these, and proposed § 1026.32(b)(1) incorporates 4(a) by reference. Real estate agents' fees are payable in a comparable cash transaction.

Points and fees include 4(b) items. Section 4(b)(3) includes "finders' fees[.]" Real estate agents are a type of finder.

The proposed points and fees definition excludes compensation to a "person that only performs real estate brokerage activities[,]" but includes that compensation if the creditor pays it. Excluding creditor-paid real estate agent fees would incentivize creditors to offer attractive financing when they sell properties acquired through foreclosure.

Recommendation

Real estate agent fees should be excluded from points and fees in all cases.

3. Hazard Insurance Premiums

The definition contradicts itself on whether hazard insurance premiums are included.

- Points and fees exclude charges payable in a comparable cash transaction. Hazard insurance premiums are payable in a comparable cash transaction.

- Points and fees include "[p]remiums . . . payable at or before consummation for any . . . accident . . . insurance[.]" Notably, the proposal would remove language that limits the definition to insurance "that provides for cancellation of all or part of the consumer's liability in the event of the loss of life, health, or income or in the case of accident[.]" Homeowners' insurance is accident insurance.
- Points and fees exclude items in 4(d). Section 4(d)(1) excludes "[p]remiums for . . . accident . . insurance . . . if . . . [t]he insurance coverage is not required by the creditor[.]" Mortgage lenders do require hazard insurance.
- Section 4(d)(2) says, "[p]remiums for insurance against loss of or damage to property . . . may be excluded from the finance charge if" certain conditions are met (they commonly are). That means hazard insurance premiums "may be" excluded. If they may be excluded, a court may find that they may be included.

Recommendation

The regulation should be clear that hazard insurance premiums are excluded from points and fees in all cases because they are payable in a cash transaction.

4. Property Taxes

The definition is unclear about whether property taxes are included.

- Amounts held for future payment of taxes are excluded from points and fees.
- Section 4(c)(7) items (real estate related fees) are excluded only if they are reasonable and paid to a third party.
- Section 4(c)(7)(v) includes escrowed amounts not otherwise included in the finance charge. Property taxes are always excluded from the finance charge because they are payable in a comparable cash transaction.
- Must property taxes be reasonable under § 1026.32(b)(1)(iii) to be excluded?

Recommendation

Property taxes should be excluded from points and fees in all cases regardless of whether they are reasonable in amount.

5. Section 4(c)(7) Fees

The exclusion for 4(c)(7) fees is unclear in two respects.

First, the rule includes in points and fees the items listed in 4(c)(7). However, 4(c)(7) is a list of excluded items. It is not clear whether including the excluded items would result in the fees being included or excluded from the points and fees calculation.

Second, the exclusion for 4(c)(7) fees if they are reasonable and paid to a third party sometimes contradicts the blanket exclusion for "any charge of a type payable in a comparable cash transaction" in 4(a). Charges payable in a comparable cash transaction should be excluded in all cases. Some 4(c)(7) fees are payable in a comparable cash transaction:

- Title and survey fees in (c)(7)(i);
- Notary fees, relating to the purchase and sale of real estate, in (c)(7)(iii); and
- Pest infestation fees in (c)(7)(iii).

Recommendation

The regulation should be clear when 4(c)(7) fees are included or excluded. It should be clear that fees are excluded if they are payable in a comparable cash transaction.

6. Appraisal Fees

The exclusion for 4(c)(7) fees, including appraisal fees, if they are reasonable and paid to a third party should not contradict the rule requiring customary and reasonable appraisal fees, § 1026.42(f).

Recommendation

Any fee permissible under the customary and reasonable rule should be per se reasonable under § 1026.32(b)(1)(iii) and per se bona fide under § 1026.32(b)(5)(i).

7. Servicing Fees

The definition contradicts itself about whether servicing fees are included.

- Points and fees exclude compensation paid to a servicer or servicer employees, agents, and contractors.
- Points and fees include 4(b) items. These include "[s]ervice, transaction, activity, and carrying charges[.]"
- They also include assumption fees. Servicers may charge assumption fees, but not at consummation.

Servicing fees can only be guessed at closing. Consumers elect some servicing fees for convenience, such as the option to make a payment by telephone. Servicing fees depend on how long the loan is outstanding and whether the loan goes into default. Servicing fees are unrelated to loan origination.

