COMMENTS

to the

Consumer Financial Protection Bureau

regarding

12 CFR Part 1026

[Docket No. CFPB-2016-0038, RIN 3170-AA61]

81 Fed. Reg. 54317 (Aug. 15, 2016)

Amendments to Federal Mortgage Disclosure Requirements under the Truth in Lending

by the

National Consumer Law Center

on behalf of its low income clients

and the

Americans for Financial Reform, Center for Responsible Lending, National Association of Consumer Advocates, and the National Fair Housing Alliance

October 18, 2016

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The National Consumer Law Center (NCLC) submits the following comments, on behalf of its low-income clients, along with Americans for Financial Reform, the Center for Responsible Lending, the National Association of Consumer Advocates, and the National Fair Housing Alliance.

1. Summary

The Consumer Financial Protection Bureau's (CFPB) proposed amendments cover a broad range of issues in Regulation Z. These comments focus on those we believe will have the greatest impact on consumers:

§ 2 We strongly oppose the proposed creation of a new tolerance for errors in the Total of Payments disclosure. The Bureau proposes to abolish the existing zero-tolerance rule and replace it with one based on the rule for understating the finance charge. However, the Bureau's reasons for doing so are not justifiable. In addition, the components of the Total of Payments must be clearly listed on or must be easily calculated from the information provided in the Closing Disclosure. Construction loan and inspection fees collected post-consummation should be included in the Total of Payments.

§ 3 The proposed new commentary describing what makes a charge "bona fide"[1] should either be expressly limited to the section the commentary applies to, as the Federal Register notice implies. Or the Bureau should adopt a more comprehensive definition. The term "bona fide" is important to many parts of Regulation Z, so the Bureau should be careful to avoid unintended consequences when attempting to define it. The Bureau should also require these charges to be "reasonable" and should adopt a definition of that term.

[1] In proposed Official Interpretation 1026.19(e)(3)(iii)-4.

§ 4 The "Calculating Cash to Close Table" is irredeemably confusing. Rather than tinker with it, as proposed, the Bureau should completely revise it to promote consumer understanding and ease compliance for creditors. In addition, the "closing costs financed" disclosure should be moved to the last page of the disclosure forms. If a lender issues a credit to reduce the principal balance, the lender should be required to update all percentage-based fees to account for the change.

§ 5.1 The Bureau should prohibit creditors from issuing revised Loan Estimates unless the revision is due to one of the changes listed in Reg. Z § 1026.19(e)(3)(iv)(A)-(F). Loan Estimates that are "for informational purposes only" risk confusing borrowers and undermining the principle that the Loan Estimate should be binding absent limited circumstances. Similarly, the figures from "informational Loan Estimates" should not be disclosed in the Calculating Cash to Close table shown on the Closing Disclosure.

§ 5.2 We agree that the Loan Estimate disclosures should be binding on the creditor until the later of 10 business days after they are provided or any later date identified by the creditor.

§ 5.3 The disclosure of specific seller credits in the Loan Estimate should be made in the appropriate closing table.

§ 6 We agree with the Bureau's proposal to clarify that borrowers in *all* transactions secured by a cooperative should receive the integrated disclosures—regardless of whether state law categorizes the consumer's ownership interest as real or personal property. In addition, we urge the Bureau to make a similar clarification to Regulation X. We believe Regulation X contains a latent ambiguity in this area that should be clarified in favor of equal coverage for all cooperatives.

§ 7 Excluding transfer taxes and recording fees from the one-percent limit in section 1026.3(h)'s partial exemption should not negatively impact consumers so long as additional protections are included to prevent abuse.

§ 8 Changing the description of the term "loan amount" to "the total amount the consumer will borrow, as reflected by the face amount of the note" is a welcome clarification.

§ 9 We support the proposal to require creditors to specifically identify all settlement services that consumers may shop for. But the proposed exception for services included in a package will hurt competition, promote price gouging, and hinder consumer shopping.

§ 10 Requiring consistent placement for certain charges on the Closing Disclosure promotes consistency and consumer understanding.

§ 11 When finalized, the new rules and commentary should only apply prospectively.

2. Total of Payments

2.1 The proposed new tolerance rules for the Total of Payments will not promote consistency or avoid misleading disclosures.

In the mortgage loan context, TILA sets a zero-tolerance rule for errors in the Total of Payments disclosure for misdisclosures that are not related to an understatement of the finance charge. This standard applies consistently to all closed-end credit transactions, including unsecured credit and credit secured by personal property, by real property, or by a dwelling. The CFPB proposes to abolish this standard and replace it with one that mirrors the rules for understatements of the finance charge. But, as discussed below, the Bureau's reasons are not justifiable.

The proposed changes track the current three-part finance charge tolerance rule for credit transactions secured by real property or a dwelling:

1) If the remedy sought is rescission (but no foreclosure is pending), the rule allows a tolerance for an understatement of $100 or 1/2 of 1% of the total amount of credit extended, whichever is greater; or for transactions refinancing the principal balance and accrued unpaid finance charges of a prior residential mortgage transaction, and subsequent refinancings of such a transaction, the finance charge tolerance is 1% of the total amount of credit extended, or $100, whichever is greater;[2]

2) If the remedy sought is rescission and the creditor has initiated a foreclosure, the tolerance is $35 for underdisclosures;[3] and,

3) If damages are sought, the tolerance is $100 for underdisclosures.[4]

These rules apply not only to underdisclosure of the finance charge but also to other disclosures affected by the finance charge. The potentially affected disclosures are the APR, amount financed, and Total of Payments. However, the finance charge tolerances do not apply to the APR, amount financed, and Total of Payments if the particular misdisclosure is not caused by an understatement of the finance charge, as noted by the CFPB in the Supplementary Information included in this rulemaking.[5] Thus, the current standard requires the understatement of the finance charge to "affect" the Total of Payments disclosure.[6]

[2] 15 U.S.C. § 1605(f).

