American Bankers Association
American Escrow Association
American Financial Services Association
American Land Title Association
Community Mortgage Banking Project
Consumer Mortgage Coalition
Mortgage Bankers Association
National Association of Realtors
The Real Estate Services Providers Council, Inc. (RESPRO®)

April 16, 2012

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: **Know Before You Owe Mortgage Loan Initiative**

Dear Director Cordray:

The undersigned are pleased to have this opportunity to submit comments to the Consumer Financial Protection Bureau (CFPB) on the rulemaking accompanying the Know Before You Owe (KBYO) mortgage loan initiative. This is an important initiative for our customers – consumers.

These comments represent our thoughts on the CFPB's memorandum dated February 21, 2012, entitled "Outline of Proposals Under Consideration and Alternatives Considered" (the Outline). We commend the CFPB for issuing this broad outline setting the regulatory context for the delivery of the reformed mortgage disclosures. It is important that all stakeholders work towards an improved mortgage disclosure system. In this sense, we believe that the objective of this reform process is not the mere issuance of a regulation. The real goal for all stakeholders is to ensure that we achieve a balanced and efficient set of rules to guide mortgage disclosures for the next generation. The true objective, as mandated by the Dodd-Frank Act, is to craft a solid and clear regulatory system that well accompanies a combination of two laws' disclosures to so that they properly inform and protect consumers.

This is very difficult work that requires careful consideration of current and pending laws and requirements, as well as the operations of the industry and the interests of consumers.

We therefore urge that the CFPB closely consider and analyze the impact of these proposals and our concerns with the substantive and procedural alternatives being discussed.

We support the CFPB's approach of reviewing the consumer's entire experience, from initially considering a loan, through application and after loan closing, as that approach will result in the best disclosures. This ability to consider disclosures holistically was absent prior to the Dodd-Frank Act because no regulator had authority to do so. Congress provided the CFPB with authority to design disclosures comprehensively for the first time.

The CFPB's iterative approach to developing the prototype disclosures has been a sound one, and we encourage the CFPB to use the same approach to developing the underlying rules because the underlying issues are significant, and deserve at least the same attention as the forms. In a recent meeting with CFPB staff, industry representatives were provided an opportunity to offer feedback on some of the rules. While we appreciated the opportunity to meet, there was insufficient time to fully review most of the issues raised. At this time, we urge continuation of those discussions.

This letter begins by setting out general comments on the KBYO initiative, including the need to coordinate it with related rulemakings for it to be successful, and highlighting the major items of concern mentioned in the Outline. The second section of this letter provides more specific comments on the revisions to mortgage disclosures and rules described in the Outline. In the third section, we recommend disclosure timing requirements, with particular attention to resolving the current problem of frequently revised Good Faith Estimates (GFEs) and minimizing unnecessary waiting periods for consumers needing to close their loans in a timely manner.

I. General Comments

A. Doing it Right Must Be the Overriding Goal

We urge the CFPB to take the time necessary to get the disclosures right. Congress prioritized the quality of the improved disclosures over getting them changed quickly,[1] and we recommend that the CFPB adopt the same approach.

[1] Congress directed the CFPB to publish a single, integrated mortgage disclosure in three places: RESPA § 4(a); TILA § 105(b); and in Dodd-Frank Act § 1032(f). Only in the third of these provisions did Congress address timing, making plain that the quality of the integration is more important than the timing. Further, even when it did address timing, Congress did not provide a due date for a final rule, which demonstrates that Congress did not want to rush the CFPB into yet another poorly designed disclosure.

Additionally, Congress required that the disclosures be validated through consumer testing, § 1032(b)(3), and provided the CFPB with the option of using trial disclosure programs, § 1032(e). Congress is aware that consumer testing and trial disclosure programs are time-consuming endeavors, but included them nevertheless. The Congressional intent to get disclosures that work, even if it takes time, is clear.

1. Congress Provided the CFPB With Broad Powers to Ensure a Successful Outcome

In creating the CFPB, Congress merged the rulewriters and gave the Bureau the broad exemptive powers under RESPA,[2] TILA,[3] and under Title X of Dodd-Frank[4] to ensure that consumers receive an integrated set of mortgage disclosures that enables them to better navigate the mortgage process. The CFPB has authority to exempt transactions from all of TILA,[5] allowing it to exempt transactions from individual provisions within TILA. Since the effective date provision for Title XIV of the Dodd-Frank Act is enacted in TILA, the CFPB has broad authority to revise the Title XIV effective dates where appropriate to ensure that the KBYO project has a successful outcome.

It is important that the CFPB consider all of the forthcoming rules in developing the KBYO disclosures because only then will the CFPB be able to identify, analyze, and address their interconnections, and prevent unintended consequences. This will prevent repeating the experience that occurred when the 2008 amendments to Regulation X were made. At that time, the confusion surrounding the 2008 amendments to Regulation X necessitated eleven rounds of Frequently Asked Questions (FAQs) after the rule was final, and required delaying enforcement of the regulation by four months.