Including, or even not clearly excluding, servicing fees would create a significant marketplace disruption.

Recommendation

The rule should clearly exclude all servicing fees from points and fees.

8. Mortgage Insurance Premiums

The definition would exclude certain mortgage insurance premiums if they are "[a]ssessed in connection with any Federal or State agency or program;" are "not in excess of" FHA premiums and are refundable pro rata; or are payable at or before consummation.

The commentary explains that "not in excess of" means "only to the extent that the premium" is not in excess of FHA premiums. The commentary cannot alter what the regulation means, it only can provide a defense to liability. Charging premiums in excess of FHA premiums is not illegal, so the commentary does not resolve the issue. As written, if a premium were one cent over the FHA cost, the entire premium would be included in points and fees.

Recommendation

Section 1026.32(b)(1)(i)(B) should be amended to remove the phrase "Not in excess of" and instead read "Only to the extent that the premium or charge of[.]" The regulation should also make clear whether Fannie Mae and Freddie Mac are federal agencies.

9. Other

The definition includes "[d]iscounts for the purpose of inducing payment by a means other than the use of credit." This is inapplicable in a mortgage context.

Recommendation

This should not be incorporated by reference.

10. Plain English

We note that the points and fees definition in the proposed HOEPA rule is different than in the proposed ATR rule. In the ATR proposal, points and fees include "all items considered to be a finance charge under § 226.4(a) and 226.4(b) except" a list of items. In the HOEPA proposal, the term includes "all items included in the finance charge under § 1026.4(a) and (b), but excluding items described in § 1026.4(c) through (e), except to the extent otherwise included by this paragraph (b)(1)) and also excluding" a list of items. The ATR proposed language is clearer and easier to use.

Recommendation

We recommend using plain English. Rather than a process of putting items in and removing them, there should simply be a list of what is included, what is excluded, and what is included conditionally.

B. Open-End Credit

1. Hazard Insurance Premiums

The definition contradicts itself on whether hazard insurance premiums are included. They should be excluded.

- Points and fees exclude charges payable in a comparable cash transaction. Hazard insurance premiums are payable in a comparable cash transaction.
- Points and fees include "[p]remiums . . . payable at or before account opening for any . . . accident . . . insurance[.]" Again, as under the closed-end points and fees definition, there is no language limiting this to insurance that cancels all or part of the consumer's liability in the event of an accident.

Recommendation

The regulation should be clear that hazard insurance premiums are excluded from points and fees in all cases because they are payable in a cash transaction.

2. Loan Originator Compensation Should Be Excluded

The CFPB does not propose to include compensation to originators in points and fees for open-end credit. For the reasons discussed above, we strongly support this. We agree with the CFPB that Congress did not intend to include originator compensation.

Recommendation

Employee compensation should be excluded from points and fees in all cases.

C. Both Closed- and Open-End Credit

1. Unrelated or Optional Fees

The proposal, existing § 4(a) and 4(b), and the commentary are unclear about when fees for optional products are included in points and fees and the finance charge because they are "imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit" within § 4(a).

Some charges may be unknown to the creditor or unknown at closing, and some may be only tangentially related to the loan. Homeownership counseling is not sufficiently related to the loan because the consumer may obtain counseling but not a loan. If home ownership counseling fees are included, the creditor would have an incentive to discourage counseling.

Recommendations

Charges should be excluded from § 4(a) if any of the following are true:

- The creditor may be unaware of the charge.
- The charge is for homeownership counseling, even if the consumer found the counselor by a list the creditor provided.

- Fees for a product the creditor cross-sells that is unrelated to the mortgage loan, such as a checking account or credit card with a periodic fee, because the consumer may have obtained those products without a mortgage loan.
- Services related to the loan, which are sold after consummation.
- Services not offered by or through the creditor. For example, the consumer may arrange with a bank that is unaffiliated with the creditor for automatic mortgage loan payments from a bank account, for a fee.

Voluntary or optional services should be included in § 4(a) only if all the following are true:

- The creditor offered the service or provided leads from the mortgage process to the third party that offers the service;
- The type of service directly relates to the loan, such as credit insurance on the loan or an automatic payment service for the loan, rather than a service that the borrower could have used even if there had been no loan;
- The borrower contracts for the service at or before loan consummation; and
- The creditor was aware of the service and its cost before consummation.

