COMMENTS
to the
Consumer Financial Protection Bureau

regarding

12 CFR Part 1024, 1026
[Docket No. CFPB-2015-0029]

80 Fed. Reg. 36727 (June 26, 2015)

Extension of Effective Date for the
Integrated Disclosure Rule Amending
Regulations X and Z

by the
National Consumer Law Center
on behalf of its low income clients

and

Americans for Financial Reform, Consumers Union, Indiana Legal Services,
National Association of Consumer Advocates, National Fair Housing
Alliance, U.S. PIRG

July 7, 2015

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The National Consumer Law Center ("NCLC") submits the following comments, on behalf of its low-income clients, with Americans for Financial Reform, Consumers Union, Indiana Legal Services, the National Association of Consumer Advocates, the National Fair Housing Alliance, and U.S. PIRG.

In general:

- We do not object to the proposed extension of the August 2015 effective date so long as there are no other changes; and

- We recommend clarifying whether the proposed extension covers *everything* published in the 78 Fed. Reg. 79730 (Dec. 31, 2013) notice.

1. Overview: We do not object to the proposed extension.

The Integrated Disclosures Rule, issued under Regulations X and Z, in December 2013[1] is an important improvement of the disclosure system currently used for closed-end consumer mortgages. For too long, consumers have been faced with a confusing hodge-podge of paperwork intended to provide vital information but ill-designed to do so. The Rule, while not perfect, will dramatically improve the format, content, and timing of information provided to borrowers.

Despite having nearly two years to implement the Rule, the mortgage industry appears to have spent as much time fighting for last-minute changes as it spent preparing for the rule. As the August 1 deadline approached, some industry participants began to urge the Consumer Financial Protection Bureau and Congress to give them a temporary "free pass." They argued that creditors should be allowed to implement the Rule with impunity for violations, so long as they allegedly acted in "good faith." The Bureau wisely rejected this request.

But soon after doing so, the Bureau announced a two-month delay of the effective date, in order to cure an administrative error. The error, a failure comply with a federal law requiring a 60-day notice of the Rule to Congress and the Government Accountability Office, appears to be incurable by any means other than delaying the effective date. Therefore, while we believe implementation is already long overdue, we do not oppose the Bureau's proposed extension.

2. The Bureau should resist calls for more changes, delays, or to weaken enforcement.

We are pleased to see that the only change to the Rule, as announced in the Federal Register,[2] is to the effective date. The Bureau should continue to resist calls to

[1] 78 Fed. Reg. 79730 (Dec. 31, 2013).
[2] 80 Fed. Reg. 36727 (June 26, 2015).

weaken the rule or its enforcement. The Bureau should also refuse to delay implementation any further.

Acceding to industry calls to suspend private enforcement or to announce a blanket suspension of supervision and enforcement efforts would be a dangerous precedent. It would also go beyond the Bureau's authority. Doing so would also leave injured homeowners without a remedy.

2.1 Implementing the combined TILA/RESPA disclosures is important.

The Bureau has done substantial work improving the disclosure rules for mortgage closings. We thank you for the time you and your staff have spent honing the rules and developing official interpretations and implementation guidance. We believe this time has been well spent and will make the transition to the new disclosures a smooth one for consumers and creditors.

The time has now come to let the combined TILA/RESPA disclosure rules take effect. The new disclosure form will give consumers expanded information before they make the biggest purchase of their lives. Proper integration of TILA's and RESPA's disclosures has been debated for over a decade. The Bureau adopted a lengthy implementation period for the final rules.[3] The mortgage industry has announced that it will make a good-faith effort to implement the rules properly. We applaud them for their effort and know it has been a substantial undertaking.

A blanket carve-out would give some an opportunity to evade the rules and would generally inhibit incentives to comply promptly. A rule without enforcement is no rule at all. The amount of resources any business devotes to compliance is most likely proportional to the risk of being held accountable. A formal announcement of lax enforcement may also be misinterpreted by some courts as meaning the rules are more flexible than the Bureau or Congress intended.

2.2 CFPB supervision and enforcement can already account for good faith

The CFPB already has the authority to take into account good-faith efforts to comply with regulations. The Bureau has the discretion to decide when to prosecute or sanction someone who violates the rules. A grace period, when the rules will not be enforced, is entirely inappropriate.

Supervision is necessary to ensure that industry knows compliance is expected. The CFPB cannot know whether a company is making a good-faith effort to comply unless the Bureau examines for compliance with the rules. Depending on what the CFPB finds, it can take appropriate action, including monitoring implementation

[3] *See* 78 Fed. Reg. 79730 (Dec. 31, 2013).

efforts, providing direction for improving compliance, or in rare cases of bad faith or systemically deceptive disclosures, enforcement. Because the Bureau already has the discretion to account for new rules and good-faith efforts, no suspension is needed. Moreover, the Bureau has an obligation to enforce the law and thus does not have the authority to suspend its own supervision or enforcement obligations.

