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CFPB Proposal to Amend Regulation Z, Implementing the Truth-in-Lending Act, and Regulation X, Implementing the Real Estate Settlement Procedures Act, to Combine Certain Mortgage Disclosures Relating to Loan Application and Closing

Executive Summary

- The Consumer Financial Protection Bureau this week issued a proposal to amend Regulation Z, which implements the Truth in Lending Act (TILA), and Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA), in order to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to combine certain disclosures mortgage loan applicants receive under these Acts, as well other disclosures provided to borrowers in connection with closing a mortgage loan.
- A link to the proposal, which also implements other provisions in the Dodd-Frank Act and provides guidance on complying with new and existing requirements, is [here](#). The document issued for comments is 1099 pages (shorter in the Federal Register version) and includes the proposed new forms as well as commentary changes to help explain the proposed regulatory provisions as well as sample forms for different loan products.
- What credit unions will be required to do:
 - Under the proposal, credit union mortgage lenders will be required to provide a new form, the Loan Estimate form, to applicants for most closed-end mortgage loans secured by land, except for reverse mortgages, mortgages secured by a mobile home, or other dwelling that is not attached to land within three business days of when they submit their application. The proposed rule also does not apply to home equity lines of credit, or to creditors who make five or fewer mortgages in a year. The form would replace the Good Faith Estimate under RESPA and the "early" disclosures provided under TILA. As described below, for many home loan applicants, the creditor would also continue to provide a special information booklet to the applicant. In addition, a new "Closing Disclosure" form for home loan borrowers must also be provided at least three business days before the loan is closed. This form would replace the HUD-1 form under RESPA as well as the "final" TILA disclosures. (One of the reasons the document is lengthy is because it provides line-by-line guidance on the contents of the proposed forms.) The agency has

included model forms for the Loan Estimate and Closing Disclosure to cover different types of closed-end mortgage transactions covered by the proposal.

- The proposal also contains several substantive provisions that would impact credit unions as mortgage lenders.
 - It would require most up-front costs associated with a closed-end mortgage secured by land or a dwelling to be included in the finance charge. As discussed below, this expansion of the finance charge and corresponding APR will have several effects and CUNA will be raising serious concerns.
 - The proposal would also require lenders to keep records relating to the new forms in a standard, “machine readable” electronic format which may be problematic for smaller institutions.

Currently, Section 1026.25 of Regulation Z requires creditors to retain evidence of compliance with TILA for two years after the date the disclosures are required to be made or action is required to be taken. Section 1024.7(f) of Regulation X requires lenders to retain documentation of any reason for providing a revised Good Faith Estimate for no less than three years after settlement, and Section 1024.10(e) of Regulation X requires lenders to retain each completed RESPA settlement statement and related documents for five years after settlement, unless the lender disposes of its interest in the mortgage and does not service the mortgage. Importantly, the Bureau is proposing Section 1026.25(c)(1)(i) which would require creditors to retain evidence of compliance with the requirements of Section 1026.19(e)(the new Loan Estimate) and Section 1026.19(f)(the new Closing Disclosure) for **three** years after the later of the date of consummation, the date the disclosures are required to be made, or the date the action is required to be taken.

- Also, consistent with existing requirements, creditors could not charge more in closing costs than what is disclosed in the Loan Estimate form unless an exception applies, such as when the consumer asks for a change, the information provided at application was inaccurate or the Loan Estimate form expires; in those cases, an updated Loan Estimate form would also be provided.

Importantly, the proposal would add new restrictions on charges for the following services: the lender’s or mortgage broker’s charges for its own services, charges for services provided by an affiliate of the lender or mortgage broker, and charges for which the lender or mortgage broker does not permit the consumer to shop. Unless an exception applies, none of these charges can increase from the amounts stated on the Loan

Estimate form. These charges are now subject to a 10% tolerance, which the proposed rule would reduce to 0%. We will be weighing in with concerns on this as well.

