



Credit Union National Association

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November 6, 2012

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

Re: Proposed Rule on High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X);  
Docket No. CFPB-2012-0029

Dear Ms. Jackson:

This letter represents the views of the Credit Union National Association (CUNA) on the implications for the Home Ownership and Equity Protection Act (HOEPA) of the Consumer Financial Protection Bureau's (CFPB) proposed rule to amend Regulation X and Regulation Z to implement changes to the Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA). The changes to those Acts were made by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Specifically, the proposed amendments would implement changes to TILA that expand the types of mortgage loans that are subject to the protections of HOEPA, by revising and expanding the triggers for coverage under HOEPA. By way of background, CUNA is the largest credit union advocacy organization in the country, representing approximately 90% of the nation's 7,000 state and federal credit unions, which serve approximately 95 million members.

This letter only addresses approaches the CFPB should consider with regard to determination of HOEPA coverage if the CFPB adopts a more inclusive definition of "finance charge" under the TILA-RESPA combined forms proposal. Our comments on all other aspects of the HOEPA Proposal were addressed in a September 7, 2012 letter to the CFPB.

CUNA does not support the proposed expanded definition of "finance charge" under the TILA-RESPA Proposal (Docket No. CFPB-2012-0028). However, if the agency proceeds with the more inclusive definition, we urge it to adopt a number of changes regarding alternative triggers for determining HOEPA coverage and other aspects of the proposal.

### CFPB's Concurrent Proposed Rulemaking on TILA-RESPA

The CFPB has concurrently issued a separate rulemaking to amend Regulation Z and Regulation X to implement provisions of TILA and RESPA. Among other proposed changes,



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the TILA-RESPA Proposal would amend the definition of finance charge to make it more inclusive. The CFPB asserts that a more inclusive approach to the finance charge—which is used to compute the annual percentage rate (APR)—would result in an APR that better reflects the true cost of credit. The TILA-RESPA Proposal would include in the finance charge for certain closed-end credit transactions a number of fees that are currently excluded. These fees would include:

- Closing agent charges;
- Application fees charged to all applicants for credit;
- Taxes or fees required by law and paid to public officials related to security interests;
- Premiums for insurance obtained in lieu of perfecting a security interest; and
- Various real-estate related fees, such as lender required title insurance and appraisal and survey fees.

Under TILA (as revised by the Dodd-Frank Act), a loan is considered to be high-cost, and thus covered by HOEPA, if: (1) the total points and fees payable in connection with the transaction exceed specified thresholds (points and fees coverage test); (2) the transaction's APR exceeds the applicable average prime offer rate (APOR) by a specified threshold (APR coverage test); or (3) the transaction has certain prepayment penalties.

#### Proposed APR Coverage Test

The CFPB is proposing two alternatives to implement the APR threshold for a high-cost mortgage under amended TILA. As proposed, the revised thresholds would generally provide that a consumer credit transaction is a high-cost mortgage if:

- The APR, under Alternative 1, or the TCR, under Alternative 2, exceeds the APOR for a comparable transaction by: (1) more than 6.5 percentage points for a first-lien mortgage or 8.5 percentage points, if the dwelling is personal property and the total transaction amount is less than \$50,000; or (2) 8.5 percentage points for a second-lien mortgage;
- The total points and fees exceed: (1) for a loan of \$20,000 or more, 5% of the total transaction amount; or (2) for a loan of less than \$20,000, the lesser of 8% of the total transaction amount or \$1,000; or
- The transaction provides for prepayment fees and penalties that (1) may be imposed more than 36 months after account opening or (2) exceed more than 2% of the amount prepaid.

Under Alternative 1, the CFPB has predicted that the more inclusive finance charge could result in additional loans being covered as high-cost mortgages because closed-end loans would have higher APRs, and we agree that is the likely outcome.

We appreciate the CFPB's recognition that an expanded definition of finance charge could have unintended consequences on related regulations. As discussed below, we are concerned that use of either alternative—APR or TCR—that the CFPB has offered would result in a contraction of available credit to consumers. At a time when our economy is in such a fragile state, CUNA urges the CFPB to exercise its authority to expand, rather than contract, credit availability and financial product choices for consumers.

### *Alternative 1 (APR) – Proposed by the CFPB*

If the CFPB expands the definition of “finance charge,” the corresponding APR used to determine HOEPA coverage will likely cause more mortgage loans to meet or exceed HOEPA’s coverage thresholds. For credit unions, we feel this outcome is unacceptable. Credit unions do not have the objective of pushing their members into high-cost loans, and their loan products should not be rendered “high-cost” by virtue of arbitrary regulatory treatment, which will subject more mortgage loans to limitations and restrictions.