2.3 The prospect of private enforcement encourages compliance and presents only a limited burden

For similar reasons, suspending liability in private suits is unnecessary and dangerous. RESPA liability for the disclosures is a moot point, as there is no private right of action for violations of RESPA's cost disclosure provisions. TILA already includes provisions protecting creditors from errors made in good faith. There is no liability if a creditor or assignee corrects the error within 60 days,[4] no liability if a violation resulted from a bona fide error,[5] and no liability for any act done or omitted in good-faith conformity with any rule, regulation, or interpretation, including use of model forms (other than numerical disclosures).[6]

For errors involving disclosure of the finance charge and related numbers, Congress allows creditors to overstate the actual amount without penalty.[7] In the specific context of the combined TILA/RESPA disclosures, the rule permits the aggregate amount of third-party service or recording fees listed on the closing disclosure to exceed the aggregate of these fees shown on the loan estimate by up to ten percent.[8]

It would be dangerous to set a new precedent of suspending private enforcement for violations of a law that is in effect. The ability of consumers to protect themselves is essential to the efficacy of TILA. The CFPB cannot target every violator. Consumers who are injured must have the right to seek a remedy. A suspension of liability would mean that creditors who badly misstate the cost of the loan would face no consequences and the homeowner would not be eligible for redress under Truth in Lending. Moreover, even though TILA litigation is extremely limited, the prospect of litigation produces a higher rate of compliance from creditors.

Litigation is a last resort and rarely undertaken. Few consumers seek out attorneys even when they are injured. Moreover, TILA provides for payment of attorney fees only if the lawsuit is successful, so attorneys are reluctant to take on cases unless violations are clear.

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[4] 15 U.S.C.§ 1640(b).
[5] 15 U.S.C.§ 1640(c).
[6] 15 U.S.C.§ 1640(f).
[7] 15 U.S.C. § 1604(f). Understatements of the finance charge cannot be larger than $100 unless the mortgage loan is a refinancing or rescission is sought in which case the tolerances are much higher. *Id.*
[8] Reg. Z § 1026.19(e)(3)(ii).

Private litigation under the Truth in Lending Act is fairly rare, especially in comparison to the volume of mortgage loans and credit generally outstanding in the United States. Even during a financial crisis that rivaled the Great Depression, only a tiny fraction of mortgage loans became the focus of TILA litigation.

2.4 The CFPB does not have authority to suspend private liability for rules that are effective

Historically, neither the Federal Reserve Board nor the CFPB has ever issued regulations under section 1640, the remedy provision in TILA.

Indeed, the CFPB does not have discretion to suspend accountability to individual consumers once a rule has been finalized. The private right of action in TILA resides in the statute itself, not the regulations. Once the regulations take effect, the private right of action is inextricably tied to those rules. Section 1640 speaks for itself in describing the remedies that are available where TILA provisions have been violated.

The CFPB's exemption authority under subsections 1604(a) and (d) does not authorize a suspension of private liability. Section 1604(a) authorizes the CFPB to prescribe regulations that contain:

> additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Suspending the private right of action rather than the entire effective date is not an additional requirement, classification, or differentiation. In addition, such a suspension would not apply to a class of transactions and thus is not an adjustment or exception permitted by the subsection. Moreover, suspending the private right of action would be counter to facilitating compliance and would not effectuate the purposes of TILA or prevent circumvention or evasion of the statute.

3. The CFPB should clarify which parts of the 2013 rulemaking are subject to the extension.

The proposed amendment to Supplement I to Part 1026 changes instances of "August 1, 2015" to "October 3, 2015." The Bureau's recent announcement and the amended paragraph (¶ 1(d)(5)-1) refer broadly to "[t]he Bureau's revisions to Regulation X and Regulation Z published on December 31, 2013 (the TILA-RESPA Final Rule)."[9] But the December 2013 rulemaking included provisions not directly related to the TILA-RESPA forms that have largely been the subject of recent

[9] 80 Fed. Reg. 36727, 36732 (June 26, 2015).

debate. Examples include: § 1026.18 (content of general closed-end disclosures); § 1026.20(e) (escrow account cancellation disclosures; § 1026.22 (determination of the APR); § 1024.33 (mortgage servicing transfers); and § 1026.39 (mortgage transfer notices).

Therefore, to reduce confusion, we recommend that the Bureau specifically state whether the extension to October 2015 includes *everything* from the December 2013 rulemaking or only specific provisions.

4. Conclusion: The Bureau should proceed as proposed with no further changes or delays.

We thank the Bureau for its hard work on the integrated disclosure forms. We believe timely implementation of the rules—as written—will do far more to benefit consumers than any further delay or the proposed grace period. We would be happy to meet with you or your staff if you would like to discuss this matter further.

5. Appendix: Description of Groups Signing on

The **National Consumer Law Center®** (NCLC®) is a non-profit Massachusetts corporation specializing in low-income consumer issues, with an emphasis on consumer credit. Since 1969, NCLC has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC publishes a series of consumer law treatises including Mortgage Lending, Truth in Lending and Foreclosures. These comments were written by NCLC attorneys Andrew Pizor and Alys Cohen.

Americans for Financial Reform is a nonpartisan coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups. Formed in the wake of the 2008 crisis, we are working to lay the foundation for a strong, stable, and ethical financial system – one that serves the economy and the nation as a whole.

Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

Indiana Legal Services is a nonprofit law firm that provides free civil legal assistance to eligible low-income people throughout the state of Indiana.

The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

The **National Fair Housing Alliance** (www.nationalfairhousing.org) – Founded in 1988, the National Fair Housing Alliance is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights groups, and individuals from 37 states and the District of Columbia. Headquartered in Washington, DC, NFHA, through comprehensive education, advocacy and enforcement programs, provides equal access to housing for millions of people.

U.S. PIRG serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful interests on behalf of their members. For years, U.S. PIRG's consumer program has designated a fair financial marketplace as a priority. Our advocacy work has focused on issues including credit and debit cards, deposit accounts, payday lending, student loans, credit report accuracy, privacy of customer information (including data breaches) and, generally, any unfair and deceptive practices.