[3] 15 U.S.C. § 1635(i)(2).

[4] 15 U.S.C. § 1605(f).

[5] *See, e.g.*, 81 Fed. Reg. at 54,336 n.70, 54,354 (Aug. 15, 2016).

[6] "[T]he disclosure of the finance charge and other disclosures affected by any finance charge…shall be treated as being accurate for purposes of this subchapter if the amount disclosed as the finance charge does not vary from the actual finance charge

Although recognizing this distinction, the CFPB blurs it by proposing to extend the finance charge tolerances to the Total of Payments disclosure even where the Total of Payments is incorrect for other reasons.[7] Examples of when the Total of Payments can be incorrect for other reasons include:

1) The creditor miscalculates the payment amounts due over the loan term;[8]

2) The creditor adds to the Total of Payments finance charges that the borrower paid separately in cash, even though these charges are not financed;[9]

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by...[stating the actual variance amount]...and...shall be treated as accurate for purposes of section 1635 of this title if...the amount disclosed as the finance charge does not vary from the actual finance charge by more than...[stating the actual variance amount]...." 15 U.S.C. § 1605(f).

[7] For example, on the one hand, the CFPB states: "[H]istorically, the total of payments has been understood to be a disclosure affected by the finance charge and therefore subject to its tolerances." 81 Fed. Reg. 54,317, 54,353. At the same time, the agency recognizes: "Congress was clear that, to the extent other disclosures with statutory liability *were affected* by a *misdisclosure* of the finance charge within the tolerance limits, the same protections should apply." *Id*. at 54,354 (emphasis added).

[8] According to consumer attorneys, these types of errors occurred with some regularity in the more complex variable rate mortgage loans originated in the years leading up to the foreclosure crisis.

[9] This arises even though the creditor correctly reflects these finance charges in the finance charge disclosure. But when the creditor then adds the finance charge to the amount financed to arrive at the Total of Payments, the paid-fees are financed and this causes the consumer to pay them twice. *See* National Consumer Law Center, Truth in Lending § 5.6.9.1.2 (9th Ed. 2015) and online version. *See also* Official Interpretations § 1026.18(g)-1.

3) The creditor fails to include pickup payments (deferred portions of the down payment) in the Total of Payments if the creditor discloses them in the payment schedule;[10] and,

4) The creditor fails to include monthly credit insurance premiums in the Total of Payments but adds the premiums into the monthly payment amount.[11]

The agency justifies this significant change in several ways:

- The CFPB believes it is appropriate to continue to apply the tolerances for the finance charge and disclosures affected by the finance charge to the modified Total of Payments.[12]
- The CFPB believes that the new rule will promote consistency with the tolerances in effect before the TILA/RESPA final rule.[13]
- The CFPB believes that the new tolerances are "sufficiently narrow to prevent these tolerances from resulting in misleading disclosures or disclosures that circumvent the purposes of TILA."[14]
- Because it changed the formula for calculating the Total of Payments for mortgage loans covered by the TILA/RESPA rules, this introduced ambiguity and uncertainty as to whether the Total of Payments is a "disclosure affected by

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[10] Official Interpretations § 1026.18(h)-2.

[11] Official Interpretations § 1026.18(g)-1. This arises with credit life, disability, and similar insurance, rather than with mortgage insurance. The misdisclosure of the Total of Payments occurs when these monthly payments are properly excluded from the finance charge. *See* National Consumer Law Center, Truth in Lending § 5.6.9.1.2 (9th Ed. 2015) and online version.

[12] 81 Fed. Reg. 54317, 54,336.

[13] *Id.*

[14] *Id.*

the finance charge and therefore subject to the same tolerances."[15]

- Some of the fees included in the Total of Payments formula are finance charges and some charges not included in the formula are finance charges.[16]

The first of the listed rationales suggests that the CFPB views its proposal as simply clarifying that the current finance charge tolerance rule for loans secured by real property or a dwelling applies to the Total of Payments determined according to the TILA/RESPA formula. The CFPB denies any intent to "alter the tolerances for accuracy applicable to the Total of Payments" when modifying the Total of Payments calculation.[17]

If so, the draft rule does not reflect this intent. Instead, the draft rule dramatically changes the tolerance rules by applying them to errors in the Total of Payments that are not caused by an understatement of the finance charge. For example, in proposed Reg. Z § 1026.23(g)-(h), the agency added the Total of Payments tolerance as a separate independent provision following the pre-existing finance charge tolerance rule.[18]

The rule does not achieve the second justification—greater consistency—because it actually creates inconsistencies among a number of types of credit where the Total of Payments misdisclosure does not result from an error in the finance charge disclosure. It creates inconsistencies between covered TILA/RESPA mortgage loans and mortgage loan transactions excluded from the TILA/RESPA regulations, as

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[15] 81 Fed. Reg. at 54,353.

[16] *Id*. at 54,353-54.

[17] *Id*. at 54,354.

[18] *See* proposed Reg. Z § 1026.23(g)(1)(ii), § 1026.23(g)(2)(ii), § 1026.23(h)(2)(ii).

well as between TILA/REPSA covered loans and non-mortgage credit transactions.

As for the remaining justifications, the proposed rule will not prevent the tolerances from resulting in misleading disclosures that circumvent the purposes of TILA. The rule abolishes the zero-tolerance standard where an inaccurate Total of Payments results from creditor miscalculations unrelated to the finance charge. Instead, the agency will apply significantly larger tolerances to this type of creditor misconduct (when compared to zero). For example, applying the tolerances when the consumer seeks rescission, ½ of 1% of the loan amount for a $300,000 mortgage loan is $1,500 and 1% is $3,000. Errors of this magnitude have a significant effect on family finances and there is no justification for allowing them.

The TILA/RESPA calculation of the Total of Payments is straightforward for creditors.[19] The formula is: the sum of the principal, interest (including per diem interest paid at or before closing), mortgage insurance, and loan costs. Each of these components is clearly defined in Regulation Z and the Official Interpretations. So, errors in the Total of Payments should be rare for compliant creditors in this age of computer programing.

