September 7, 2012

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, D.C. 20552

Re: Docket No. CFPB-2012-0028 and Docket No. CFPB-2012-0029

Dear Ms. Johnson:

The American Financial Services Association ("AFSA") appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (the "Bureau") proposed rule to amend the Home Owner's Equity Protection Act ("HOEPA") and the new expanded definition of finance charge (the "Proposal"). AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

The AFSA members that engage in mortgage lending are traditional finance installment consumer credit lenders that typically offer a broader product range than conventional Fannie, Freddie or FHA lenders. AFSA lenders provide an important source of credit for consumers who live in underserved small towns and urban settings and those who have less than perfect credit.

I. Expanded Definition of Finance Charge

AFSA members feel very strongly that the Bureau should not adopt the proposal to expand the definition of finance charge ("all-in finance charge") and urge the Bureau to table any discussion of adopting an all-in finance charge until after all regulations mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") have been finalized, lenders have had a chance to implement the new rules, the full impact of these regulations can be gauged, and the Bureau can conduct empirical studies to determine whether additional changes are necessary to effectuate the purposes of the Truth in Lending Act ("TILA") and HOEPA.

A. The Bureau Lacks Authority To Eliminate Statutory Exclusions

The Bureau does not have authority to eliminate statutory exclusions from the finance charge for credit insurance and real estate related fees.

TILA Section 106 provides:

> Charges or premiums for credit life, accident, or health insurance written in connection with any consumer credit transaction shall be included in the finance charge unless
>
> (1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit; and
>
> (2) in order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof.[1]

> and

> The following items, when charged in connection with any extension of credit secured by an interest in real property, shall not be included in the computation of the finance charge with respect to that transaction:
>
> (1) Fees or premiums for title examination, title insurance, or similar purposes.
> (2) Fees for preparation of loan-related documents.
> (3) Escrows for future payments of taxes and insurance.
> (4) Fees for notarizing deeds and other documents.
> (5) Appraisal fees, including fees related to any pest infestation or flood hazard inspections conducted prior to closing.
> (6) Credit reports.[2]

Thus, there are clear statutory exclusions from the finance charge for credit insurance and certain real-estate related fees.

Put simply, a federal agency may not change a federal statute by regulation. The Proposal would eliminate both of these statutory exclusions. In doing so, the Bureau relies on its statutory exception authority to include in any regulation "additional requirements, classifications, differentiations, or other provisions, and [to] provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith."[3] Although this provision provides the Bureau with authority to adjust and add to TILA's statutory requirements, it does not authorize the Bureau to eliminate clear statutory mandates. Dodd-Frank imposed sweeping changes to TILA and other consumer financial laws. If Congress intended for the APR and finance charge calculation to change in such a drastic and fundamental way, it would have specifically effected that change in the text of the Dodd-Frank. Thus, this proposed all-in finance charge is statutorily unauthorized. A stated purpose of Dodd-Frank is that the Bureau is to supervise covered persons for compliance with

---

[1] 15 U.S.C. § 1605(b).
[2] 15 U.S.C. § 1605(e).
[3] 15 U.S.C. § 1604(a).

federal consumer financial law. AFSA would suggest that implicit in that stated purpose is the expectation by Congress that the Bureau will, in promulgating its regulations, also comply with the statutory provisions of federal consumer financial law.

B. The All-In Finance Charge is Not Required

The all-in finance charge for real estate loans is not required by Dodd-Frank, and is in direct conflict with statutory requirements of TILA. Mortgage lenders are still struggling to recover from the worst economic crisis in recent history. On top of that, they have incurred, and will continue to incur, staggering costs in monitoring, commenting on, interpreting and implementing the mandated regulatory proposals that have been issued to date. Between the passage of Dodd-Frank and August 30 2012, the following regulations affecting mortgage lending and servicing have been proposed for comment by the Bureau:

- TILA Mortgage Servicing Rules (Docket No. CFPB-2012-0033)
- RESPA Mortgage Servicing Rules (Docket No. Docket No. CFPB-2012-0034)
- ECOA Appraisal Rules (Docket No. CFPB–2012–0032)
- Appraisal Rules for Higher Risk Mortgage Loans (Docket No. CFPB-2012-0031)
- TILA Loan Originator Compensation Rules (Docket No. CFPB-2012- 0037)
- Reopened Comment Period For Ability to Repay Rule (Docket No. CFPB-2012-0022)

To unnecessarily add the additional burden of an all-in finance charge and its associated cost to a recovering mortgage industry would further impair the industry and would ultimately harm consumers as the complexity and cost of these regulations drive lenders out of the mortgage lending market.