2. Required to be Included

The points and fees definition excludes bona fide third-party charges not retained by the creditor, loan originator, or an affiliate of either unless the charge is "required to be included" in points and fees under proposed § 1026.32(b)(1)(i)(B). Section (b)(1)(i)(B) does not require anything at all, it is part of a definition. It does not include anything, in excludes certain things only.

Recommendation

We recommend revising the reference in § (b)(5)(i) to read, "except to the extent mortgage insurance premiums are included in points and fees by paragraph (b)(1)(i) of this section."

3. Bona Fide Discount Points

The proposed HOEPA rule incorporates by reference the ATR definition of bona fide discount point, § 1026.43(e)(3)(iv). In proposing that definition, the Federal Reserve explained that TILA § 129C(b)(2)(C)(iv) [as does TILA § 103(dd)(4)] mandates that "the amount of discount points paid by consumers for a particular interest rate reduction be tied to the capital markets."

The policy goal is for discount points to reduce the rate on the loan. The difficulty is how to establish when this occurs. To the extent creditors have difficulty understanding or applying the definition, they will not offer discount points as a way to buy down loan rates. This would harm consumers choosing to lower their costs.

The definition would require the discount points to account for compensation the creditor can reasonably expect in the secondary market. This exceeds the Dodd-Frank Act. It is undefined and would result in litigation if a creditor were to allow discount points. Supply and demand (prices) in the secondary market are not necessarily correlated with supply and demand (prices) in the primary market.

The proposed ATR definition of bona fide discount point has relevant proposed commentary. However, it is in proposed comment 43(e)(3)(ii)-3 and -4, rather than (e)(3)(iv), so it apparently would not apply because 43(e)(3)(ii) is not incorporated into the § 1026.32 commentary.

Recommendations

- The definition of discount points should not relate to what a creditor can reasonably expect in the secondary market.
- For jumbo loans and loans on second homes, which have higher interest rates, there should be one percentage point added to the margin above APOR for excludable discount points.
- The language in Comments 43(e)(3)(ii)-3 and -4 should be repeated as Commentary to § 1026.32(b)(5)(ii).

4. Clarification of Specific Fees

We would appreciate clarification that the following fees would continue to be excluded from the finance charge:

- Charges related to the discharge or subordination of existing liens;
- Modification or conversion fees;
- Required property completion or repairs;
- Payoff of prior liens or debts;
- Amounts charged by a homeowners association or by a condominium or cooperative association;
- Fees of the borrower's attorney;
- Fees for services required under the purchase and sale agreement with the seller;
- Fees for recording the discharge when the loan is paid in full; and
- Fees paid after closing to evaluate collateral on a HELOC to determine whether to reinstate a suspended HELOC.

5. Credits Should Be Excluded

It is common for lenders to provide credits against specific fees, or a credit that applies against closing costs generally (such as a general marketing or promotional credit or a credit given to the borrower in exchange for a higher rate). While the proposed regulation indicates that seller-paid amounts will be excluded from the finance charge, it is not unusual for the borrower's employer to provide credits, or for a governmental agency or non-profit to provide a credit against closing costs.

Recommendation

Lender or third-party credits that reduce what the consumer pays should be excluded from points and fees.

VI. Total Loan Amount

A. Closed-End Loans

For closed-end loans, the total loan amount is not clear. The proposed rule describes it as "the amount of credit extended at consummation that the consumer is legally obligated to repay, as reflected in the loan contract, and deducting any cost that is both included in points and fees . . . and financed by the creditor."

One mortgage loan can involve more than one loan contract, such as note in addition to a buy-down contract between the borrower and a third party, but the regulation does not specify which contract it references.

Money is fungible, so it is not clear what costs the creditor finances. Suppose a promissory note is $100,000, the cost of the property is $125,000, the cost of the appraisal included in points and fees is $400, and the borrower brings $25,400 in cash to closing. Two scenarios that will appear the same to the borrower would result in different total loan amounts.

