American Financial Services Association

November 6, 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

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 referenced above (the "Proposed Rule"), which seeks to integrate mortgage disclosures under the Real Estate Settlement Procedures Act ("RESPA") and the Truth in Lending Act ("TILA"). 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.

Some of AFSA's members that engage in mortgage lending are traditional installment consumer credit lenders that typically offer a broader product range than conventional Fannie, Freddie or FHA lenders. These lenders offer a variety of loans, including consumer loans and mortgage loans for household purposes. These loans are made under various state loan laws, and include multiple types of rate structures: interest bearing, precomputed, add-on, and split rate. As explained more fully below, these rate structures are very different in their calculations and effects. AFSA lenders provide an important source of credit for consumers who live in underserved small towns and urban settings, as well as those who have less than perfect credit.

I. Expanded Definition of Finance Charge

AFSA members submitted a separate comment in September 2012 in response to CFPB 2012-0033 and 0034 discouraging the Bureau from adopting the proposal to expand the definition of finance charge. AFSA members reiterate their request for 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 TILA and the Home Ownership and Equity Protection Act ("HOEPA").

II. <u>Definition of Application – 12 C.F.R. § 1026.2(3)(i)</u>

The Proposed Rule adopts a new, more limited definition of "application." Under the new definition, a creditor is deemed to have received an application upon receipt of six specific pieces of information. This proposed definition presents at least three problems.

First, the Proposed Rule would create a different definition of "application" for TILA/RESPA purposes and for Equal Credit Opportunity Act purposes. More broadly, the Proposed Rule would create different definitions of an "application" for mortgage and non-mortgage loans. For lenders whose employees make mortgage and non-mortgage loans under the various rate structures, this difference will create additional costs, require additional training, require revised compliance procedures and corporate policies, and increase administrative burdens for lenders. In short, such a difference will add complexity to the mortgage lending process. We encourage the Bureau not to adopt a new definition of "application" for this limited mortgage-related purpose.

Second, requiring lenders to consider an application final before knowing the amount of taxes and insurance virtually guarantees that at least one revised Loan Estimate (and an additional three day waiting period) will be required. In order to provide the borrower with a meaningful Loan Estimate, the estimate must include an accurate estimate of taxes and insurance. While a lender can obtain the borrower's tax liability by calling the local taxing authority, obtaining an accurate estimate of the annual cost of insurance is very difficult. In the experience of AFSA members, the borrower's estimate of these amounts is frequently incorrect and significantly different than the actual cost of insurance finally determined. This results in at least two problems. One, requiring a lender to give a Loan Estimate without accurate tax and insurance information virtually ensures that a revised Loan Estimate will be required in most loans. This would then delay the loan closing beyond the time borrowers would reasonably expect to receive their proceeds. Two, were the borrower to comparison shop for another loan from another lender, who estimated a different annual insurance cost, the borrower would not then be comparing comparable Loan Estimates. In AFSA members' experience, one of the most important, if not *the* most important, number that a borrower considers is the monthly payment amount. By comparing loans that used different annual insurance premiums, the estimated monthly payments could well be significantly different. This, then, could result in confusion for the borrower, or the borrower choosing the loan with the lower estimated monthly payment, only to find later that the payment amount they thought they were getting changed significantly due to an incorrect insurance estimate. Delaying the "completion" of the application long enough to obtain an accurate insurance premium would not harm the borrower, and would better ensure both that the loan closes as soon after the Loan Estimate as possible and that the borrower obtains the best information possible without unnecessary delay.

The problems caused by not giving a lender enough time to obtain accurate closing costs such as insurance are demonstrated by recognizing the effect on high cost, or potentially high cost (HOEPA) loans. A completed application triggers certain additional disclosures required by HOEPA (Section 32), in addition to the Loan Estimate. Changes in estimated insurance amounts will likely trigger revised HOEPA disclosures, which would further delay the loan closing. Lenders who have made the decision not to make HOEPA loans monitor the treasury rates and establish their pricing accordingly for each month. If closing costs increase – due to an inaccurate estimate of insurance costs, for example – and a revised Loan Estimate is required, closing would be pushed back and could be bumped into the next calendar month. If closing is pushed into the next calendar month, different HOEPA triggers could apply, and the lender may have to adopt different loan pricing to avoid turning a non-HEOPA loan into a HOEPA loan. If, however, the loan then becomes a HOEPA loan, the lender would have to revise the Loan Estimate, provide a HOEPA disclosure and further delay closing.

III. Revised Loan Estimates – 12 C.F.R. § 1026.19(e)(4)(ii)

The Proposed Rule would limit closing costs that can increase after the Loan Estimate is provided. And, even when an exception allows closing costs to increase, an updated Loan Estimate is required, as well as an additional waiting period. The Proposed Rule specifies that the revised Loan Estimate may not be provided at the same time as the final Closing Disclosures (i.e., three -business days before consummation). AFSA members are concerned that this could delay closings and create problems for borrowers, for example, when the purchase of a new home is contingent on the successful closing on the sale of an existing home or when a borrower has a pending expense, such as a tuition payment, that is coming due. Where a permissible change occurs within a short period of time before closing, AFSA members request that the Bureau allow lenders to provide the new Loan Estimate and the Closing Disclosures simultaneously so as not to further delay the closing and inconvenience the borrower.