2. QM and QRM Rules Need to Be Synchronized and Integrated

There are a number of other rulemakings in the pipeline that will impact the disclosures, including a final qualified mortgage (QM) rule and a final qualified residential mortgage (QRM) rule. Investors and originators will use the disclosures to determine whether a loan is a QM loan or QRM loan. Thus, it is important that the disclosures accommodate the QM and QRM rules. The CFPB can accomplish this by requiring disclosures that clearly delineate which charges are included within points and fees, as both the QM and the QRM rules will cap points and fees.

3. The Definition of the 3% Cap on Points and Fees Needs to be Finalized and Synchronized in Both the QM and QRM Rulemakings

During underwriting, lenders must be able to determine whether the points and fees exceed the QM and QRM caps. Few, if any, lenders will be willing to make non-QM loans because of possible TILA liability. Even if a lender were willing to make a non-QM loan, if during underwriting the points and fees increase to exceed the QM or QRM cap, the lender would likely need to reprice the loan and, presumably, redisclose a Loan Estimate. A lender also must then be able to determine if the increased rate or points makes the loan a high-cost Home Ownership and Equity Protection Act (HOEPA) loan

[2] RESPA § 19(a).
[3] TILA § 105(a), (f).
[4] Dodd-Frank Act § 1032(a).
[5] TILA § 104(5).

under the new Dodd-Frank HOEPA thresholds.

4. Mortgage Originators Need to be Able to Easily Determine if Loans Are QM Loans to Avoid Steering

Mortgage originators also will need to determine whether a preexisting loan is a QM loan when the consumer is shopping for a new loan, because originators are prohibited from steering a consumer from a QM loan for which the consumer is qualified to a non-QM loan.[6] For this reason, mortgage originators will also need to determine whether the prospective new loan will be a QM loan.

5. The Definition and Requirements for the APR to APOR Comparisons Need to be Made and Synchronized

In 2009, when the Federal Reserve proposed to revise the definition of finance charge to improve the usefulness of the APR, Dodd-Frank, and its requirement for APR to average prime offer rate (APOR) comparisons, had not been enacted. Any amendments related to the APR need to be thought through in the context of the seven new APR to APOR comparisons required by Dodd-Frank because they are interrelated. For example, if the CFPB were to include more items in the APR, it would presumably want to include the same items in its definition of APOR so that the comparisons will measure what they are intended to measure – the amount by which the rate on a particular loan exceeds the market rate, the APOR.

6. Potential Amendments to the Finance Charge Definition Would Need to Be Integrated (Outline pp. 17-20)

The CFPB has indicated it may consider removing some exclusions from the finance charge definition. The prototype Loan Estimate and Settlement Disclosures de-emphasize the APR and finance charge disclosures, so the need for such simplification is mitigated. The disclosure of the finance charge seems to be particularly unnecessary considering the fact that upfront fees are being categorized as “Settlement Fees” or “Settlement Costs” rather than as prepaid finance charges. Information on finance charges imposed after closing – mortgage insurance costs and interest – is disclosed in more detail than under current disclosures.

One possibility is to determine whether the finance charge remains useful and, if not, remove disclosures of it and of the APR.

The CFPB acknowledges that a more inclusive finance charge could result in increased APRs for many loans, thereby making more loans exceed federal and state high-cost loan thresholds. (Outline p. 20.) The definition of finance charge could also affect the calculation of points and fees in the QM and QRM rules, causing more to hit the cap on points and fees.

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[6] TILA § 129B(c)(3)(B).

We note that the 2009 all-in APR proposal pre-dated Dodd-Frank, which lowered the HOEPA thresholds. This exacerbates the interplay between these requirements. This is a prime example of why the disclosure rules cannot be considered in isolation from the substantive rules, including whether *bona fide* third-party fees are included in the definition of points and fees (which appears contrary to the intent of the Dodd-Frank Act.)

We urge the CFPB to refrain from adding more complexity to this reform system by revising the APR until we have seen how the forms might work. If the Bureau were to decide to move forward, it must consult with stakeholders, as this change would be costly and would affect various other rules, as indicated.

B. RESPA and TILA Remain Separate Statutes

Although their disclosures are being integrated, RESPA and TILA remain separate statutes. The CFPB has suggested that it may incorporate Regulation X FAQs into Regulation Z or its commentary. (Outline p. 12.) We recommend that they be incorporated into Regulation X to the extent they implement RESPA because Regulation Z only implements TILA.

Both the RESPA and TILA statutes and implementing regulations provide liability and remedies respecting their respective disclosures, but the liabilities and remedies are not the same. There is no basis under these statutes or Dodd-Frank to apply RESPA liability to TILA disclosures or *vice versa*. The CFPB should specify in its proposal which liabilities and remedies flow from each disclosure. If this is not clear, years of expensive and unnecessary litigation will ensue.

The CFPB is considering whether to propose a rule that requires use of standard forms under RESPA for mortgage loans subject to RESPA, but optional model forms for transactions that are subject only to TILA. Standard forms should only be required for the sections of the integrated disclosures that contain the RESPA-required disclosures, and there should be one standard form each for purchases, refinances, and home equity loans. We note that many model TILA forms will be needed to accommodate the wide range of loan products available today.