Creditors wishing to game the system can make the Total of Payments appear smaller, and hence more desirable to consumers, by placing fees in the "Other Costs" box on the form when they rightly belong in the "Loan Costs" box. This reduces the Total of Payments because "loan costs" are a component of the Total of Payments separate from the principal, while "other costs" are not. In addition to finagling the location of fees on the Closing Disclosure, creditors can incorrectly amortize the principal (usually in variable rate loans and loans that negatively amortize), as they have done

[19] This is not the case for consumers attempting to check the creditor's calculations. *See* § 2.2, *infra*.

in the past. These tactics should be subject to the zero-tolerance rule.

The CFPB's concern that the TILA/RESPA Total of Payments may not include all of the fees that are finance charges is of little consequence. Presumably, this is the basis of the "uncertainty" as to whether the finance charge tolerance rule applies. In actuality, all fees that meet the definition of a finance charge that are legitimately listed in "Other Costs" (and, hence, are not "loan costs") will be a part of the Total of Payments when those fees are financed. This is so because those fees are part of the principal, a separate component of the Total of Payments.

The only finance charges that will not be added into the Total of Payments are those that legitimately constitute "other costs" and are paid by the borrower, seller, or a third party before closing. This situation arises for a tiny subset of finance charges, as long as creditors are properly placing fees in the "Other Costs" section. The most common examples appear in Model Form 25(B) under "Other Costs", lines F2 (per diem interest) and G1 (escrowed mortgage insurance premiums). However, these fees must be captured in the Total of Payments, in any event, because they constitute separate components of the Total of Payments.[20]

In the Dodd-Frank Act Analysis section of the proposal, the CFPB raised additional concerns and requested additional information. The Bureau believes that the change would benefit creditors, "in the limited circumstances where a small, within tolerance error in Total of Payments calculation occurs."[21] Our response is that this is the current state of affairs created by Congress when it added the finance-charge-tolerance rules to section 1605 in 1995. Creditors have

[20] *Per diem* interest is "interest" which is a separate component of the Total of Payments. Mortgage insurance premiums are a separate component of the Total of Payments as well.

[21] 81 Fed. Reg. at 54,362.

originated millions of loans under this regime since then. There is no reason to amend the rule, especially where the agency admits there is no evidence that creditors are having difficulty selling mortgage loans into the secondary market due to potential errors in the Total of Payments disclosure or that investors have raised any red flags.[22] In addition, there is no evidence that creditors have increased the cost of credit due to the possibility of consumer claims based on the understatement of the Total of Payments calculated under the TILA/RESPA rules.[23]

We request that the CFPB abandon these amendments to Regulation Z or table them unless credible and material evidence of these concerns emerges over time. Creditors have lived with the current regime since 1995 and millions of mortgage loans were sold into the secondary market since then.

One question remains: will the current finance charge tolerance rule become irrelevant in relation to the TILA/RESPA Total of Payments disclosure due to the new calculation formula? The answer is no. One example of when the underdisclosure of the finance charge remains relevant to the new Total of Payments is when the creditor miscalculates the interest anticipated to be earned over the loan term. Since interest (a component of the Total of Payments) is a finance charge, the miscalculation of the interest will affect the Total of Payments. Nonetheless, this concern should not be the basis for creating a whole new tolerance for the Total of Payments. Even if the circumstances in which an understated finance charge affects the Total of Payments is rare, this does not justify a new tolerance rule applicable to the Total of Payments.

[22] *Id.*

[23] *Id.*

2.2 The components of the Total of Payments must be clearly listed on or must be easily calculated from the information provided in the Closing Disclosure.

As previously noted, the Total of Payments is the sum of the principal, interest (including per diem interest paid at or before closing), mortgage insurance, and loan costs in the TILA/RESPA context.[24] The principal and interest (P & I) payments appear in the "Projected Payments" box on page 1. For consumers, calculating the Total of Payments is less difficult when the interest rate is fixed, assuming the creditor has correctly disclosed the interest and principal payment amount. To arrive at the total, one multiplies the P & I payments by the total number of months in the loan term.[25]

Unfortunately, the calculation is more complex for consumers when the interest rate varies. One reason is that the P & I payments disclosed in variable rate loans consist of only the minimum and maximum possible payments.[26] In this context, the amounts of the P & I payments the creditor adds into the Total of Payments are not listed nor can be easily calculated from the information provided on the Closing Disclosure. The creditor must apply complicated rules found in the Official Interpretations § 1027.17(c)(1)-10.[27] To check the accuracy of the Total of Payments, the borrower must interpret the terms of the loan note regarding the change dates, the index and margin, and other relevant terms,

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[24] Reg. Z § 1026.38(o)(1); Official Interpretations § 1026.38(o)(1)-1 (referring to Official Interpretations § 1026.37(l)(1)(i)-1 for guidance).

[25] When the interest rate varies, the closing disclosure will show the number of years during which each monthly payments amount applies.

[26] Reg. Z § 1026.37(c)(1)(iii).

[27] Official Interpretations § 1026.38(o)-1 (referring to § 1026.37(l)(1)(i)-1); § 1026.37(l)(1)(i)-1 (referring to § 1026.17(c)(1)-10.

according to the Official Interpretations instructions, and input them into an amortization program or an Excel spreadsheet! The Adjustable Interest Rate (AIR) Table and, if applicable, an Adjustable Payment (AP) Table contain only some of the information necessary to make the calculation.

We urge the CFPB to require creditors to use an addendum to disclose the projected actual monthly payment at each change listed under "Projected Payments"—not just the maximum and minimum. In addition, we urge the CFPB to require creditors to disclose the total of each component of the Total of Payments in an addendum. Without the addendum, this information will not be transparent to borrowers, their representatives, or supervisory agencies. Adding this information in an addendum will simplify checking the accuracy of the Total of Payments disclosure.