Loan proceeds disbursed to seller	$100,000	$99,600
Appraisal charge paid at closing	400	400
Buyer's payment to seller at closing outside of loan proceeds	25,000	25,400
Appraisal cost financed	0	400
Total loan amount	100,000	99,600

Recommendation

The total loan amount needs to be clarified. It should be the amount in the promissory note between the consumer and the creditor.

B. Optional Products

The proposed rule would include in the loan amount any charges for optional credit insurance or debt cancelation coverage if they are included in the note amount. The commentary, but not the regulation, would restrict this inclusion to refinances. In a purchase transaction, including charges for optional products introduces the problem that money is fungible.

The regulation would require disclosure of the optional charges "grouped together with the disclosure of the amount borrowed." There are multiple disclosures of the amount borrowed, but this does not specify which it means. The meaning of "grouped together with" is unclear. The disclosure of the amount borrowed would be treated as accurate within a $100 tolerance.

Recommendations

- The regulation should make clear when charges for optional products are included in the loan amount.
- There should be more clarity about which disclosure of the loan amount § 32(c)(5) references, and what "grouped together with" means.
- The $100 tolerance for the total loan amount should be adjusted annually for inflation.
- Existing § 31(d)(1), which says the disclosures should reflect the terms of the legal obligation between the parties, should have added, "except as otherwise provided by this part" so it will not contradict the $100 tolerance.

VII. High-Cost Mortgage Loans

A. Thresholds Should Be Calculated in a Similar Manner for All Federal Purposes

As the CFPB notes, changes to threshold calculations will affect not only whether a loan is a high cost HOEPA loan, but also whether it is a non-QM loan, a "higher priced" loan subject to mandatory escrow, a "higher risk" loan subject to additional appraisal requirements, or a "higher priced" balloon loan subject to additional underwriting requirements. The rate spread reported under HMDA is also currently calculated by comparing the disclosed APR to the APOR. While the CFPB indicates that it wishes to analyze the impact on a rule-by-rule basis, all of the rules are focused on what is the appropriate measurement of higher-cost loans, and having to calculate higher costs in different ways for each different rule will cause significant operational burdens. The same basic metrics should be used for each of these rules.

If the CFPB adopts an all-in-APR, we agree that third party fees that would become finance charges should be excluded from points and fees, not only for the high-cost threshold, but for all federal requirements containing a points and fees test.

B. The Proposal Would Interfere with Existing Contracts

Creditors have the constitutional right to enforce their contracts. A regulation cannot interfere with existing, valid contracts, yet this proposed rule would do so in several respects, as discussed below. See, e.g., the GSEs' Uniform Security Instruments. These instruments are in common usage nationwide, even on non-GSE loans, and set out the contractual rights in the event of payment default and nonpayment default. The GSEs developed the Uniform Security Instruments after a substantial effort to balance the needs of consumers with the safety and soundness needs of investors. The instruments have created more liquidity in the secondary market by providing investors with certainty about loan terms. The CFPB's regulations need to be entirely consistent with these instruments.

1. Acceleration of Debt

The CFPB proposes to implement the statutory limitations on accelerating high-cost loans. The Dodd-Frank Act permits acceleration in three circumstances:

- Payment default;
- Pursuant to a due-on-sale provision; and
- In case of material violation of the loan agreement unrelated to the payment schedule.

The CFPB proposes to prohibit acceleration in the event of a payment default "in error[.]" This would permit borrowers to mail a payment, or all payments, to the wrong location then prohibit the creditor from accelerating the loan. The CFPB gives the example of a borrower who sends a payment to "a branch rather than the main office of the creditor." But the comment is not limited to cases of legitimate error. It would enable a borrower to mail all payments to a party unrelated or unknown to the creditor, claim error, and prevent acceleration.

The Dodd-Frank Act gives creditors a statutory right to accelerate high-cost loans in the event of "default in payment[.] A default in payment is defined by the loan agreement. When a borrower fails to make payments when and as required, that is a "default in payment" for which creditors are statutorily permitted to protect themselves, regardless of whether the consumer made an error. The loan agreement also gives creditors the right to treat a payment mailed to the wrong location, in error or otherwise, as a default.

Recommendation

Regulation Z should be consistent with the Uniform Instruments and other loan contracts, and with the Dodd-Frank Act. Creditors should be permitted to accelerate loans as provided by their contracts.