C. Implementation Should Be Efficient and Cost-Effective; Guidance Will Be Necessary

1. Guidance Will Be Necessary

We respectfully urge that when the final rule is published, the CFPB embark on a process for implementation that commits to providing timely guidance for the questions that will inevitably arise. Commentary developed and issued with the final rule is unlikely to address all of the issues that will arise as a result of such a massive and complicated

overhaul of the disclosure rules. The shorter and more difficult the implementation process, the more important timely guidance will be.

The CFPB may want to consider issuing proposed rules on both disclosures and substantive issues, soliciting comments on the proposed rules, then reproposing the rules for comment before issuing a final rule. This would allow both consumers and industry to see the major substantive decisions that the CFPB will be making, and identify areas where additional guidance is needed and where loopholes need to be closed.

2. Implementation Needs to be Efficient and Cost-Effective

The implementation period should provide sufficient time for training, systems development and the many operational changes that the rule will necessitate. For larger lenders, a considerable amount of time will be needed not only to integrate these changes but for the programming and testing of a large number of complicated, often legacy, systems and the data passed among them. Smaller lenders not only need time to train and make these same changes with fewer resources, but they must also await the completion of guidance from larger lenders, vendors, and secondary market aggregators. Smaller lenders need such guidance because, unless the final rules are absolutely clear on what is required to comply, large lenders will establish overlays of additional requirements to ensure that the loans they buy from smaller lenders comply. Different large lenders have differing overlays, making it more difficult for smaller lenders to make their loans and sell them in the secondary market. We also respectfully urge that the minimum time period for compliance be twelve months, and it should ensue after questions are answered and sufficient guidance is released.

3. Implementing Rules is Costly

Implementing revised mortgage disclosure forms is a costly, time-consuming task for all. The CFPB stated in its Small Business Panel outline that, "it is possible that routine systems updates would at least partially mitigate these one-time [implementation] costs since the costs would, in part, already be budgeted." (Outline p. 6.) It is true that lenders routinely update their systems, and that these costs may already be budgeted, but budgeting costs does not reduce these costs, it merely tries to anticipate them. More importantly, the cost of routine systems updates is minor in comparison to the costs of implementing major regulatory changes.

The CFPB also questions whether implementation costs would be mitigated by vendors that offer free updates and training to small entities. (Outline p. 6.) In checking with vendors, many have indicated that they will not offer a free update service for redesigning the GFE and HUD-1 because of the costs involved. Even if a vendor were to offer some training materials for which it has not yet billed directly, there will still be significant costs to our members for employee training. The more the rules change, the higher the implementation costs.

The CFPB's inquiry about free updates indicates that the CFPB needs additional information as to what is involved in systems changes, especially by changes that would redesign disclosure forms. For perspective, at one large lender, implementing the Regulation Z amendments that became effective October 1, 2009 required over 70,000 hours, while implementing the 2008 amendments to Regulation X took more than twice as much time. These costs are significant, and are ultimately borne by consumers. Careful planning of the timing of the rulemakings, accompanied by one set of changes to the disclosures, can greatly reduce costs and improve efficiencies, while delivering a more comprehensible disclosure regime to consumers.

4. *Integrating Disclosures Would Satisfy the Cost-Benefit Analysis Requirement*

Congress required that the CFPB's rules pass a cost-benefit analysis.[7] The CFPB stated in its Small Business Panel outline, "The proposals under consideration are not, *by themselves,* anticipated to require subsequent updates of software and compliance systems beyond the initial update." (Emphasis added). Viewing related rulemakings in isolation masks the actual costs, and that risks increasing the costs unnecessarily. Further, § 1022 does not permit the CFPB to assess the costs and benefits of each rule in isolation. It requires the CFPB to consider, among other things, "the impact of proposed rules[.]"[8] Congress used the word rules in the plural, and did not limit the impact analysis to CFPB rules. Thus, in the KBYO rulemaking the CFPB must consider the impacts of other proposed rules, including the TILA and the QRM rulemakings. We do not believe that a piecemeal implementation process would pass a cost-benefit analysis, in part because of its unnecessary costs, and in part because piecemeal rulewriting results in flawed disclosures, such as those in place today.

We urge that the CFPB use a holistic approach to viewing the consumer's experience, including a consideration of all the origination disclosures, and that it consider the regulatory burden of implementing all the new Dodd-Frank rulemakings as part of its cost-benefit analysis. This approach would both improve the disclosures and minimize implementation costs.

D. More Prototypes and Testing Are Needed

The mortgage market offers a range of loan products to address diverse needs. In order to ensure that these disclosures are useful, the CFPB should develop prototypes for all standard loan products of Fannie Mae, Freddie Mac, and the Federal Housing Administration, as well as construction loans and bridge loans.

