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NCLC Response to Dear Colleague Letter Supporting H.R. 1295

Unfortunately, the recent Dear Colleague letter sent to Members of Congress in support of H.R. 1295 misleads readers by claiming that the bill would benefit homeowners and reduce predatory lending. This simply is not the case. **The bill would have devastating consequences on mortgage lending in this nation. Not only would it preempt every state law of any kind that affects mortgage lending in any way[1], but the existing protections in federal law -- under current HOEPA -- would be rendered completely meaningless.** The effect of this bill unquestionably would be to allow abusive, unaffordable and deceptive lending to **expand** in this nation. If H.R. 1295 were to pass homeownership would continue to decline due to escalating foreclosures and the continued bleeding of home equity –caused by the complete lack of meaningful limits on mortgage lending in federal or state law.

Below is a point-by-point response to the statements made in the recent Dear Colleague letter.

The Dear Colleague letter claims that the bill would:

. Cover more loans with special protections

- ***Our response:*** *Despite the proposed reduction in HOEPA's trigger for points and fees from 8 to 5, it is doubtful ANY additional loans would be covered. By eliminating* ***single premiums credit insurance*** *and third party* ***fees paid to affiliates****, the trigger for points and fees would effectively be RAISED and* **fewer** ***loans would be covered.***[2] ***The bill also removes the FRB's discretion to include new, abusive products in the trigger.***[3]

. Toughen "loan flipping" prohibitions

- ***Our response:*** *More words regarding flipping are added, but the liberal safe harbor provisions relieve creditors of*

[1] This potentially includes **all** state laws that regulate or limit mortgage lending activity, including basic contract law, the UCC, unfair trade practice law, foreclosure law, debt collection laws. *See* proposed TILA section 111(f)(2), page 53 the bill. This proposed preemption is far broader than anything even the OCC or the OTS has promulgated or proposed for financial institutions.
[2] Current law covers both. *See* 12 CFR 226.32(b)(1)(iii) and (iv).
[3] *See 15 U.S.C.§ 1602(aa)(a)(5).*

all effective prohibitions. Indeed, the effect would likely be to encourage unnecessary refinancing.[4]

. Strengthen repayment ability requirements

- ***Our response:*** *This simply is not true. One of the most helpful provisions in the current HOEPA is the requirement that the creditor verify and document the consumer's repayment ability. The bill deletes this requirement.*[5]

. Limit prepayment penalties

- ***Our response:*** *This is true only if one ignores the fact that dozens of state limits on prepayment penalties – most of which are far stricter than this proposal – are completely preempted. Worse, the new "limits" are the highest generally seen in the market. The net effect for the majority of consumers subject to high cost loans will be to* ***increase*** *the prepayment penalties that can be charged.*[6]

. Restrict financing of points and fees

- ***Our response:*** *The bill does add a restriction against financing more than 5% of loan in points and fees, which is not currently in HOEPA. However, in doing so it also preempts state law limits that are far more protective of consumers.*[7]

. Prohibit single premium credit insurance

- ***Our response:*** *While the bill does add a new prohibition against financing single premium credit insurance for HOEPA loans, this abusive practice will still be permitted for non-HOEPA loans and the premiums will not be included in the HOEPA trigger.*

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[4] Current law prohibits refinancing a HOEPA loan within another HOEPA loan within 1 year. Unless the refinancing is in the borrower's interest. 12 CFR § 226.34(a)(3). Current law does not include the long list of exceptions and safe harbors that this bill does.

[5] There are two **stronger** provisions in current law that would both be deleted by this bill. In 15 U.S.C. § 1639(c)(2)(ii), the law prohibits all prepayment penalties on HOEPA loans unless the lender has **verified** the consumer's income. The FRB has also said that there is a presumption of violating HOEPA if a creditor engages in a pattern or practice of making HOEPA loans without verifying the consumer's repayment ability. 12 C.F.R. § 226.34(a)(3).

[6] For example, in NC and SC no prepayment penalties are permitted for loans under $150,000.

[7] For example, NC prohibits the financing of *all* points and fees for high cost loans; NJ and NM limits are 2%; SC limits are 2.5%; NY limits are 3%; MA limits to 5%.

. Ban "steering" to higher-cost products

- ***Our response:*** *The idea is good, yet the safe harbor is so huge, the ban will never be effective.*

. Disallow balloon payments

- ***Our response:*** *The exception provided for the "irregular" income of the borrower actually makes this provision less protective than current law.*[8]

. Increase protections against home improvement scams

- *It does.*

. Add appraisal requirements to stop "property flipping"

- ***Our response:*** *It does add some appraisal protections, but they are so minimal that no "property flipping" will be stopped by this bill.*

. Provide new disclosure warnings and counseling notices

- ***Our response:*** *It does, but these are unlikely to have any helpful effects.*

. Require reporting to credit bureaus

- *It does.*

. Adopt payoff statement requirements

- ***Our response:*** *It does, but these protections are not particularly helpful to consumers because there are no real limits on the fees for most times these statements would be provided.*

. Limit modification and deferral fees

- ***Our response:*** *These are limited in a meaningless way, because there is an exception for loans which are 60 days or more in default – and these are just the loans which are most likely to be modified and deferred.*

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[8] Current law prohibit balloon terms for all HOEPA loans of less than 5 years, with no exception for the income of the borrower. 12 CFR § 226.32(d)(1). As many consumers have irregularity in their income, the bill's proposal to except from the prohibition payment schedules adjusted for the irregular income of the borrower undermines the whole protection.