2.3 Construction loan and inspection fees collected post-consummation should be included in the Total of Payments.

The CFPB proposes to allow creditors to list construction loan and inspection fees to be collected after consummation in an addendum, rather than in the Loan Costs table on the Loan Estimate and Closing Disclosure.[28] In its discussion of this proposal, the CFPB made clear that these charges constitute "loan costs." When these fees are collected at or before closing, they must be disclosed as origination charges or as charges for services the borrower did not shop for, depending on whether the fees are paid to the creditor or to a third party.[29]

Permitting post-consummation fees of this type to be disclosed in an addendum raises the question of whether they should be included in the Total of Payments. As noted above,

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[28] Proposed Official Interpretation § 1026.37(f)-3, § 1026.38(f)-2, discussed in 81 Fed. Reg. at 54,339.

[29] 81 Fed. Reg. at 54,339.

the Total of Payments formula includes all loan costs scheduled to be paid either through the end of the 60th month (Loan Estimate) or to the end of the loan term (Closing Disclosure). "Loan costs" includes all items disclosed pursuant to Regulation Z § 1026.37(f)(1)-(3): origination charges plus the cost of services the borrower can and cannot shop for.[30]

We do not object to placing the fees to be collected from the borrower after consummation in the addendum but we urge the CFPB to clarify that those charges must be added to the Total of Payments disclosures on the Loan Estimate and Closing Disclosure.[31]

3. The proposed definition of bona fide charges should either be expressly limited to the determination of good faith, or it should be modified so it will be appropriate for all purposes in Regulation Z. The Bureau should also require fees to be reasonable.

The integrated disclosure rule requires creditors to disclose good faith estimates of certain closing costs on the Loan Estimate form. Regulation Z § 1026.19(e)(3)(iii) addresses when estimates of a specific list of charges are deemed to have been made in good faith. This provision limits increases to fees shown on the loan estimate that can occur depending on the type of fee. For charges not subject to a cap, the rule states that an estimate of specific charges is made in good faith if the creditor makes the estimate based on the best information reasonably available at disclosure.[32] The Bureau proposes to amend this section to specify that this rule applies "even if such charges are paid to affiliates of the creditor, so

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[30] Reg. Z § 1026.37(f)(1)-(3); Official Interpretations § 1026.37(l)(1)(i)-1 (including both financed and paid-in-cash costs).

[31] The proposal does not expressly discuss this issue.

[32] Reg. Z § 1026.19(e)(3)(iii).

long as the charges are bona fide."[33] As proposed, new commentary to the amended provision would state: "[t]o be bona fide, charges must be lawful and for services that are actually performed."[34]

We are concerned about this proposed definition of "bona fide." Regulation Z uses the term "bona fide" to qualify charges or fees in a number of places, such as the definition of finance charges,[35] provisions regarding third-party charges in high cost loans,[36] and the partial disclosure exemption for certain mortgage loans.[37] The proposed new commentary, however, contains a definition of "bona fide," where none exists in connection with its appearance in other parts of the regulation. Consequently, it is very likely that courts will refer to this new definition when trying to apply the "bona fide" requirement in other areas of Regulation Z. Therefore, this definition is very important.

The CFPB's discussion of the new definition, however, appears to express the belief that this definition should be limited to the determination of good faith.[38] If the Bureau

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[33] 81 Fed. Reg. at 54,332.

[34] Proposed Official Interpretations § 1026.19(e)(3)(iii)-4.

[35] Reg. Z. § 1026.4(c)(7) (exclusion from the finance charge definition for certain real estate charges, "if the fees are bona fide and reasonable in amount").

[36] Reg. Z § 1026.32(b)(1)(i)(D) ("Any bona fide third-party charge not retained by the creditor").

[37] Reg. Z § 1026.3(h)(5)(ii) and (iii) ("A bona fide and reasonable application fee"; "A bona fide and reasonable fee for housing counseling services").

[38] 81 Fed. Reg. at 54,332 ("The proposed bona fide determination under § 1026.19(e)(3)(iii) would be specifically for determining good faith for purposes of § 1026.19(e)(1)(i). For example, such determination is distinct from the broader finance charge

believes such a limitation is appropriate, it should expressly state that limitation in the regulation or the Official Interpretation.

Otherwise, the Bureau should tailor the definition to make it more appropriate for the important role it will serve. Drawing on court decisions that have interpreted the term “bona fide” in the finance charge context, we agree that a bona fide charge must be lawful and for services that are actually performed. But such a charge should also be limited to the amount of the charge actually incurred and without any inflation or padding.[39]

We also recommend adding a requirement that the charges be reasonable. The commentary should specify that a charge is “reasonable” if it does not exceed the market rate for equivalent services in the local community or any limits set by law.[40]

4. Overhauling the Cash to Close and Calculating Cash to Close tables will enhance consumer understanding and ease lender compliance.

4.1 Overview

The Loan Estimate and Closing Disclosure both include two related tables: the Costs at Closing table on the first page,[41]

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determination under § 1026.4(c)(7) . . . and the points and fees determination under § 1026.32(b).”).

[39] *See generally* National Consumer Law Center, Truth in Lending § 3.9.6.3.2 (9th Ed. 2015), *updated at* www.nclc.org/library (compiling court decisions defining “bona fide” in the finance charge context).

[40] National Consumer Law Center, Truth in Lending § 3.9.6.3 (9th ed. 2014) (summarizing court decisions discussing the “bona fide and reasonble” standard for excludable real estate closing charges).

[41] Reg. Z §§ 1026.37(d)(1); 1026.38(d)(1).

which includes the amount of Cash to Close, and the Calculating Cash to Close table on a subsequent page.[42] The Bureau's Federal Register notice makes a number of changes to address questions that creditors have raised regarding the Calculating Cash to Close table.[43] A sample of these changes or clarifications include:

- addressing the difference between calculations and disclosures in the table for first and subordinate loans;[44]
- how to handle refunds when a loan program does not permit cash refunds;[45]
- how to calculate the amount of closing costs financed;[46] and
- how to calculate the amount of a down payment;[47]

The difficulty lenders have had understanding this table likely pales in comparison to how consumers feel about it. Yet none of the proposed changes or clarifications will make the table clearer to consumers (or to the lawyers writing these comments).