The prototypes should be carefully tested in conjunction with lenders and settlement service providers to ensure that they accommodate the many issues that arise in mortgage lending and provide the correct information to consumers. Rather than simply testing the

[7] Dodd-Frank Act § 1022.
[8] Dodd-Frank Act § 1022(b)(2)(A)(ii).

prototypes with focus groups, factual situations derived from loans that have actually closed should be used to verify that the prototypes will work – that lenders will know how to complete them correctly and consumers will understand them – at every stage of the transaction from application through closing. This will reveal the flaws[9] that may exist in any disclosure regime.

E. Unnecessary Changes Should Not Be Made

In 2008, as you aware, HUD issued new RESPA rules to which the industry has just adjusted. Those changes included a new definition of application, the imposition of tolerances, and a revised disclosure regime. In the Outline, reviewed in greater detail in sections II and III below, the CFPB proposes to revise these new provisions to: establish more difficult tolerances; establish new waiting periods and responsibilities for disclosures; change the definition of application; and even possibly change the definition of the Finance Charge and the APR. We oppose this approach. As reviewed in this letter, reform can be accomplished by building on the strengths of the current system, without unduly revising the provisions that work. Reform should be focused where Congress intended – on combining the RESPA and TILA disclosures to finally enhance consumer understanding of their mortgage loans.

II. Specific Comments on Revisions to Rules and Disclosures

The Outline and the nine rounds of prototypes are subject to change as the CFPB works through the large number of responses it continues to receive. Notwithstanding that there will be changes, we note below some of the most significant issues.

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[9] Under the prototypes, we do not know how a lender would populate the Projected Payments disclosure for a loan on which the payment could change more than four times before reaching its maximum. The prototypes have used up to four columns but never more than four. If a loan product would require more than four columns to show all the changes before the payment reaches its maximum, there would either be additional columns or some of the changes would not be shown. Either way, it is not clear that consumers would understand how the payment could change. Another area where testing is needed is on the revised Loan Estimate. It is not clear whether it would include only the items that change, or everything then known. Either way, consumers are not likely to understand the disclosure. Finally, we do not how the CFPB would require the prototypes to be prepared for no-closing cost loans or subordinate loans, nor do we know how the CFPB will treat preapprovals, such as whether a post-application identification of a property address would be a changed circumstance. We believe the rules should clearly permit "prequalification" programs. These programs are extremely important in the home-shopping process, but the rules applicable to them are unintelligible in today's RESPA regime. Prequalification programs allow prospective homebuyers to approach a lender, who will check their credit, verify income, and then provide assurances that will allow real estate agents to proceed with more precise searches for prospective homes. This permits buyers a better grasp of affordability, and possibly gain an advantage over other shoppers because they can reliably show the seller that they have the means to buy the house. Current RESPA rules, however, obfuscate the distinction between an "application" and a "prequalification" program.

A. **Tolerances Should Not Be Tightened** (Outline pp. 9-11)

The CFPB has indicated it is considering reducing certain tolerances from their levels under Regulation X. Since the tolerances imposed as recently as the 2008 Regulation X amendments largely solved the problem of unexpected cost increases at closing, we do not believe the tolerances need to be lowered yet again. We know of no data indicating that the ten percent tolerance on third party fees is insufficient. The CFPB should not lower the tolerances unless it has data that a tightening of the tolerances is necessary to prevent surprises at closing, and that unintended consequences will not result.

Specifically, the CFPB has indicated that it may apply a zero tolerance if the lender selects the settlement service provider. The CFPB explains that it may be appropriate to hold lenders to a higher standard if the lenders do not allow consumers to shop for the service provider. RESPA permits lenders to require consumers to pay for the services of attorneys, credit reporting agencies, or real estate appraisers "chosen by the lender to represent the lender's interest in a real estate transaction[.]"[10]

Lenders do not control the charges of third parties. A zero tolerance would make lenders liable for charges they do not control, which is unfair and unworkable. Currently, the zero tolerances apply to individual fees rather than to the aggregate of all fees in the zero tolerance category. Adding additional zero tolerance fees would be very problematic if each fee were considered separately.

The CFPB also suggests that the fees of third-party providers that consumers must select from a "list of service providers" provided by the lender also bear a zero tolerance. We suggest that this written list of service providers be eliminated. Notably, the Loan Estimate prototypes to date have not included or referenced lists of service providers. A lender should only be held to a ten percent tolerance if the consumer asks for recommendations for third-party services or the lender requires the third-party provider.

If the consumer selects the service provider without, or regardless of, a lender recommendation, the lender should not be held to a tolerance because lender has no knowledge of or control over the pricing set by such providers.

Further, a requirement for written lists harms small businesses. A lender will not place a provider on the list unless the lender is relatively sure of the provider's costs. The Regulation X FAQs indicate the lender may not include a provider on the list unless the provider is likely to be available. The more providers the lender includes on its list, the greater its risk of error. The tendency is for lenders to list a small number of large providers who offer their services over a wide area, to reduce tracking costs and ensure availability. This disadvantages smaller settlement service providers.

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[10] RESPA § 8(c).