. Curb late fees

- *It does.*

. Regulate prepaid payments

- ***Our response:*** *This is misleading because current HOEPA regulates prepaid payments in a much more effective way.*[9]

. Prohibit increasing interest on default

- ***Our response:*** *The opposite is true. The current HOEPA prohibits increasing interest on default. The new proposal rewrites the law in a way* ***to allow increasing interest on default.***[10]

. Ban negative amortization

- ***Our response:*** *Negative amortization is already prohibited for HOEPA loans. The bill would actually allow – and indeed encourage – negative amortization in new situations.*[11]

. Bar encouraging default

- ***Our response:*** *It does. But this behavior is already illegal under state and federal laws prohibiting unfair trade practices.*

. Proscribe call provisions

- ***Our response:*** *While there is language limiting the creditor's right to call a loan due, there is an exception that completely swallows the prohibition. Indeed, one cannot*

[9] The current law prohibits the financing of two or more "periodic" payments. 15 U.S.C. § 1639(g). The effect of the standard proposed in the bill – to prohibit two or more "scheduled" payments is to undermine the protection, because a creditor can simply avoid scheduling the payments, yet can include the same amount in the loan, and thus avoid the prohibition.
[10] In the current HOEPA, the prohibition is simple. 15 U.S.C. § 1639(d). The bill proposes so many exceptions – including for default on another transaction – that the net effect is to eradicate the protection.
[11] The current law is clear – no negative amortization is permitted. 15 U.S.C. § 1639(f). The bill would eradicate this flat prohibition and instead permit negative amortization in periods of "temporary forbearance" – which provides an incentive to creditors to encourage consumers *not* to make their payments on a regular basis.

imagine any situation in which a creditor could **not** *call a loan due.*[12]

. Prohibit bad faith attempts to avoid restrictions

- ***Our response:*** *The bill essentially blesses loan splitting in such a way that many loans will be restructured to successfully avoid HOEPA coverage.*[13]

. Forbid waiving rescission rights

- ***Our response:*** *In fact, the bill amends current law to expand the circumstances for waiver.*

. Ban mandatory arbitration

- ***Our response:*** *Only for HOEPA loans, not for all home-secured loans.*

. Allow a meaningful right to cure errors

- ***Our response:*** *This provision is provided to* ***creditors*** *to allow them to cure their deliberate violations of the law* ***after they have been caught****. This provision cancels any incentive creditors have to comply with the law. In the rare instances they actually are caught, they simply would need to comply at that time.*

. Toughen statutory penalties

- ***Our response:*** *This increase is illusory. Yes, statutory penalties are increased, but because of the new right to cure provisions in the bill, they would almost* ***never be collected****.*

. Increase statute of limitations

- ***Our response:*** *Ditto*

. Apply limited assignee liability

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[12] The new “no call” provision is on page 28 of the bill.

[13] The provision in proposed Section 129(o)(2) on non-attribution creates an exception to the prohibition against loan splitting such that any combination of loans in which the loan to value ratio exceeds 80% of the value of the home is exempt from the anti-evasion requirement. As it is just those loans which are most likely to be structured in a way to avoid HOEPA coverage, the language in the bill was clearly included to *protect* bad acts, rather than to prohibit them.

- ***Our response:*** *While a cursory reading of these provisions would lead one to believe that purchasers of loan contracts would occasionally have liability, this is not the case. The assignee liability provisions in this bill make it appear that no assignee would ever have liability for any claim – under HOEPA or even under state law – for which they currently have liability.* ***This provision of the bill renders any consumer protections that might otherwise exist in the bill completely meaningless. As no claim for violations of the law could ever be enforced, there would be no reason for creditors to comply with the law.***

. Require escrow accounts and disclosures

- *It does.*

. Update mortgage servicing standards

- *It does*

. Establish mortgage broker licensing standards and national broker registry

- *It does.*

. Create uniform national standards

- ***Our response:*** *The uniform national standard created is one in which creditors will be completely free to take advantage of consumers in any way they can, as no state law protections will apply to any aspect of the mortgage transaction – from loan application to foreclosure and collection – and the limited protections of the current federal HOEPA will be eradicated.*

. Expand borrower education and counseling opportunities

- ***Our response:*** *Will education protect consumers from abusive lending? Moreover, the problem of fraudulent for-profit credit counseling is well documented.*

. Enhance appraiser independence and oversight

- ***Our response:*** *The provisions on appraisers do not begin to address the problem of appraiser fraud in this nation.*

. Provide optional foreclosure prevention counseling assistance

- ***Our response:*** *It does, but not in a meaningful way.*

The bottom line is that H.R. 1295 is anything but responsible. It is a cynical attempt to pretend that it is a consumer friendly bill, when in fact it does far more harm than good.

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