2. Material Violation

The CFPB proposes to permit acceleration if the consumer materially violates a loan term unrelated to the payment schedule. The commentary gives examples, including failure to pay taxes or "permit[ting] the filing of" a senior lien.

Recommendations

We suggest several ways to make this consistent with the Uniform Security Instrument, which requires the borrower to "promptly discharge" prior liens regardless of the borrower's intent or whether the borrower permits the lien.

- The examples should include failure to pay condominium or homeowner association dues or assessments, including special assessments, when and as due. This should be regardless of the filing of a lien because several states permit, and other states are pursuing legislation that would permit, such unpaid costs to result in a lien prior to a first mortgage lien, even if the mortgage predated the newer lien.

- The examples should include failure to pay utilities or other costs that can result in a lien prior to the creditor's lien.

- The failure to pay when and as required, not the filing of a lien, needs to be the operative event because by the time a prior lien is filed, the creditor has been materially harmed.

- The examples should include failure to maintain or repair the property as required by the loan agreement or security instrument. For example, if the property is damaged by fire, the Uniform Security Instrument generally requires the hazard insurance proceeds to be used to repair the property.

- The proposed language in comment 32(d)(8)(iii)-2.i.C is that the consumer "permits" the filing of a senior lien. The word "permits" should be removed. It is the possibility of a lien that harms the creditor, not the consumer's intent or belief or other action.

3. The Death of an Obligor Should Not Always Prevent Acceleration

The CFPB proposes to delete Comment 32(d)(8)(iii)-2.i.E and an example in Comment 32(d)(8)(iii)-2.ii about permissible acceleration if the sole consumer obligated on the credit dies. It does not explain why. There is existing law that prohibits enforcement of due-on-sale clauses in many events. These include a transfer of the property to a relative resulting from the borrower's death. It is therefore not clear what purpose the proposal serves. To the extent not otherwise prohibited by law, creditors have a contractual right to accelerate loans in the event of default. If a borrower dies and the borrower's estate or family permit default, the creditor can accelerate. A servicer may be under a contractual obligation to do so.

Recommendation

We recommend retaining Comment 32(d)(8)(iii)-2.i.E and the example in Comment 32(d)(8)(iii)-2.ii the example of permissible acceleration if the sole consumer obligated on the credit dies.

4. Eminent Domain

The CFPB proposes to remove the example of a property taken by eminent domain. This is inappropriate. In this event, the creditor may have a contractual right to some portion of the government payment for the property. Failure of the borrower to pay the proceeds owed is a default for which creditors may have a contractual right to take action. The Uniform Security Instrument provides "In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower."

Recommendation

We recommend retaining Comment 32(d)(8)(iii)-2.i.F.

5. Construction Loans

We are concerned about the apparent expansion of HOEPA to cover construction financing. Neither the proposal nor the preamble is explicitly clear on whether the amended HOEPA provisions will cover construction financing, or construction-to-permanent financing. The Board's existing rules provide an exception to the balloon payment prohibition for a bridge loan with a maturity of less than one year. See 12 C.F.R. § 226.32(d)(1)(ii). Under existing law, such bridge loans must be in connection with the acquisition or construction of a dwelling that is intended to become the consumer's principal dwelling.

We note that in the proposal, the Bureau would delete this exemption from current Regulation Z, particularly that portion stating that "loans with maturities of less than one year, if the purpose of the loan is a 'bridge' loan connected with the acquisition or construction of a dwelling intended to become the consumer's principal dwelling." (See 77 F.R. 49152).

We believe the current exemption is greatly beneficial to consumers and does not undercut consumer protection. In fact, we fear that subjecting construction-to-permanent financing to the new HOEPA provisions will completely eliminate lenders' abilities to finance new home construction projects. In typical instances of home construction financing, the initial construction loan (that is later refinanced into a permanent 30-year loan) is structured as a balloon note, or a very short term, but higher interest rate, loan. Either option would now be restricted. Members report that the higher interest rate applicable to such temporary financing are high enough to trigger HOEPA thresholds, and do not have comparable APOR indices to allow for proper comparisons.

Recommendation

We request that the Bureau retain the exemption found in 12 C.F.R. § 226.32(d)(1)(ii). Construction lending was never a segment that was ripe with abuse. Removing the existing exemption would, for no good reason, devastate the construction loan industry, and be of great detriment to consumer option.