- The Dodd-Frank Act requires the proposal to implement the combined forms to be issued for comments by July 21, 2012 but does not indicate a compliance date. Additionally, the Dodd-Frank Act requires a number of new disclosures that have a statutory deadline in January 2013. The agency is seeking comments on when compliance with the rule should become mandatory and also on delaying the effective date of the new disclosures to coincide with compliance with the overall rule. CUNA will strongly support the delay and encourage an overall compliance date that will provide ample time for affected credit unions to get ready to meet new requirements.
- Comments on the proposal are generally due November 6, 2012. However, provisions regarding the finance charge and the annual percentage rate (APR), as well as the delayed effective date of several of the new disclosures under the Dodd-Frank Act, are open for comment only through September 7, 2012. While the new forms themselves may be fairly straight forward, the proposed rule changes to bring about the integration of the forms are lengthy and complex.
- In light of the complexities of the proposal, we are handling it somewhat differently than usual. We will be providing two CUNA Comment Calls to address issues based on when comments are due. We will also be developing surveys regarding key changes in the proposals to help facilitate responses from credit unions and leagues.

This CUNA Comment Call provides an overview of the proposal and focuses on the aspects of the proposal for which comments are due first, namely the APR and finance charge proposed changes and the proposed approach to delay the effective date of certain disclosure provisions required by the Dodd-frank Act.

CUNA's Regulatory Advocacy group is preparing a second CUNA Comment Call that provides greater details of the proposed rule changes, commentary, and the forms.

With comments due September 7 on the APR and delayed effective date of certain disclosures, we hope to hear from credit unions and leagues by August 10 so we can draft our letter and circulate to the credit union system. Please send your comments to CUNA's Deputy General Counsel [Mary Dunn](#); Senior Assistant General Counsel [Jared Ihrig](#); or Assistant General Counsel [Luke Martone](#). We will be working with CUNA's Housing Finance Reform Task Force, CUNA's Consumer Protection Subcommittee, and the CUNA Lending Council, as well as the AACUL Regulatory Advisory Committee to develop our letter.

The supplementary information to the proposal notes that the agency has six rules in the works that are required by the Dodd-Frank Act to take effect January 21, 2013. There are a number of rulemakings on mortgage servicing, mortgage loan originator

compensation, high-cost mortgages, appraisals, ability-to-repay and escrow requirements. These proposals are anticipated in the coming weeks.

Delay of the Effective Dates of Some Dodd-Frank Act Disclosure Requirements

The Dodd-Frank Act imposes new disclosure requirements under TILA, RESPA, and other consumer laws that creditors will be required to provide when a consumer applies for a loan or shortly after the consummation of the loan. The Dodd-Frank Act requires institutions to comply with these disclosure requirements by January 21, 2013. This is in contrast to the provisions regarding the combination of the TILA-RESPA forms that were required to be proposed this month but have no statutory compliance date.

In light of the closely-related nature of these disclosures to the integrated forms, the Bureau is proposing to delay the compliance date for these additional disclosures until the final rule combining the TILA-RESPA forms takes effect. The Bureau plans to issue a final rule to implement the delay of the disclosures prior to January 21st of next year. The disclosures that the Bureau is proposing to delay are:

- Warning regarding negative amortization features;
- State law protections for borrowers regarding deficiency judgments;
- The creditor's partial payment policy;
- Information regarding mandatory escrow accounts;
- Waiver of escrow at consummation of the loan;
- The monthly payment, including escrow, at the initial and fully indexed rate for variable-rate loans;
- Repayment analysis, including the amount of escrow payments for taxes and insurance;
- Settlement charges and fees and the approximate amount of the wholesale rate of funds;
- Mortgage originator fees;
- Total interest as a percent of principal; and
- Optional disclosure of appraisal management company fees.

CUNA believes the proposed approach to delay implementation of these disclosures is commendable and will urge the Bureau to adopt it to provide just as much time as possible for institutions to comply with the requirements of the final rule once it is adopted.

Finance Charge Used to Calculate the APR

The proposal would expand the types of fees and costs that should be included in the finance charge for closed-end transactions secured by a dwelling or land by amending § 1026.4 of Regulation Z to make the finance charge more inclusive than under current Regulation Z provisions.

Under the proposal, a loan charge or fee would be included in the finance charge if it is both payable directly or indirectly by the applicant or borrower and imposed directly or indirectly by the creditor as a condition of receiving the credit or as an incident to

receiving the credit. Fees or charges paid in comparable cash transactions would be excluded as they are now.

Also, late fees and delinquency or default charges, seller's points, amounts required to be paid into escrow accounts if the amount would not otherwise be included in the finance charge, and premiums for property and liability insurance would be excluded. (For the premiums to be excluded the consumer must be able to choose the insurer and the creditor must disclose that fact. If the coverage is obtained from or through the creditor, the premium for the initial term of insurance coverage must be disclosed in order to be excluded from the finance charge.)