IV. Timing for New Closing Disclosures – Exemptions – 12 C.F.R. § 1026.19(f)(2)

The Proposed Rule would require new Closing Disclosures and an additional three-day waiting period in the event of any changes to the Closing Disclosures after they are delivered. The Proposed Rule provides an exception to this requirement if the changes result in an increase of less than $100.

AFSA members feel that the $100 threshold in the second exception is too low. In a mortgage transaction, $100 represents a very small percentage of the overall transaction amount—only 1/1,000th of a $100,000 loan or 1/100th of a $10,000 loan. Further, mortgage transactions are fairly complex and there are many variables that could change between application and closing. Setting the redisclosure threshold so low will result in a higher than anticipated number of revised Loan Estimates and additional three-day waiting periods. A threshold of $250 is more appropriate and strikes the right balance between the need for flexibility in a mortgage transaction and the need to protect the consumer from being surprised at the closing table. Therefore, AFSA members are concerned that not allowing revisions for up to $250 will harm borrowers. Examples of such harm include when the purchase of a new home is contingent on the successful closing on the sale of an existing home or when a borrower has a pending expense, such as a tuition payment, that is coming due. In such circumstances, requiring additional waiting periods will result in delayed closings and will unnecessarily burden cash-strapped borrowers. This is especially true of borrowers who, like most of AFSA's members' borrowers, are refinancing a loan or who are using their real estate to secure a loan with no seller involved and at a time when timely access to cash is important. Therefore, where a change occurs within a short period of time before closing, AFSA members request that the Bureau allow lenders to provide the new Loan Estimate and the Closing Disclosures simultaneously so as not to delay the closing and inconvenience the borrower.[1]

V. Recordkeeping – 12 C.F.R. § 1026.25(c)(iii)

The Proposal would require lenders to keep records in "electronic, machine readable format." This requirement is fraught with problems. It is not clear what is meant by "machine readable format." Does this mean that the lender must be able to scan documents so that the Bureau may later search and retrieve information from those documents? If so, that assumes all lenders have a data format that can be pulled and read in this manner. Would the Bureau require all lenders to switch to a new system that has this capability? It seems like overreaching for the Bureau to require lenders to implement specific systems in this way. Consider that the Electronic Signatures in Global and National Commerce Act (ESIGN) prohibits a state or federal government from requiring the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records.[2] Finally, any type of system required to maintain electronic records will inevitably become outdated. It is not clear how the Bureau will deal with evolving technology. Will updating be required? What standards will apply to any such updating requirement? How often will these expensive systems need to be updated?

Whatever this requirement means, it is extremely problematic for smaller lenders who do not have the capability or systems to create and store this large quantity of data electronically. Some AFSA members do not currently have the capability to store loan documents electronically. The cost for smaller lenders to implement the new systems that would be required to comply with this requirement would be prohibitively expensive and could drive more small lenders out of the market.

VI. Forms – 12 C.F.R. §§ 1026.37, 1026.38

AFSA members support the effort to integrate RESPA and TILA disclosures and applaud the Bureau for its careful approach to this monumental task. The proposed disclosures are much clearer and more understandable for consumers for many transactions, particularly the standard home purchase money mortgage. There are, however, problems with the proposed Closing Disclosure that need to be addressed before the proposed forms can be used with non-purchase money loans and refinancing (single party loans).

First, the Closing Disclosures have been used primarily to present a traditional purchase money transaction between a seller and a buyer. To a great extent, the Closing Disclosures do a good job in explaining these transactions. But, while the regulations mention transactions in which a seller

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1 We note that the Proposed Rule would permit a borrower to provide a statement of bona fide emergency. However, in the experience of AFSA members, the statement of bona fide emergency in the context of rescission is simply never used, even if warranted, for at least two reasons. One, many borrowers are not sophisticated in financial matters and do not know how to draft such a statement. Two, given the clear policy against use of this exception as evidenced by the refusal to allow lenders to use a form, lenders are unwilling to risk the potential liability by assisting a borrower in drafting the statement.

2 15 U.S.C. § 7004(b)(2)(C)(iii).

is not involved, and a blank model form is provided for such transactions (Model Form H-25(j)), additional thought and guidance is needed for these transactions.