### *Alternative 2 (TCR) – Proposed by the CFPB*

As discussed above, an alternative method of compensating for the broader definition of finance charge would be to replace the APR benchmark for closed-end mortgage loans with the TCR. The TCR would be calculated solely for purposes of determining whether a closed-end transaction is covered by HOEPA, and would not need to be disclosed to the consumer. The calculation of the TCR would be the same as that of the APR for a closed-end transaction, except that the TCR would not include certain fees paid by the consumer to third parties. Thus, the TCR could result in some loans not being classified as high-cost mortgages that would otherwise qualify under an APR threshold.

Because the proposal to broaden the definition of “finance charge” does not apply to open-end transactions, the CFPB proposes to retain the APR as the rate that will be compared to the APOR to determine whether an open-end credit plan is a high-cost mortgage under HOEPA. We believe it would be unduly burdensome to require creditors, including credit unions, to use one calculation for a closed-end loan and another for an open-end loan. We believe one calculation should be used for both types of loans.

### *Alternative 3 – Suggested by CUNA*

Because we have serious concerns with both alternatives the CFPB has offered, we suggest an alternative approach for creditors to determine HOEPA coverage. Alternative 3 incorporates certain aspects of Alternatives 1 and 2, as well as other characteristics that we believe will make it a more manageable option for creditors, while still achieving the objective of both the CFPB and Congress.

The CFPB has determined it has the authority to use a rate other than the APR for determining HOEPA coverage, as evidenced by proposed Alternative 2 (TCR).<sup>1</sup> Thus, we believe the CFPB is well within its authority to use a modified APR, such as that suggested under Alternative 3, for HOEPA coverage determination purposes only.

Under Alternative 3, creditors could exclude from the finance charge additional fees and costs retained by third parties, except for those retained by mortgage brokers or affiliates of the creditor; these exclusions are consistent with those of the proposed TCR. This finance charge would be used to calculate the APR for purposes of determining which mortgage loans are covered by HOEPA.

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<sup>1</sup> Specifically, the CFPB relies on its authority under TILA section 105(a) and (f) and Dodd-Frank Act sections 1032(a) and 1405(b). 77 Fed. Reg. 51142.

### ***Finance Charge Used for Alternative 3 APR Calculation***

	<b>Charges Retained by Creditor</b>	<b>Charges Retained by Third Party</b>
For Coverage Determination Purposes	Included	Not included
For Disclosure Purposes	Included	Included

The CFPB should allow creditors to choose whether to use the APR, TCR, or our Alternative 3 to determine whether a loan is covered by HOEPA.

### **Use of APOR as Benchmark**

There are currently some differences between the APR and the APOR, which as noted above is the benchmark rate under the Dodd-Frank Act for determining HOEPA coverage. The APOR is generally calculated using data that includes only contract interest rate and points, but not other origination fees. The current APR includes not only discount points and origination fees but also other charges the creditor retains and certain third-party charges. A more inclusive finance charge, which as proposed would also include most third-party fees, would widen the disparity between the APR and the APOR and expand coverage of HOEPA.

If the CFPB adopts a more inclusive finance charge in its TILA-RESPA final rule, we urge it to thoroughly examine whether parallel modifications to the APOR calculation are appropriate and would provide a more accurate measurement of a high-cost mortgage loan under HOEPA.

### **Points and Fees Coverage Test**

Under HOEPA's points and fees coverage test, the definition of points and fees includes, as its starting point, the finance charge. Therefore, a potential consequence of the more inclusive finance charge is that more loans might exceed HOEPA's points and fees threshold because new categories of charges would be included in the calculation of total points and fees for purposes of that coverage test.

Similar to our concerns noted above regarding the APOR, we ask the CFPB to consider as a way to provide a more accurate measurement of a high-cost loan revising the definition of points and fees to reflect the expanded definition of finance charge, if adopted. For example, the CFPB should consider amending the definition of points and fees to add the some or all of the fees and charges that the CFPB is proposing to add to the finance charge.

### **Effective Date**

The CFPB has noted that because the final rule will provide important benefits to consumers, it seeks to have the rule become effective as soon as possible, even though there is no statutory deadline. As mentioned above, CUNA and the credit union industry support appropriate disclosure of information that will benefit the consumer. However, in light of the

compliance burden the final rule will impose on lenders to update systems and retrain staff, we urge the CFPB to provide for a lengthy implementation period and mandatory compliance date for credit unions of at least 18 - 24 months after the final rule is published in the *Federal Register*.

### Conclusion

Thank you for the opportunity to express our views on the CFPB's HOEPA Proposal to amend Regulation Z to compensate for the CFPB's proposed amendment to the finance charge in its TILA-RESPA Proposal. In addition to the comments above, we urge the CFPB to provide flexibility under the final rule, wherever possible, as well as to do all it can to minimize the implementation costs for credit unions. If you have any questions about our comments, please do not hesitate to give Senior Vice President and Deputy General Counsel Mary Mitchell Dunn or me a call at (202) 508-6743.

Sincerely,

A handwritten signature in cursive script that reads "Luke Martone". The signature is written in black ink and is positioned above the typed name and title.

Luke Martone  
Assistant General Counsel