The Bureau states that it plans to develop supplemental educational materials to help explain how consumers could use the finance charge and APR in comparing loan costs over the long term.

The agency also states that it recognizes the proposed changes for determining costs and fees to be included in the finance charge will likely affect the application of other laws relating to mortgage lending. These include:

- Causing more closed-end loans to fall under the Regulation Z provisions that apply to high-cost mortgage loans as governed by the Home Owners Equity Protection Act (HOEPA; this act amended TILA and is implemented by provisions in Regulation Z). This would mean more mortgage loans would be subject to additional disclosures, restrictions on loan features and strengthened consumer remedies. The proposed finance charge would affect which points and fees are included as well as how the APR is determined for purposes of defining a high-cost loan.
- Causing more loans to have escrow accounts for first lien higher-priced mortgage loans.
- Causing more loans to be subject to requirements for one or more appraisals for "higher-risk" mortgage loans (a new category of loans created by the Dodd-Frank Act which is separate and apart from both higher-priced mortgage loans and high-cost mortgages under current Regulation Z provisions).

Reducing the number of loans that would otherwise be "qualified mortgages" under the Dodd-Frank Act's Ability to Re-pay provisions since such mortgages cannot have points and fees over three percent of the loan amount. More loans would also have to comply with separate underwriting requirements applicable to higher priced balloon loans.

CUNA and others have raised concerns with the CFPB about the consequences of expanding the definition of finance charge as the Bureau is proposing. The Bureau is seeking further comments on the impact of the expansion and said it will take such concerns into consideration.

(The Bureau also noted that the Federal Reserve Board (which implemented Regulation Z and other consumer rules prior to their transfer under the Dodd-Frank Act) had previously proposed an expanded finance charge; to facilitate reconciliation between a new definition of the finance charge and existing APR thresholds, the Board also

proposed replacing the APR with a "transaction coverage rate" (TCR). This TCR would have been transaction-specific and would have allowed the creditor to compare it with the average prime offer rate to determine if a transaction would be covered as a higher-priced mortgage loan. The use of a TCR would mean that lenders would be required to calculate one rate for purposes of disclosure and one for determining regulatory coverage. As part of the proposal to implement HOEPA, the Bureau has proposed language to adopt the TCR and CUNA's Comment Call on that proposal will address the TCR issue more thoroughly.)

Definition of "Finance Charge"

Under Sec. 1026.4 of Regulation Z, the Bureau is seeking comments on several changes to the definition of the "finance charge" and various regulatory or official commentary provisions relating to the definition, which include the following changes.

Sec. 1026.4(a)(2) addresses closing agent charges in determining the finance charge. The proposal provides that the exclusion from the finance charge of fees charged by a third party that conducts the loan closing will not apply to closed-end transactions secured by land or a dwelling. Under the proposal, fees charged by closing agents, including fees of other third parties hired by the closing agent to perform related services, would be included, as long as they meet the general definition of finance charge and no other exclusion applies.

Proposed comment 1026.4(a)(2)-3 would clarify that comments 1026.4(a)(2)-1 and 1026.4(a)(2)-2 do not apply to closed-end transactions secured by real property or a dwelling. The Bureau is proposing this rule to include in the finance charge both voluntary and required charges that are imposed by the creditor to avoid fact-based analysis and improve consistency in disclosure of the finance charge and APR.

The Bureau is proposing to treat a disclosed finance charge as accurate if it does not vary from the actual finance charge by more than \$100 or is greater than the amount required to be disclosed, and reasons that the risk of understating the finance charge is lessened by this portion of the proposal. The Bureau is requesting comments as to whether it should increase the tolerance for the finance charge for closed-end transactions secured by land or a dwelling in light of the fact that a creditor may not know whether a charge is imposed by a third party or the amount of the charge.

The proposal does not distinguish for finance charge determination purposes between voluntary and involuntary charges to the consumer. The Bureau is requesting comments on whether there are voluntary third party charges that the creditor would not be able to determine three days before consummation of the loan. The Bureau is also requesting comments on whether more guidance is needed regarding the assumptions Regulation Z provides to creditors to label voluntary or optional charges as estimates.