B. The RESPA Definition of Application Should Not Be Revised (Outline, p. 7-9)

As detailed further below in section III-A below, the definition of application under RESPA should not be revised to delete the clause that allows lenders to request additional information of their choosing at application. The definition should be applicable under TILA, as well.

There is a clear tension between providing applications early and providing applications that can be relied upon by the borrower and the lender. The undersigned believe the rules should assure that getting a reliable estimate is the greater imperative. Respectfully, we believe this is an area where a misplaced belief in the early disclosure as a shopping tool should not be permitted to lead to the wrong result.

C. Settlement Agents Should Deliver Settlement Disclosures (Outline p. 15)

Respectfully, we do not believe that the rules need to be revised to require that lenders themselves provide consumers with settlement disclosures. This requirement would be unduly burdensome, and would create unnecessary waiting periods for consumers needing to close their loans on a timely basis.

D. "In 5 Years" Comparison (Outline, Attachments B-1, B-2)

The Loan Estimate prototypes attached to the Outline contain an "In 5 Years" comparison. Dodd-Frank does not require this new terminology, and implementation of this comparison will require additional training and systems changes. The costs and benefits of implementing these new terms must be carefully evaluated. It is not apparent that this will meaningfully assist consumers.

E. The Loan Calculation Disclosures (Outline, Attachments C-1, C-2)

The Settlement Disclosure prototypes attached to the Outline contain three "Loan Calculations" disclosures that are of questionable value. They are the Total of Payments, Total Interest Percentage, and Lender Cost of Funds (also called the Average Cost of Funds).

The first two disclosures would always be inaccurate on an ARM loan and on any loan paid off before final maturity.

The Lender Cost of Funds (or Average Cost of Funds) is not a helpful disclosure and might be harmful to consumers because it could distract consumer attention away from relevant information. While we appreciate the CFPB's suggestion that the lender disclose a "publically available cost of funds index" (Outline p. 7), we do not believe that would be useful to consumers either. If this disclosure is included, explanatory language should disclaim its importance, explain that an index is used that does not specifically

apply to the loan, and, most importantly, that borrowers should the use interest rate and settlement costs and any other relevant concerns, such as the quality of service, as appropriate reasons to select a particular lender or settlement service provider.

We strongly urge that the CFPB use its authority under TILA to eliminate these disclosures entirely. If these disclosures are required, however, it is important that they not be designated a "material disclosure" under TILA to provides a basis for rescission. In addition, we recommend that their lack of accuracy and relevance be stated.

F. The Definition of "*Bona Fide*" Discount Points Needs to be Clearly Defined (Not discussed in the Outline, but it is important to note.)

It is particularly important to clearly define the term *bona fide* discount points[11] in order to remove any subjectivity. Any lack of clarity, even seemingly minor, will prevent loans from being made due to regulatory uncertainty, even to qualified applicants.

G. Guidance on Average-Cost Pricing Needs to be Coordinated (Outline p. 12)

The CFPB has indicated it is considering guidance to facilitate the use of average-cost pricing under RESPA. We support the use of average cost pricing. We recommend that the CFPB consider applying it to any APR exclusions as well.

H. Machine Readable Record Retention Requirements (Outline p. 17)

The CFPB is considering requiring lenders to maintain standardized, machine-readable, electronic versions of the Loan Estimates and Settlement Disclosures and the reasons for any changes to the information provided in those disclosures. It is not clear whether the costs and benefits of such a requirement would justify this change. For many lenders, major systems and other changes may be necessary. One possibility would be to make machine-readable records optional to allow lenders to migrate to this approach. Clearly, the comparative cost differences of paper versus automated data must be carefully evaluated before the CFPB seeks to introduce this as a requirement.

I. Several Overlapping Rules (Outline p. 21)

The CFPB has said it is not aware of any federal regulations, other than TILA and RESPA, that duplicate, overlap, or conflict with the proposals under consideration. The QM, QRM, and all Dodd-Frank Act amendments to TILA interact with the KBYO initiative. This letter provides the CFPB with a recommendation as to how it can integrate these rules, with Regulation B, into a streamlined, understandable disclosure regime.

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[11] TILA § 129C(b)(2)(C).

We note that under § 1024.7(a)(5) and the HUD FAQs at GFE #31, lenders may not require an applicant to provide documentation as a condition of providing the GFE and, the applicant must be given a ten-business day shopping period after the initial GFE is issued. § 1024.7(c). It is not clear whether documentation may be required during that ten-business day shopping period. Yet Regulation B §§ 1002.9 (a)(1)(ii) and (c) require action within 30 days after receipt of an incomplete application.

The CFPB should also consider Homeowners Protection Act (HPA) requirements. Before the Dodd-Frank Act, no regulator had the ability to issue HPA regulations. The CFPB now has the opportunity to clarify HPA requirements and integrate HPA disclosures with the RESPA and TILA disclosures. The Loan Estimate and Settlement Disclosure prototypes have significant amounts of information related to mortgage insurance. It would be useful for the CFPB to consider how the KBYO disclosures work with the HPA disclosures to avoid overdisclosures or other confusing disclosures.

