



August 30, 2012

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20006-4702

Re: Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)

Dear Mr. Cordray:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment on the proposed rule on *Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)*.¹ This comment is on the proposed amendment to 12 CFR § 1026.4. Advocacy has no comment on 12 CFR § 1026.1(c). Advocacy reserves the right to file comments on the remainder of the proposal by November 6, 2012.

Advocacy Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA,² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

In July 2010, the United States Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act).⁶ Section 1011 of the Act establishes the Consumer Financial

¹ 77 Fed. Reg. 51116, August 23, 2012.

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁵ Id.

⁶ Public Law 111-203.

Protection Bureau (CFPB) to supervise certain activities of financial institutions. Section 1100G, entitled “Small Business Fairness and Regulatory Transparency,” amends 5 U.S.C. § 609(d), to require the CFPB to comply with the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel process, making it the third agency with this responsibility, joining EPA and OSHA.

The SBREFA panel process requires the CFPB to conduct special outreach efforts to ensure that small entity views are carefully considered prior to the issuance of a proposed rule, if the rule is expected to have a significant economic impact on a substantial number of small entities. This outreach is accomplished through the work of small business advocacy review panels, often referred to as SBREFA panels, consisting of a representative or representatives from the rulemaking agency, the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) and the Chief Counsel for the Office of Advocacy. The panel solicits information and advice from small entity representatives (SERs), who are individuals who represent small entities affected by the proposal. SERs help the panel better understand the ramifications of the proposed rule. The product of a SBREFA panel’s work is its panel report on the regulatory proposal under review. The CFPB convened a SBREFA panel for this rulemaking.

The Office of Advocacy performs outreach through roundtables, conference calls and other means to develop its position on important issues such as this one. Advocacy held a small business roundtable on this issue on July 31, 2012. Subsequently, Advocacy hosted a conference call to further solicit small entity input on August 9, 2012.

The Notice for the Proposal Was Inadequate

The proposed rule was posted on Regulations.gov on July 9, 2012. However, the proposal was not published in the *Federal Register* until August 23, 2012.⁷ As such, a small entity that relies on the *Federal Register* for regulatory information would be unaware of the proposal and have only 10 business days to prepare a response. Section 553 of the Administrative Procedure Act specifically states that the general notice of proposed rulemaking shall be published in the *Federal Register*. In addition, the Regulatory Flexibility Act (RFA) states that the initial regulatory flexibility analysis (IRFA) shall be published in the *Federal Register*.⁸ The intent of both is to assure that the public has adequate notice and an opportunity to comment on rulemakings. Advocacy asserts that 10 business days to review and develop a public comment is inadequate.

The Rulemaking

On August 23, 2012, the Consumer Financial Protection Bureau (CFPB) published in the Federal Register a proposed rule to amend Regulation X, the Real Estate Settlement Procedures Act (RESPA), and Regulation Z, the Truth in Lending Act (TILA), to establish new disclosure requirements and forms in Regulation Z for most closed-end consumer credit transactions secured by real property. In addition to combining the existing disclosure requirements and implementing new

⁷ 77 Fed. Reg. 51116.

⁸ 5 U.S.C. § 603.

requirements in the Dodd-Frank Act, the proposed rule provides extensive guidance regarding compliance with those requirements.⁹

The amendment to section 1026.4 revises the test for determining the finance charge for residential mortgage loans. The CFPB is proposing to amend section 1026.4 to replace the current “some fees in, some fees out” approach to the finance charge with a simpler, more inclusive test based on the general definition of finance charge in TILA section 106(a). The proposed changes to section 1026.4 apply to closed-end transactions secured by real property or a dwelling. Under proposed section 1026.4, the current exclusions from the finance charge would be largely eliminated for closed-end transactions secured by real property or a dwelling.¹⁰

The Proposed Changes to Section 1026.4 May Be Harmful to Small Banks & Settlement Service Providers

Small banks and settlement service providers are concerned that a more inclusive approach to finance charges may be harmful to small entities. As stated in the SBREFA panel report for this rulemaking, several lender small entity representatives (SERs) expressed concerns that the increase to the annual percentage rate (APR) could subject them to additional requirements under the Home Owners Equity Protection Act (HOEPA) and state laws.¹¹ They also expressed concerns about the inclusion of taxes and insurance that are required to be paid to an escrow account.¹² They stated that the unintended consequences of a more inclusive approach could be that more loans would qualify as high-cost loans and, therefore, be subject to the additional requirements of HOEPA.¹³ A settlement service SER stated that the changes would require extensive changes to the processing system.

In addition, in a letter to Director Cordray, the Independent Community Bankers of America (ICBA) expressed its concerns that the changes to the finance charge could be harmful to small community banks.¹⁴ Like the SERs, ICBA also stated that the inclusion of additional items in the APR would drive the APRs higher, causing more loans to be higher-priced mortgage loans which require escrows for taxes and insurance.¹⁵ According to ICBA, this would be problematic to small banks which do not have the ability to escrow taxes and insurance. Since they are unable to escrow, they would not be able to make the loans.¹⁶ ICBA also stated that the changes will require upgrades to the loan processing system, massive retraining of staff, revision of materials and changes to mortgage loan advertisements.¹⁷ All of the changes would be extremely burdensome for small banks.

The CFPB Should Further Review the Amendments to the APR and Consider Alternatives

Advocacy has heard concerns that the changes could result in small community banks exiting the marketplace, leading to less competition and higher prices for consumers. In light of the information that it gleaned from the SERs and small banking industry representatives, the CFPB should consider alternatives to these proposed changes.

⁹ 77 Fed. Reg. 51116.

¹⁰ 77 Fed. Reg. 51143.

¹¹ Final Report of the Small Business Review Panel on CFPB’s Proposals Under Consideration for Integration of TILA and RESPA Mortgage Disclosure Requirements, April 23, 2012, p. 25.

¹² Id.

¹³ Id.

¹⁴ Letter to the Honorable Richard Cordray from the Independent Community Bankers of America, April 13, 2012, p. 4.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

At a minimum, the CFPB should postpone any decisions on this issue until it has sufficient economic data on the impact and until it has made the decisions on other regulatory proposals involving a more inclusive definition of APR.¹⁸ In the initial regulatory flexibility analysis (IRFA), the CFPB states that it does not have the data to model the impact of the proposed more expansive definition of finance charge.¹⁹ Advocacy encourages the CFPB not to make any changes until it can fully assess the economic impact of the changes. A full understanding of the impact will assist the CFPB in developing a less costly alternative.

In the IRFA, the CFPB also discusses the other rulemakings that it is considering to address the issue of a more inclusive finance charge. The CFPB states that the impact of this proposal would be muted if the CFPB adopts those changes. The real estate industry has undergone numerous changes over the last few years which have been costly for small entities. Since the CFPB is considering other proposals that involve this same issue, it may be prudent to wait until the decisions are made on the other proposals before instituting this change.

Conclusion

Advocacy encourages the CFPB to give full consideration to the concerns of small banks and settlement service providers regarding the proposed changes. Small banks provide a valuable service to lower income and rural areas where banking options are sparse. This proposal for a more inclusive APR could potentially lead some small businesses to leave the marketplace. In addition, Advocacy reiterates its concern about the inadequate notice for small entities about this important proposal.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

Jennifer A. Smith
Assistant Chief Counsel
For Economic Regulation & Banking

Cc: Boris Bershteyn, Acting Administrator, OIRA

¹⁸ Proposed rule on *Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)*, July 9, 2012, p.

¹⁹Id., at p. 650