The proposal would amend comment 1026.4(b)-1 to reflect that as mentioned above, exclusions from the finance charge for other types of charges would not apply to closed-end transactions secured by real property or a dwelling, consistent with proposed § 1026.4(g). Similarly, § 1026.4(c) of Regulation Z would also be amended to spell out that other than exclusions for seller's points, late fees, exceeding a credit limit, default, delinquency, escrowed items or similar charges, the specific exclusions from the finance charge will not apply to closed-end credit transactions secured by a dwelling or land.

The proposed commentary to this section reflects that as well.

The proposal would as indicated above continue some exclusions from the finance charge (seller's points, late fees and delinquency charges, escrowed taxes and insurance (unless otherwise included in the finance charge)). These are addressed in § 1026.4(c)(5), § 1026.4(c)(2) and § 1026.4(c)(7)(v) of Regulation Z and related comments.

The proposal would amend § 1026.4(d) of Regulation Z to provide that exclusions from the finance charge for voluntary credit insurance premiums, property insurance premiums, and voluntary debt cancellation or debt suspension fees would not be allowed for closed-end mortgage transactions secured by land or a dwelling. The proposed commentaries to this section would indicate that as well.

§ 1026.4(e) of Regulation Z provides an exclusion from the finance charge for certain government recording taxes and related fees and premiums for insurance in lieu of perfecting a security interest, if these amounts are disclosed to the consumer. The proposal would amend this provision and associated staff commentary to eliminate these exclusions for closed-end transactions secured by land or a dwelling.

Proposed § 1026.4(g) of Regulation Z and related commentaries would reinforce that exclusions from the finance charge, except for late payment charges, fees for exceeding a credit limit, delinquency, default, and similar fees, seller's points, premiums for property and liability insurance and, escrowed items that are not included in the finance charge do not apply to closed-end credit transactions secured by land or a dwelling.

QUESTIONS TO CONSIDER REGARDING THE PROPOSED RULE

1. Do you support extending the compliance date for certain disclosures as discussed above that would otherwise have to be implemented starting in January of next year? **Y or N**
2. Would an additional year to get ready for compliance, until January 2014, be sufficient time? **Y or N**
3. What substantial burdens will this proposal regarding the finance charge impose on your credit union?

Staff training. **Y or N**

Member education. **Y or N**

Software or data processing changes. **Y or N**

Other:

4. Should the finance charge and APR calculations be expanded to cover more costs and fees to the consumer, as the agency is proposing? **Y or N**

5. Do you agree with the proposed approach to finance charge and APR calculations that would include most fees and costs to a borrower as they relate to a closed-end transaction? Namely should most costs and fees that are paid directly or indirectly paid by the applicant or borrower and assessed directly or indirectly by the creditor as a condition of receiving the credit or related to the credit be included in the finance charge and APR? **Y or N**

If not, please explain.

6. Do you agree that fees for late fees and delinquency or default charges, seller's points, amounts required to be paid into escrow accounts if the amount would not otherwise be included in the finance charge, and premiums for property and liability insurance should be excluded from the finance charge and APR? **Y or N**
7. What other fees or costs to the applicant or borrower should be excluded from the finance charge and APR?
8. Are there other fees and costs to the applicant or borrower that should be included in the finance charge and APR?
9. Should fees for discretionary options the consumer may choose in obtaining the loan, such as certain insurance, be included in the finance charge and APR?
Y or N
10. Should fees charged by third party closing agents be included in the finance charge and APR? **Y or N**
11. Will creditors know what these charges are in advance so they can be included?
12. Should fees for government recording taxes and related fees and premiums for insurance in lieu of perfecting a security interest, if these amounts are disclosed to the consumer be excluded from the finance charge and APR? (The proposal would amend this provision and associated staff commentary to eliminate these exclusions for closed-end transactions secured by land or a dwelling.)

13. To what extent do settlement costs increase from the good faith estimate to closing?

14. The Bureau is proposing to treat as accurate a disclosed finance charge if it does not vary from the actual finance charge by more than \$100 or is greater than the amount required to be disclosed. Should the Bureau increase the finance charge tolerance for closed-end transactions secured by land or a dwelling in light of the proposal to include third-party charges in the finance charge? **Y or N**

If yes, what should the amount of such an increase be?

15. Should seller's points be included in the finance charge for closed-end transactions secured by real property or a dwelling? **Y or N**

16. How often are seller's points passed on to the borrower through a higher sales price?

17. What are the potential ramifications of including seller's points in the finance charge for other types of credit than closed-end transactions?