III. Timing of Disclosures

The CFPB has a difficult task of designing disclosures that make clear a complex transaction that develops continuously over a period of weeks.

A. Pre-Disclosure Loan Estimate

The CFPB is considering requiring that any preapplication, consumer-specific, written estimate of loan terms or settlement charges contain a prominent disclaimer that the document is not the Loan Estimate required by TILA and RESPA. (Outline p. 9.) Preliminary estimates are useful to consumers for shopping prior to making a loan application, and we agree with this approach.

After application, which follows shopping, we suggest that the rules emphasize a clear, four-step disclosure timing regime that would provide consumers with information they need, when they need it, and without excessive overdisclosures. An advantage to emphasizing a four-step timing regime is that consumers would know when to expect their disclosures, and they would know what types of information would be included in each. This would help consumers understand the mortgage loan transaction as it develops. A finite number of disclosures would be easier for consumers to understand.

The form used in each of the four steps should be as consistent as possible so the consumer will be able to easily comprehend the information being presented as the transaction moves forward through the process. The CFPB's prototype Loan Estimate and Settlement Disclosures are more similar than the current GFE and HUD-1 and we support efforts to make them as similar as possible.

B. Step 1: Loan Estimate Three Days After The Lender Receives an Application

Within three business days of a lender's receipt of an application, the lender would deliver a Loan Estimate. This timing is similar to the timing under current rules, but there is one new wrinkle caused by combining RESPA and TILA disclosures.

With the combination of RESPA and TILA disclosures and the advent of a more detailed form, mortgage brokers may be unlikely to be able to provide the Loan Estimate within three days because brokers do not have a good portion of the necessary information about the loan terms. Brokers will need to rely on lenders to provide this information. If brokers are to be effective in assisting consumers, they will need time to do so. The lender will need up to three days to prepare the Loan Estimate, measured from the date the lender receives the application from the broker. Otherwise, if a broker were to take two days to select a lender, it would be difficult for the lender to prepare the Loan Estimate in one day. Too short a time could result in rejecting the application, even if the applicant were a qualified consumer.

As noted earlier, there is a clear tension between providing disclosures early and providing disclosures on which the consumer and lender can rely.

At this early point in the transaction, important information is unknown. How much is known will depend, in part, on what the CFPB defines to be an application. The CFPB has indicated that it may revise the Regulation X definition of application, which triggers the requirement for a Loan Estimate, so that the application is limited to only six items: the consumer's name; monthly income; social security number; the property address; an estimated property value; and the loan amount sought. (Outline pp. 7-9.) This would remove from the Regulation X definition the seventh item, "any other information deemed necessary by the loan originator."[12] With only this information, a significant amount of the information required to be disclosed by the prototype Loan Estimates would be unknown when the disclosure is required.

For example, the lender would not know:

- Whether the borrower will occupy the home as a principal residence;
- Whether the loan will be a first or junior lien;
- Whether the loan is a purchase or refinance;
- If it is a purchase:
  - The purchase price;
  - The amount of transfer taxes;
  - The real estate broker's fee; and
  - Any seller credits or employer-paid items;

[12] 12 C.F.R. § 1024(2)(b).

- Whether the consumer prefers an adjustable-rate (ARM) loan;
- Whether the consumer wants to pay discount points to reduce the interest rate and, if so, how many;
- What loan term (in years) the consumer wants;
- Whether the consumer wants a balloon loan;
- Whether the consumer prefers a prepayment penalty in exchange for a lower rate;
- Whether the loan would have an escrow;
- The cost of homeowners' insurance;
- Whether the property is a condominium and if so, the amount of the dues; and
- Whether the consumer will retain an attorney.

The latest prototype Loan Estimate requires disclosure of all of these items, and for good reason. A robust Loan Estimate requires this information. A consumer's estimate of the property value may be inaccurate, but the loan-to-value ratio is a significant determinant in the pricing of the loan. HUD included the seventh item, "any other information deemed necessary by the loan originator," in its 2008 RESPA reform rule because of its recognition that the GFE would be binding and subject to tolerances. For this reason, HUD permitted the lender to seek any needed information needed before it was bound.

Also, the lien position and whether the property would be owner-occupied would have an impact on the pricing of the loan.

If the lender has only six items of information, it will not be able reliably estimate the loan costs. Therefore, the Loan Estimate would need to be revised when the lender has enough information to solidify the earlier estimate. This would both be confusing to the consumer and add unnecessary costs to the transaction.

We recommend the CFPB incorporate into its definition of application the reasoning behind Regulation C, which requires lenders to collect and report, among other things, the loan type applied for; the loan purpose; the property type; and whether the lien is first or subordinate.[13] These are all necessary for pricing. The lender needs to collect this information in any event, and the method most consistent with the policies behind the Home Mortgage Disclosure Act (HMDA) and Regulation C would be to permit the lender to collect necessary information during application intake.