6. Personal Property

The CFPB seeks comment on the separate percentage point trigger for first-lien transactions that are secured by a dwelling that is personal property and for which the total loan amount is less than $50,000. Application of the HOEPA rule to personal property that is not designed to be a dwelling would be an unnecessary and disruptive policy. It could reach financing of recreational vehicles and boats. Financing personal property is a separate line of business than mortgage lending, with different risks and therefore different pricing. Vendors that finance purchases of recreational vehicles and boats may not have the capacity to comply with HOEPA. HOEPA is designed to combat predatory mortgage lending, and should not cap rates and fees on boat and vehicle financing.

Recommendation

The CFPB should make clear that the HOEPA restrictions do not apply to personal property such as recreational vehicles or boats, even if they are principal dwellings.

VII. Housing Counselors Disclosure

A. Content

The proposal would require disclosure of five housing counselors in the consumer's zip code, or in the "closest" zip code. Closest zip code is not defined. The proposed rule would not require disclosure of a counselor's name, address, and phone number in all cases, and the email address and website only if available from the CFPB or HUD.

We strongly support the fact that the CFPB is expecting to maintain a database of counselors searchable by zip code that lenders could use.

Recommendations

We suggest the CFPB go further:

- Make the database available to the public, not just lenders. This would let consumers readily receive the information at any time, not just when applying for a loan. It would also prevent creating a problem where certain counselors are identified to consumers frequently and others less often or not at all.

- The creditor should be able to comply by notifying the consumer of the website and a HUD toll-free number where the consumer can get the information.

- The proposal seems to assume that creditors' and brokers' systems can access the CFPB's website on a loan-by-loan basis. This is operationally difficult. The CFPB should make the information available in a table format that creditors and brokers can download so their systems can access the downloaded information, instead of the website. The information will not change extensively or frequently so that monthly updates to the downloaded information should be sufficient.
- When a person enters a zip code for which there are not 5 counselors, the database should select the "closest" zip codes.
- Disclosing what the CFPB database produces should be per se compliance with the required content of the disclosure.
- If a counselors' address or phone number is not available on the CFPB's or HUD's website, its disclosure should not be required.
- HUD's website shows Alaska only has three counselors, and the Virgin Islands only one. Counselors from a different state should not be required to be disclosed.

B. Timing

Lenders would need to deliver the "most current" information available on the CFPB's or HUD's website. We appreciate that the proposal would permit the flexibility of delivering the list, on HELOCs, under either § 1024.20(b) or § 1026.40(b).

Recommendations

- "Most current" should be any time during the month before the disclosure is prepared.
- Regardless of whether the CFPB requires the list at the same time as the Loan Estimate, a list of counselors should only need to be disclosed once per loan, even if a Loan Estimate is revised.
- The CFPB should retain the proposal to permit the flexibility of delivering the list, on HELOCs, under either § 1024.20(b) or § 1026.40(b).

C. Other

The rule would both refer to the list of counseling information as a "written list" and permit electronic delivery under the E-Sign Act.

If a mortgage loan "involves" more than one lender, the proposed rule would require only one to provide the list of counseling information. Operationally, it may be easier for more than one lender to deliver a list. One lender may not know there is another lender involved, or the two may not agree on who is responsible for sending the list.

Recommendations

It should be permissible for multiple lenders to provide a list. Section § 1024.20(a)(1) should not refer to the list as a "written" list so as not to interfere with § 1024.20(a)(6).

Conclusion

Once again, ABA thanks the Bureau for its efforts to clarify the very important elements surrounding the legislative reforms of high-cost mortgage lending. This endeavor is critical because the definitions of the HOEPA regulations, and how the threshold triggers operate, will determine the very contours of the mortgage lending market. The ability of community banks to serve all of our communities through safe and viable credit must be preserved. As mentioned above, these new HOEPA provisions must carefully balance a number of factors, as Dodd-Frank mandates that the Bureau consider the availability of safe and responsible mortgage credit in its rulemakings.

As always, ABA stands ready to assist the Bureau as it navigates through this difficult implementation process. If you need further assistance, please contact Rod J. Alba at ralba@aba.com.

Sincerely,

Robert R. Davis

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