C. The All-In Finance Charge Will Reduce Competition

Bluntly, the Proposal is anti-competitive. As the Bureau continues to release proposed and final regulations mandated by Dodd-Frank, many mortgage lenders are questioning whether they can absorb the costs of implementation and continue to be profitable while offering mortgage lending to rural and underserved urban populations. In fact, several AFSA members have expressed that they are seriously considering leaving the mortgage market as a result of the costs imposed by previously issued regulations. The complexity and additional cost of using an all-in finance charge for mortgage lending will no doubt drive additional players from the mortgage market. As smaller lenders are unable to stay in the mortgage business, the inevitable result is that competition will decrease and the market will become more concentrated in a few large lenders. Regulations like this, therefore, will have the ironic, and we believe undesirable, effect of monopolizing the mortgage market. This could produce two serious consequences for consumers. First, if mortgage lending is concentrated in a small handful of lenders, the likelihood of a serious disruption in the availability of credit is exponentially increased. Any threat to the viability of these institutions could pose a situation similar to that in 2008 which required the federal government bailout of Fannie Mae and Freddie Mac. Second, market concentration will reduce or eliminate the availability of credit in disadvantaged and rural areas. Smaller mortgage lenders represent an important source of credit to this population, who are often ineligible for the credit products offered by larger lenders and banks. Some of AFSA's member companies provide mortgage loans to people who may not be eligible for bank loans. If this source of credit goes away, these populations, who are already underserved, will have virtually no access to mortgage loans. Yet, many times, their real property represents their only valuable asset capable of allowing a lender to be willing to lend money to them. Thus, in addition to the general concerns about limited competition, further concentration in the mortgage market poses heightened risk that consumer access to mortgage credit in particular and credit in general will be limited.

D. The Bureau No Longer Considers Finance Charge and APR To Be Important Disclosures

The finance charge and APR disclosures are de-emphasized in the combined TILA-RESPA disclosures. On the Loan Estimate disclosure, the finance charge is excluded and the APR appears on the last page. On the Closing Disclosure, the APR and finance charge disclosures appear next to and only as conspicuous as the "total interest percentage" and "approximate cost of funds" disclosures, both of which the Bureau is considering leaving off the disclosure. It is illogical, unnecessary, and costly to industry to impose this significant burden and additional cost to calculate disclosures that the Bureau itself acknowledges are not important consumer shopping terms.

E. The All-In Finance Charge Would Prevent Comparison of Loan Terms

The APR and finance charge disclosures were originally conceived as tools that would help consumers comparison shop among loan products. By changing the APR and finance charge calculations for mortgage loans only, consumers will not be able to compare the cost of real-estate secured loans against the cost of other loan products. For instance, a consumer who wants a loan to pay for the cost of her child's college tuition would have difficulty determining whether she would get better terms through a home equity loan or an unsecured loan. Using the new all-in finance charge and APR, the home equity loan would appear more expensive, even if that was not the case.

F. The All-In Finance Charge Will Significantly Increase Compliance Costs

The Proposal claims that an all-in finance charge would reduce lenders' compliance costs. In fact, the Proposal would have the opposite effect. The new all-in finance charge would be used only for mortgage lending and only for purposes of disclosure. The old finance charge calculation would still be used for all other types of credit as well as for purposes of determining HOEPA coverage in mortgage lending.[4] Even if the Bureau did not adjust the HOEPA triggers in response to adopting an all-in finance charge, lenders would have to calculate the traditional APR (and therefore the traditional finance charge) for purposes of state usury caps and state high cost loan laws, many of which incorporate elements of the traditional finance charge calculation. Thus, under the Proposal, mortgage lenders would have to undertake the following calculations:

---

4 As discussed below, if the all-in finance charge is adopted, the HOEPA test will need to be revised to ensure that a significant number of transactions that currently fall outside of HOEPA will not be caught within its coverage.

1. All-in finance charge
2. APR, using the new all-in finance charge
3. Higher priced mortgage loan trigger
4. Traditional finance charge (as modified by Dodd-Frank)
5. Transaction Coverage Rate, using traditional finance charge (as modified by Dodd-Frank)

The Proposal would add to the number of calculations. More calculations necessarily mean more complexity, increased compliance costs and increased training costs. This effect is compounded for lenders like AFSA member companies that also engage in non-mortgage lending. Non-mortgage lenders would have to build and maintain a completely separate process for calculating finance charge and APR for mortgage lending and non-mortgage lending.