Net Loan Proceeds: The primary concern noted by the AFSA members is the lack of a clear and conspicuous disclosure of the amount of funds the borrower will receive from the transaction. Many home equity loans and refinancings involve situations where the borrower expects to walk away from closing with a considerable proceeds check. Often the proceeds are going to address important consumer needs such as to finance a college education or a major home improvement project. However, the forms and instructions provided in the Proposal do not recognize the importance of clearly telling the consumer the amount of his or her net loan proceeds. It appears from the Proposal that this information would only appear on page three of the Closing Disclosure in the "Calculating Cash to Close" section of the form. The net proceeds amount would appear on the line labeled "Funds for Borrower" and would be a *negative* amount. This is particularly ironic because cash to close usually is not an important amount in a home equity loan or refinancing. It is typically the case that borrowers do not have to bring any cash to closing for these transactions. The net loan proceeds amount should be clearly and conspicuously disclosed on the Model Form H-25(J) – preferably on page one as this is the most important piece of information from the borrower's perspective – so that the consumer can quickly confirm that they are receiving the loan proceeds that they have been promised. Section N of the current HUD-1A Settlement Form (entitled "Net Settlement") provides a good example of the type of information that is helpful to consumers and that should appear in Model Form H-25(J).

Disclosure of the "Interest Rate": Unlike prior TILA disclosures, the Closing Disclosure (and the Loan Estimate) requires the disclosure of the "interest rate." The Proposed Rule seems to assume that all mortgage loans are simple interest transactions where a single interest rate is applied to the balance that is outstanding from time to time. However, AFSA members offer loans under many of the older state consumer finance statutes that authorize precomputed rates, add-on interest rates, discount rates and even split interest rates (where the interest rates are precomputed based on different rates applying to different portions of the precomputed loan amount) [3].[4] Note that these are not variable rates; the amount of the finance charge is calculated in advance and does not change for these types of loans. However, none of them have a simple "interest rate" that can easily be disclosed. One of the original benefits of the TILA requirement to disclose an annual percentage rate was to cut through the different ways states permitted interest rates to be calculated and to come up with a single measure for all types of loans. Now that the Proposed Rule will once again require the disclosure of an "interest rate," AFSA members must have guidance on how this should be done for non-simple interest transactions. This is not academic. Without explicit guidance in defining "interest rate" for these various rate structures, there can be no way for a consumer to comparison shop different loans, and lenders

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[3] For example, in Florida for loans that do not exceed $25,000, a lender may charge a maximum interest rate of 30% per annum, computed on the first $2,000 of the principal amount as computed from time to time; 24% per annum on that part of the principal amount as computed from time to time exceeding $2,000 and not exceeding $3,000; and 18% per annum on that part of the principal amount as computed from time to time exceeding $3,000 and not exceeding $25,000. See, Fla. Stat. Ann. § 516.031(1).

will be exposed to lawsuits on this point if they do not disclose this in the way a plaintiff's expert thinks more appropriate.[5]

Amount Paid on Prior Loans with the Same Creditor: AFSA members also need guidance on where they should disclose the amount of proceeds that will be applied to pay off an existing loan with the same creditor. It is clear from the Proposed Rule that when a home equity loan or refinance transaction pays off a loan to a third party, the name of the prior lender and the amount of the payoff would appear under the heading "Disbursements to Others." It is less clear if a payoff amount that is going to the creditor to pay off a prior loan with the same creditor should be disclosed in this area or elsewhere on the Closing Disclosure. AFSA members request guidance on this issue.

Second, Dodd-Frank requires the forms to include several pieces of information that AFSA members do not believe are helpful to borrowers and, in fact, would detract from the overall clarity of the proposed forms. The disclosure of the "total interest percentage" and the "approximate cost of funds," as the Bureau has discovered in the course of testing the proposed disclosures, are confusing to consumers and do not appear to be helpful to consumers in comparison shopping for loans and could contribute to "information overload" for consumers. AFSA members agree with the concerns expressed by the Bureau as the result of its consumer testing and would encourage the Bureau to use its exception authority to eliminate these superfluous disclosures in the interest of more streamlined, meaningful disclosure forms.

VII. Safe Harbor

AFSA members urge the Bureau to provide a safe harbor for using the proposed forms. AFSA members fully support the integrated disclosures and believe that they benefit consumers and lenders alike. However, the difficulty in integrating disclosures produces the understandable result that the proposed disclosures deviate in several critical ways from the requirements of TILA and RESPA. For example, TILA provides that the annual percentage rate and finance charge disclosures must be more conspicuous than other disclosures.[6] The APR disclosure appears on the last page of both the Loan Estimate and the Closing Disclosure. The finance charge has been eliminated entirely from the Loan Estimate and appears on the last page of the Closing Disclosure with no special formatting requirements to make this disclosure more conspicuous. AFSA members do not disagree with the placement of these disclosures, but are uncomfortable using the new disclosures without the protection of a clear and unambiguous statement from the Bureau that use of the proposed forms in accordance with the regulations would be a safe harbor for compliance with both TILA and RESPA.

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[5] The problem is demonstrated by considering, for example, that a 10% add-on interest rate is approximately equal to an 18% simple interest rate; and a 10% discount rate is approximately equal to a 17.97% simple interest rate.

[6] 15 U.S.C. § 1632(a).

AFSA thanks the Bureau for the opportunity to comment on the Proposed Rule. Please feel free to contact me with any questions at 202-466-8616 or bhimpler@afsamail.org.

Sincerely,

Bill Himpler
Executive Vice President
American Financial Services Association