Notably, the Bureau solicits general comments on how to improve the Calculating Cash to Close table.[48] Our comments are, therefore, directed toward an overhaul that would make

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[42] Reg. Z §§ 1026.37(h)(1); 1026.38(i).

[43] 81 Fed. Reg. at 54,341.

[44] 81 Fed. Reg. at 54,341

[45] 81 Fed. Reg. at 54,349. We support allowing a reduction of the loan principal as an alternative to a cash refund. But disclosing this, or anything else, as a negative number will risk confusing borrowers.

[46] 81 Fed. Reg. at 54,341.

[47] 81 Fed. Reg. at 54,342.

[48] 81 Fed. Reg. at 54,341.

this table more useful and comprehensible for consumers. We also make suggestions for improving the Cash to Close disclosure in the Costs at Closing table.

4.2 Modifying the Cash to Close disclosure will avoid confusion.

The Cash to Close disclosure, under the Costs at Closing section on page 1 of both forms, is confusing when it is used to indicate how much cash the consumer will *receive* at the closing. In that circumstance, the headings (i.e. the reference to "costs" and "cash to close") can be understood to mean that the consumer is expected to pay money rather than receive it. The Bureau's proposed changes will not resolve that problem.

Instead, we recommend changing the Cash to Close row of the Costs at Closing table to reflect what is actually happening. When the consumer will receive money, it should say "cash paid to you" on the left (instead of merely "Cash to Close") and "the amount of money you will receive at the closing after closing costs" on the right (instead of "includes closing costs"). When the consumer must bring money to the closing, the label on the left should say "cash you owe at closing" and the right side should say "the amount of money you must pay at the closing, including closing costs." While the current rules allow creditors to add "to" or "from" check boxes (to indicate cash to or from the borrower),[49] that is insufficient because the surrounding disclosures are more prominent.

4.3 Replace the Calculating Cash to Close table entirely.

The Calculating Cash to Close table (on page 2 of the Loan Estimate and page 3 of the Closing Disclosure) appears to be confusing to everyone. The only way we can see to solve this problem is to completely redesign the table. Instead of the

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[49] *See, e.g.*, Reg. Z § 1026.37(d)(2)(ii); Official Interpretations § 1026.38(d)(2)-2.

current design, the table should include a simple itemization of the total costs and charges, such as in the examples below:[50]

[50] We realize there are many potential variations in transactions. But our proposed format could readily be adjusted to accommodate them. To simply formatting, each example is on a separate page.

Example #1

Calculating Cash to Close	
BORROWER MUST PAY:	**Estimate**
Sale price	$260,000
1st mortgage closing costs (this disclosure form)	$5,000
2nd mortgage closing costs (see other disclosure form)	$3,000
TOTAL CLOSING COSTS	$8,000
TOTAL BORROWER OWES	*$268,000*
PAID BY/FOR BORROWER:	
Seller general credit	$5,000
Deposit	$1,000
1st Mortgage (this form)	$205,000
2nd Mortgage (see other form)	$50,000
TOTAL PAID BY/ON BEHALF OF BORROWER	*$261,000*
TOTAL BORROWER OWES	*$268,000*
TOTAL PAID BY/ON BEHALF OF BORROWER	*$261,000*
Estimated cash borrower must pay at closing	**$7,000**

Example #2

Calculating Cash to Close			
BORROWER MUST PAY:	**Estimate**	**Final**	**Did this change?**
Sale price	$260,000	$260,000	NO
1st mortgage closing costs (see other form)	$5,000	$7,000	YES, the increase exceeds the legal limit by $500. You have been given a lender credit in this amount.
2nd mortgage closing costs (this form)	$3,000	$3,000	NO
TOTAL CLOSING COSTS	$8,000	$10,000	YES
TOTAL BORROWER OWES	*$268,000*	*$270,000*	YES, the closing costs increased
PAID BY/FOR BORROWER:			
Seller general credit	$10,000	$10,000	NO
Deposit	$1,000	$1,000	NO
1st Mortgage (see other form)	$205,000	$205,000	NO
2nd Mortgage (this form)	$50,000	$50,000	NO
Lender general credit	$0	$500	YES, you got a credit for a closing cost overage
TOTAL PAID BY/ON BEHALF OF BORROWER	*$266,000*	*$266,500*	YES, this increased because you received a lender credit
TOTAL BORROWER OWES	*$268,000*	*$270,000*	YES, the closing costs increased
TOTAL PAID BY/ON BEHALF OF BORROWER	*$266,000*	*$266,500*	YES, this increased because you received a lender credit
Cash borrower must pay at closing	**$2,000**	**$3,500**	YES, your closing costs increased

Example #3

Calculating Cash to Close			
BORROWER MUST PAY:	**Estimate**	**Final**	**Did this change?**
Payoff existing mortgages	$175,000	$175,000	NO
Payoff other debts	$14,000	$14,000	NO
TOTAL CLOSING COSTS	$9,000	$10,000	YES. See **Total Loan Costs (D)**
TOTAL BORROWER OWES	*$198,000*	*$199,000*	YES. Your closing costs increased
PAID BY/FOR BORROWER:			
New mortgage	$250,000	$250,000	NO
TOTAL PAID BY/ON BEHALF OF BORROWER	*$250,000*	*$250,000*	NO
TOTAL BORROWER OWES	*$198,000*	*$199,000*	YES. Your closing costs increased
TOTAL PAID BY/ON BEHALF OF BORROWER	*$250,000*	*$250,000*	NO
Cash paid to borrower at closing	**$52,000**	**$51,000**	Yes. Your closing costs increased

These proposed alternatives address the Bureau's primary concerns: consumer comprehension, easing compliance, and how to disclose simultaneous subordinate loans.[51] The items included and their arrangement mirror the details and steps in a mortgage transaction more closely than the current version. Therefore, we believe they will be more intuitively comprehensible for all parties. The key points are as follows:

- Both the first and second mortgage would be disclosed in the same table. This reflects that the two loans are part of a single transaction and must be considered together. The closing costs for each are itemized and totaled. This reflects the reality that the "cash to close" owed/received by the consumer at the closing will only be a single check. Using the same table on the disclosure forms for both loans will facilitate comparison and consumer comprehension of the transaction.