Additionally, under the new ability-to-repay requirements, lenders are likely to require more, not less, information to protect consumers. For example, many lenders are likely to seek information on residual income or debts beyond those contained in credit reports. We do not want a situation where RESPA-TILA requirements could hamper compliance with the ability-to-repay rule.

The process should provide consumers the time they need to decide whether to apply for an ARM or fixed-rate loan, or to decide how many discount points to pay. Encouraging

[13] 12 C.F.R. § 1003.4(a).

dialog between the lender and consumer on these important decisions would be the better consumer protection policy. Therefore, the three-day clock should begin when the lender has the information it needs from the borrower, because otherwise the lender may need to reject the application, even if the applicant were qualified.

Therefore, we recommend that the CFPB define application as under RESPA currently, for the Loan Estimate so that the lender can collect any information the lender deems necessary to accurately price the loan and populate the Loan Estimate before the three-day clock begins to run.

C. Step 2: Disclosure Upon Loan Approval; Combine With Regulation B Disclosure

Regulation X has an unintended consequence that results in revised GFEs whenever a settlement service charge, which is subject to a ten percent tolerance, changes, due to borrower-requested changes or permissible changed circumstances. The CFPB has expressed concern that repeated redisclosures may harm consumers if the third-party charges can increase ten percent with each revised GFE. The CFPB has indicated it wants to resolve this overdisclosure problem by requiring a redisclosure only when the charges subject to a ten percent tolerance, in the aggregate, exceed the tolerance due to changed circumstances or borrower-requested changes. (Outline p. 11.)

The CFPB's statement in the Small Business Panel outline that "available compliance software likely offers the functionality to track the timing and reasons for changed circumstances" (Outline p. 13) is not the main issue. Rather, the main issue is that there are too many revised GFEs today. Tracking possible changes in costs on a continual basis is burdensome. Many settlement service providers are small businesses, for whom tracking transaction-specific charges is burdensome.

Settlement service charges are numerous and they are dynamic, yet consumers need a static disclosure. Even if the CFPB were to require a revised Loan Estimate when certain charges had increased more than ten percent, charges would still be dynamic.

A workable approach would be to require lenders to redisclose the Loan Estimate at a certain *point in time*, rather than when the charges reach a certain *dollar amount*. Beyond the initial disclosure, that point in time should be when the costs have firmed up sufficiently that a redisclosure would be useful. Some charges would still be dynamic, but the number of revised disclosures would be reduced. We believe that the appropriate point in time is when the lender delivers the Regulation B notification of action taken, which is no later than 30 days after receipt of a complete loan application.[14] This approach would remove the problem of excessive redisclosures, would be operationally workable, and would dovetail well with Regulation B disclosure requirements, making a clean disclosure that consumers could understand. It would also further streamline the disclosures by integrating the KBYO disclosures with other origination disclosures.

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[14] 12 C.F.R. § 1002.9(a)(1).

Of course, certain changes in the loan product will always require revised Loan Estimates regardless of settlement services and regardless of Regulation B. For example, changing from a fixed-rate loan to an ARM, changing from a QRM to a non-QRM loan, or adding a balloon payment or other risky feature will always require a new disclosure. These disclosures would need to be Step 1 disclosures because they will require repricing the loan.

D. Step 3: Disclosure At Least Three Days Before Scheduled Closing

The CFPB is considering requiring delivery of a Settlement Disclosure three business days before closing. (Outline p. 14.) Our suggested timing would be that lenders provide a third Loan Estimate at least three days before closing. This disclosure would not provide the specific disclosure that would be provided in Step 4, yet it would provide consumers with important information that will let them know whether the charges are within the tolerances and the amount of cash that will be needed to close the mortgage loan transaction.[15]

Requiring a final Settlement Disclosure three days before closing would lead to negative unforeseen consequences. It would require the lender to assure, three days prior to scheduled closing, that the financing has been secured as described in the closing documents. This, in effect means that the transaction becomes “wet” in advance of the settlement date. Having a “wet” transaction means the loan must be “booked” in the lender’s pipeline, and the funds made available at that earlier date. This means that the loan is in the warehouse “pipeline” a full three days longer than required in today’s operations—but unlike today’s loans, the loans would be “booked” but yet continue to carry risks that costs and conditions are still subject to change.

This three-day advance booking of loans has several deleterious effects. First, the lender is taking on contractual risks on any changes that may occur (and changes are fully expected to occur as the negotiations between buyer and seller can advance) in the three-day waiting-period. These risks are largely unpredictable. Second, having wet transactions in the pipeline for three additional days means that, to do the same level of transactions that lenders do today, lenders will have to increase warehouse capacity by a considerable amount. We are still estimating the precise amount of the increase necessary to absorb the effects of this rule, but some lenders have preliminarily forecasted that they expect a 30-40 percent more warehouse capacity. The impact to warehouse capacity means, of course, that the added costs and risks will be reflected in

[15] RESPA § 4(b) provides, “Upon the request of the borrower to inspect the forms prescribed under this section during the business day immediately preceding the day of settlement, the person who will conduct the settlement shall permit the borrower to inspect those items which are known to such person during such preceding day.” The CFPB does not have authority to require a settlement statement three days before closing.

loan pricing to the consumer. In addition, it should be noted that lenders cannot augment warehouse line capacity unless they increase net worth—for many banks, such increases is impossible in the short and mid-range term. It is costly in the long run. This would put smaller lenders at a significant disadvantage.