G. The All-In Finance Charge Includes Fees That Creditors Cannot Control

Many of the fees to be included are not within the control of the creditor, and in some states the creditor may not even control which entity provides services, the cost of which would be included in the finance charge. For example, South Carolina gives borrowers the right to select the attorney to close their loans. S.C. Code 37-10-102. A lender has no control over such a provider and cannot stop the provider from providing an unreasonably low estimate for its services and then imposing a higher charge at settlement. The result of the higher than expected closing cost could result in a loan being a higher priced mortgage loan or a HOEPA loan, but the creditor would not know until after the closing that the transaction hit one of these triggers. This places lenders in an untenable position whereby they, through no fault of their own, could violate TILA, and be subjected to regulatory enforcement actions or expensive lawsuits; or decide simply to not make mortgage loans.

II. New Points and Fees Trigger for HOEPA

While AFSA members strongly oppose the adoption of an all-in finance charge, if the Bureau adopts the all-in finance charge concept, it will need also to exclude from the definition of points and fees the additional closing costs that are captured by the all-in finance charge. Otherwise, a significant portion of transactions that now fall outside of the coverage of HOEPA would become high-cost mortgage loans.

For example, consider the 30-year fixed rate mortgage the Bureau used in its Closing Disclosure example in the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act and the Truth in Lending Act Proposed Rule, 77 F.R. 51116, 51368 (August 23, 2012)(0.25 points and fees of $4,876 for a total in points and fees of $5,281). Under the current HOEPA test, the points and fees in this example are well under the points and fees test (by $10,160). If the all-in finance charge is adopted and no adjustment is made in the points and fees trigger, the points and fees in this example are much closer to making it a HOEPA loan (within less than $3,000). We note that the example used by the Bureau was a moderately priced mortgage transaction. Other mortgage loans that have only slight risk adjustments in their pricing would fall within the HOEPA coverage under an all-in finance charge rule unless some adjustments are made. While

Congress revised the coverage of HOEPA somewhat in Dodd-Frank, it did not contemplate such a significant expansion of the severe lending restrictions in HOEPA.

We also note that Congress specifically addressed and revised the definition of the points and fees trigger for HOEPA loans in Dodd-Frank. It is inappropriate for the Bureau to revise this newly adopted definition of points and fees without a demonstrative reason. The Bureau has not offered any empirical evidence that the new definition of points and fees adopted by Congress in Dodd-Frank fails to effectuate the purposes of HOEPA, is necessary to prevent circumvention of evasion thereof, or would facilitate compliance with HOEPA. In fact, until the Congressional definition is adopted by regulation and tested in the marketplace, the Bureau will have no basis for revising the points and fees test mandated by Congress.

III. <u>Counseling Requirement</u>

In implementing the HOEPA counseling certification requirements in Dodd-Frank, the members of AFSA urge the Bureau to clarify that counseling conducted by telephone or over the Internet will satisfy this requirement as long as the counseling is done by a HUD-approved counselor. We note that the HUD regulations governing approved housing counseling programs specifically authorize counseling either in face-to-face sessions or by telephone.[5] This flexibility is particularly important in underserved rural areas where the nearest HUD-approved housing counselor may be hours away.

Additionally, AFSA members are concerned that the counseling requirement could unnecessarily delay loan closings if the counseling certification cannot be obtained in timely manner. AFSA requests that the CFPB consider incentivizing counselors to complete the certification within a certain time period, or, alternatively, allowing lenders to move forward with the transaction if the certification is not provided within a certain time period.

IV. <u>Fees for Payment Deferrals</u>

In implementing the Dodd-Frank prohibition on fees for payment deferrals, the members of AFSA request that the Bureau consider that many smaller creditors offer mortgage loans under state laws that permit the pre-computation of interest, with an appropriate interest refund upon prepayment. Under a precomputed loan contract, interest does not accrue on the outstanding daily balance like it does on an interest-bearing transaction of the type made by most large mortgage lenders. When a payment deferral is offered on a precomputed transaction, a deferral fee is traditionally charged to reflect the creditor’s cost of leaving its money outstanding for a longer time. The members of AFSA believe this type of deferral fee on a precomputed transaction is different from the penalty fees that Dodd-Frank sought to prohibit.

Thus, in implementing this proposal, we request that the Bureau exclude from a prohibited deferral fee any fee that is limited to compensating the creditor for the interest that would accrue on the deferred balance at the annual percentage rate over the deferral period. Such exclusion would put smaller creditors that offer precomputed transactions under state law on the same footing as larger lenders that make traditional Fannie or Freddie type mortgage loans.

[5] 24 CFR 214.300(a)(3).

*   *   *   *   *

AFSA thanks the Bureau for the opportunity to comment on the Notice. Please feel free to contact me with any questions at 202-466--8618 or bhimpler@afsamail.org.

Sincerely,

Bill Himpler
Executive Vice President
American Financial Services Association