- The only difference between the disclosure forms for the first and second mortgages would be a parenthetical reference to "(this form)" or "(see other form)."

- Adding the words "estimated" to the heading and the bottom line of Example #1 emphasizes that the numbers are tentative and may change.

- The Borrower Must Pay section summarizes the charges incurred cost and clearly shows the total "bill" owed by the consumer.[52] This is similar to what a consumer would expect from a retailer, where the cash register or restaurant receipt shows a clear, total amount due.

- The Paid By/For Borrower section summarizes the amounts paid toward the borrower's bill and totals the amount paid so far.[53] This reflects the order of a simple payment

[51] 81 Fed. Reg. at 54,340.

[52] The total bill is indicated by the Total Borrower Owes label.

[53] The total amount paid is indicated by the Total Paid By/For Borrower label.

transaction: you get a bill, then you make a payment towards it.

- The rest of the Calculating Cash to Close table summarizes the basic arithmetic of the transaction in plain English and clearly states how much cash the borrower will receive or must pay.
- Our version does not include the amount of closing costs financed[54] for the reasons explained in the next section.

On the Loan Estimate, we urge the CFPB to place all credits, whether from the seller, the lender, or other third parties only in the Calculating Cash to Close table. There is no need to show them under Total Closing Costs in the Closing Cost Details section. At the loan estimate stage, it is irrelevant whether the credits are general or specific credits: they all operate to reduce the bottom line for the consumer.

At the Closing Disclosure stage, where the credits should appear on the form depends upon whether the credits are general or specific. In the case of specific credits, the CFPB determined that a credit provided by the creditor, seller, or third party can offset a specific fee if the legal obligation so provides in the TILA/RESPA context.[55] If the fee being offset is a finance charge, the total of the finance charges is reduced by the amount of the specific credit. In that case, the credit

[54] This disclosure is required by 15 U.S.C. § 1638(a)(17).

[55] Reg. Z § 1026.17(c)(1); Official Interpretations § 1026.17(c)(1)-19, § 1026.19(e)(3)(i)-5, § 1026.38(h)(3)-1). *See* CFPB Webinar, Post-effective date questions and guidance, slides 9-12 (April 12, 2016), *available at* www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/tila-respa-disclosure-rule; CFPB discussion of specific and general credits in the context of which type of credit affects the total of payments calculation, 81 Fed. Reg. 54,318, 54,355, 54,385 (Aug. 15, 2016) (only specific credits are excluded from the total of payments).

must appear in the "Seller-Paid or "Paid by Others" columns under Closing Cost Details, Loan Costs on page two.[56]

Moreover, the offset against specific finance charges affects the Finance Charge disclosure located under Loan Calculations on page five. If the legal obligation is silent or does not specify the fee or fees the credit will offset, the creditor cannot offset it against a specific fee. Such credits should be treated as general credits that do not reduce the total of the finance charges. In the Closing Disclosure, the amount of any "generalized" lender credits, disclosed as a negative number, labeled "Lender Credits" are currently listed under the "Closing Cost Subtotals" line.[57] We urge the CFPB to eliminate the placement of general credits from this location and, instead, mandate that they appear in the Calculating Cash to Close table. Our examples place the general lender credit into the Calculating Cash to Close table. (See Example #2 above.)

We believe an overhaul of the Calculating Cash to Close table is warranted because it would benefit both consumers and lenders. Consumers would better understand their transactions and lenders would benefit from a disclosure that is easier to complete. It would also greatly simplify the regulations and commentary.

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[56] Official Interpretations § 1026.38(h)(3)-1. See also Official Interpretations §§ 1026.17(c)(1)-19, 1026.19(e)(3)(i)-5 (more guidance on lender credits).

[57] Reg. Z § 1026.38(h)(3); Official Interpretations § 1026.38(h)(3)-1. *See* CFPB Webinar, Post-effective date questions and guidance, slides 9-10 (April 12, 2016), *available at* www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/tila-respa-disclosure-rule; CFPB discussion of specific and general credits in the context of which type of credit affects the total of payments calculation, 81 Fed. Reg. 54,318, 54,355, 54,385 (Aug. 15, 2016) (only specific credits are excluded from the total of payments).

4.4 The "closing costs financed" disclosure should be moved to the last page of the disclosure forms.

One of the additions the Dodd-Frank Act made to the Truth in Lending Act was a new requirement to disclose "the amount of [settlement] charges that are included in the loan."[58] The CFPB implemented that requirement by adding a line to the Calculating Cash to Close table (on both the Loan Estimate and the Closing Disclosure) for the amount of "closing costs financed."[59] The instructions for calculating this amount are puzzling.[60] And they will only become longer with the Bureau's proposed clarifications.[61]

We propose moving this disclosure to the last page of the disclosure forms because it is confusing to the consumer and (except in the simplest mortgage transactions) there is no transparent or logical method for calculating it. When the instructions require a creditor to disclose $0 for the amount of closing costs financed, the disclosure may confuse the borrower because the zero may lead some borrowers to believe there are no closing costs associated with the loan. This will contradict other disclosures nearby. A similar problem will arise any time the number to be disclosed is less than the total amount of closing costs associated with the loan.

In other circumstances, the instructions call for disclosing the amount as a negative number.[62] That is likely to cause

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[58] 15 U.S.C. § 1638(a)(17).