Additional waiting periods due to revised disclosures would exacerbate this warehouse problem greatly, as the lender would incur extra costs for each waiting period. This would be especially inappropriate for waiting periods due to changes in a purchase transaction rather than the loan transaction.

Providing the updated Loan Estimate at least three days before closing would avoid establishing unnecessary waiting periods that delay closings, and it would avoid unnecessarily upending current business practices.

It is important not to trigger waiting periods unless they would provide a tangible consumer benefit.

Waiting periods should be required only for loan-related changes, not purchase-related changes. The buyer and seller may negotiate details of their transaction up to closing without advising the lender. Requiring a waiting period for these changes is unnecessary because the borrower negotiated and agreed to the change.

The CFPB suggests that a waiting period should only be triggered if: the APR increases by more than 1/8 of 1 percent, an adjustable-rate feature, prepayment penalty, negative amortization feature, interest-only feature, balloon payment, or demand feature is added to the loan; or the cash needed to close increases beyond an unspecified tolerance. (Outline p. 14.)

We agree with the CFPB that a minor increase in the APR should not require a waiting period. A change that benefits the consumer, such as a decrease in APR, should never require a waiting period. Short of adding a risky feature to a loan product, any change due to a consumer request should not require a waiting period because the consumer would benefit from it. For example, the consumer may elect to revise the deductible on the homeowner's insurance policy and thereby change the premium. The consumer would have already discussed this with the insurance agent, so there would be no need for a waiting period.

We do not agree that a change in the cash needed to close, by itself, should trigger a waiting period – a new Loan Estimate can provide that information without an unnecessary delay. Waiting periods themselves can significantly increase the cash needed to close.

Cash to close can change for a large number of reasons, some unrelated to the loan, some minor, and some that are the consumer's choice. These do not warrant a waiting period in all cases. Prorated charges and daily interest change daily, but these changes do not warrant waiting periods because they are predictable.

The trigger for a waiting period should be loan-related changes to the consumer's detriment that are significant enough that the consumer needs three days to decide whether to abandon the loan. At this stage of the transaction, the consumer has a financial stake in getting the loan closed, and this needs to be weighed in determining whether a waiting period is appropriate.

Whatever the choice of circumstances to support a waiting period, the rule should permit consumers the ability to waive a waiting period whenever they choose.

Nevertheless, the triggers for waiting periods and for their waiver need to be very clear while not unnecessarily restrictive. Today, consumers can waive their waiting periods if they have a "*bona fide* personal financial emergency[.]"[16] Lenders are unable to determine when such an emergency exits, so they cannot permit waivers. If the trigger for a waiting period or waiver is in any way unclear, lenders will require waiting periods to avoid liability. If the rule it is unduly restrictive, borrowers will in too many cases be unduly delayed.

If the CFPB were to require unnecessary waiting periods, these would become the new unwelcome surprise just before closing.

E. Step 4: Final Disclosure at Settlement

After the last waiting period, or, in most cases where there is no waiting period at all, the person conducting the settlement would provide the Step 4 disclosure, the Settlement Disclosure. It would be easiest for consumers if the disclosure looked the same in Steps 1 through 4, with the difference in the final disclosure being the amount of itemization.

We also suggest that the pages be re-ordered so that the loan-specific information appears in a section separate from the settlement information.

The CFPB is weighing whether the lender or the settlement agent should be responsible for preparing the RESPA-required information. (Outline p. 15.) If it is to be the lender, the lender would need to get final information from the settlement agent at least a week before the closing. We believe this approach would increase waiting periods unnecessarily. Further, the lender should not be responsible for verifying the accuracy of the settlement agent's charges because that would delay closings even further.

From the consumer's point of view, it would be better to have the settlement agent prepare the settlement-related information.

[16] 12 C.F.R. § 1026.19(a)(3).

IV. Conclusion

We greatly appreciate the CFPB's work, and look forward to a result that will truly improve the mortgage process for consumers. For the reasons discussed, we strongly urge the CFPB to design and implement all of the disclosure changes, including those required as a result of Dodd-Frank, comprehensively. Done correctly, this will ensure that the regulations and disclosures are well-designed and benefit consumers.

This is an historic opportunity to finally put in place a mortgage disclosure regime that enables consumers, our customers, to make informed credit decisions. We share in the CFPB's and Congress' mutual goal of ensuring that this project comes to a successful conclusion.

Sincerely,

American Bankers Association
American Escrow Association
American Financial Services Association
American Land Title Association
Community Mortgage Banking Project
Consumer Mortgage Coalition
Mortgage Bankers Association
National Association of Realtors
The Real Estate Services Providers Council, Inc. (RESPRO®)