[59] Reg. Z §§ 1026.37(h)(1)(ii); 1026.38(i)(3).

[60] *See* Official Interpretation § 1026.37(h)(1)(ii)-1.

[61] *See* 81 Fed. Reg. at 54341-342, 54,349; Proposed Official Interpretation § 1026.37(h)(1)(ii)-1 and -2; Official Interpretation § 1026.38(i)(3)-1 and -2.

[62] Proposed Official Interpretations § 1026.38(i)(3)-1 ("If the result of the calculation is positive, that amount is disclosed as a negative number under § 1026.38(i)(3), but only to the extent that the

confusion too.[63] What does financing a negative amount mean?

Disclosing the amount of closing costs financed implies that some of the loan funds are earmarked for the closing costs. In a very simple transaction, this is true. For example, assume a consumer borrows $110,000 to buy a house that costs $100,000 and is charged $10,000 in closing costs. If there are no other credits or adjustments, it is apparent that the $10,000 portion of the loan amount that exceeds the sale price can only be said to pay the $10,000 of closing costs. But few transactions are that simple.

As proposed, the Official Interpretations require creditors to calculate the amount of closing costs financed by subtracting the total amount of payments to third parties not otherwise disclosed under the Closing Cost Details from the face amount of the note.[64] The problem with this calculation is that money is fungible. It cannot be definitively said that any amount over zero resulting from this calculation was used to pay closing costs. Maybe the borrower's down payment went to the closing costs instead. Or maybe a general credit from the lender paid part of the closing costs. Or maybe some combination thereof. The transaction can only be accurately

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absolute value of the amount disclosed under § 1026.38(i)(3) does not exceed the total amount of closing costs disclosed under § 1026.38(h)(1).").

[63] PIAAC Fact Sheet: New Data on the Skills of American Adults (stating that, according to research by the Organization for Economic Cooperation and Development, almost a third of American adults "have difficulty solving anything beyond simple mathematical operations involving counting, sorting, and basic arithmetic."), available at https://s3.amazonaws.com/b.3cdn.net/dpromise/47ea55c5ec3c5ac2e9_23m6iizfd.pdf.

[64] Proposed Official Interpretations § 1026.38(i)(3)-1.

described as a total amount due[65] minus a total amount paid.[66] Therefore, the current method of disclosing the amount of closing costs financed is inherently confusing and perhaps unreliable. We have tried to develop an alternative that would work for all transactions but have not been able to do so.

Because this disclosure does not provide meaningful information or protection to consumers, it should be relocated to the back of the disclosure forms so it does not interfere with comprehension of the closing cost disclosures. We recommend making this disclosure the last item under "Loan Calculations" on the Closing Disclosure.

4.5 If a lender issues a credit to reduce the principal balance, the lender should be required to update all percentage-based fees to account for the change.

If the closing costs disclosed on the Closing Disclosure exceed those on the Loan Estimate by more than the legal limits, the creditor must issue a credit to the borrower.[67] The Bureau notes in the Federal Register that some loan programs or legal restrictions prevent creditors from issuing cash refunds to borrowers.[68] To address that, the Bureau proposes to clarify that creditors may also issue the credit in the form of a principal reduction or curtailment.[69]

We support allowing a reduction of the loan principal as an alternative to a cash refund—in fact, we believe this is the

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[65] Defined as the sale price plus all other costs owed by the borrower.

[66] Defined as the mortgage loan plus all credits and cash paid.

[67] 81 Fed. Reg. at 54,349

[68] *Id*.

[69] *See* Proposed Reg. Z § 1026.38(i)(1)(iii)(A)(3); proposed Official Interpretation § 1026.38(i)(1)(iii)(A)-3.

most consumer-friendly method of issuing a credit because it not only reduces the amount borrowed but also reduces the amount of interest and other costs tied to the size of the loan. For that reason, the Bureau should clarify that when a lender issues a credit that reduces the loan balance, the creditor should update all related numbers and disclosures. This includes the loan amount on the note and everywhere it appears on the disclosures; the monthly payment; and all charges that are based on the loan amount (such as percentage based fees, transfer taxes, and recording fees).

This is appropriate to protect the consumer from the lender's wrongdoing (exceeding the limit on closing costs) and to prevent the lender from profiting from its error or misconduct. Such a requirement will not unduly burden the lender because all lenders subject to the integrated disclosure rule use computer software to prepare the loan documents

5. Loan Estimates

5.1 The Bureau should prohibit creditors from issuing Loan Estimates that are "for informational purposes only."

Under Regulation Z, once a creditor issues a Loan Estimate, the details on that disclosure are binding.[70] Redisclosure (such as to disclose higher fees) is allowed only in the event of a limited universe of changed circumstances that are listed in Reg. Z § 1026.19(e)(3)(iv)(A)-(F).[71] The revised form "resets" the baseline used for determining whether the estimates on the disclosure have been made in good faith. The current Official Interpretations apparently allow a creditor to provide a revised Loan Estimate even in the absence of the circumstances listed in Reg. Z § 1026.19(e)(3)(iv).[72] In this

[70] Reg. Z § 1026.19(e)(3).

[71] Reg. Z §§ 1026.19(e)(3)(iv)(A)-(F).

[72] 81 Fed. Reg. at 54,333; Official Interpretations § 1026.19(e)(3)(iv)(A)-ii.

rulemaking, the CFPB says a revised a Loan Estimate is "for informational purposes only" and does not affect the good-faith baseline if the creditor issues it after a change that is not among those listed in Regulation Z.[73]

When the creditor later issues the Closing Disclosure, the creditor must complete the Calculating Cash to Close table with figures from the Loan Estimate so the consumer may see any changes between the estimated disclosure and the final disclosure. This raises the question, addressed in the notice of proposed rulemaking, of whether a creditor should use numbers from a "for informational purposes only" Loan Estimate (hereinafter "an informational Estimate"), when it is the most recent version of the Loan Estimate, even though it is for informational purposes only.[74] The alternative would be to use an older, non-informational version even though it would have numbers that have been superseded by the informational Estimate.

The Bureau recommends using the most recent disclosure, even if it was provided for informational purposes only.[75] We disagree, however, because the Bureau's proposal would undermine the rule that the original Loan Estimate is binding unless a limited universe of changed circumstances occur.[76]

Instead, we recommend that the Bureau prohibit creditors from issuing informational Estimates. A revised Loan Estimate should be issued only if the creditor makes a good-faith change that meets the threshold for redisclosure. In addition, we recommend that each revised Loan Estimate contain a notation on the first page (after the date) indicating that it is "Estimate X of Y" so anyone reviewing the transaction will be aware of the existence of prior versions.

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[73] 81 Fed. Reg. at 54,333, 54,349.

[74] 81 Fed. Reg. at 54,349.

[75] Id.

[76] Reg. Z § 1026.19(e)(3).

Dating the disclosures is helpful but does not provide any information about prior versions.

As the Bureau and outside commentators have observed on other occasions, the flood of paper and information overload common in mortgage transactions may do more harm than good. When a creditor issues a revised Loan Estimate (whether informational or not), the creditor is informing the consumer that the numbers on the revised document are now the most recent and accurate ones. Consumers will not understand the difference between an informational Estimate and one used for assessing good faith. After all, aren't all disclosures for informational purposes?

Consumers receiving an informational Estimate may consider the previous Loan Estimate to be useless and discard it. But that is exactly the wrong message to take from a chain of Loan Estimates. Instead, the original and all intervening versions remain relevant for determining whether the creditor's estimates were made in good faith.[77] To guard against this misunderstanding, we recommend that each Loan Estimate and Closing Disclosure include the following short statement at the top of page one: "KEEP ALL VERSIONS OF THIS DOCUMENT YOU RECEIVE."

Informational Estimates should be prohibited because the risks of issuing one outweigh any benefits. The Bureau has already decided which changes are important enough to trigger the redisclosure rule, so anything less than that is—by definition—less important. The new information that could be shown on an informational Estimate will appear on the Closing Disclosure. The Closing Disclosure must be given to the consumer at least three business days before the closing. So the consumer will have time to compare it with the most recent Loan Estimate and the original one and then to ask questions. Prohibiting informational Estimates will mean fewer documents to review and fewer documents to keep

[77] 81 Fed. Reg. at 54,349.

track of, and will protect consumers from a confusing blizzard of paper.

While banning informational Estimates may slightly delay notice of some changes (until the Closing Disclosure), clarity and avoiding information overload are more important.

5.2 The figures on the Loan Estimate should be binding on the creditor until the later of 10 days or any longer expiration date offered by the creditor.

Currently, after a creditor gives a Loan Estimate to a consumer, the creditor is bound by the details on the disclosure for 10 business days (subject to rules allowing certain changes). If the consumer waits beyond 10 days before telling the creditor that he or she would like to proceed with the transaction, Regulation Z allows the creditor to issue a new Loan Estimate without any limitation on changes.[78]

Creditors may voluntarily give the consumer more than 10 days to respond. The CFPB proposes to clarify that when a creditor gives the consumer more than the required 10-day period, the longer period becomes the relevant time period for measuring compliance with the regulations and issuing any revised estimates.[79] We support this proposal. It eliminates any confusion for lenders. And it ensures that consumers do not lose any rights by availing themselves of additional time provided by the lender.

5.3 Disclosure of specific seller credits in the Loan Estimate should be in the appropriate closing costs table.

The CFPB proposes to amend the Official Interpretations to allow creditors to disclose specific seller credits in one of two ways on the Loan Estimate: in the Loan Costs or Other Costs

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[78] Official Interpretation § 1026.19(e)(1)(vi)-4; 81 Fed. Reg. at 54,330.

[79] 81 Fed. Reg. at 54,333.

tables, as appropriate, or in the Calculating Cash to Close table.[80] The commentary provides examples. We urge the CFPB to require that specific seller credits be listed only in the Loan Costs or Other Costs tables (by showing the amount of the fee minus the amount of seller credit and the result), rather than allowing the creditor to decide where to put this information.

Having a rule that requires a consistent placement of seller credits on Loan Estimates provided by different potential creditors enhances consumer understanding during the shopping process. Comparing one Loan Estimate to another is less confusing when specific seller credits are found in the same locations on each form. Perhaps more importantly, consumers can compare the Loan Estimate to the Closing Disclosure and find the seller credits in the same tables. Specific seller credits currently must be listed on the Closing Disclosures in the Loan Costs or Other Costs Table, as applicable, in the column labeled "seller-paid."[81]

The CFPB expressed ambivalence about whether it matters where specific seller credits are shown on the Loan Estimate.[82] This is surprising since consistency among forms of the same type and between the early and the Closing Disclosures undergirds much of the CFPB's work in crafting the integrated TILA/RESPA rules. We urge the CFPB to apply this core principle in this context and require that specific seller credits be disclosed only in the Loan Costs or Other Costs tables on the Loan Estimate. Specific credits provided by lenders, sellers, and third parties should be treated in the same fashion on both forms to provide important consistency among Loan Estimates during the shopping process and to

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[80] Proposed Official Interpretations § 1026.37(h)(1)(vi)-2.

[81] Official Interpretations § 1026.38(j)(2)(v)-1. *See, e.g.,* Reg. Z app. H-25(B) (Mortgage Loan Transaction Closing Disclosure—Fixed Rate Loan Sample), page 2.

[82] 81 Fed. Reg. at 54,343.

allow for easy comparison between the Loan Estimate and the Closing Disclosure in a specific transaction.

6. Cooperatives

6.1 All transactions secured by cooperatives should receive the integrated disclosures regardless of whether state law classifies the ownership interest as real property.

Currently Regulation Z § 1026.19(e) and (f) apply only to loans secured by "real property." This leads to inconsistent coverage for cooperatives because some states classify cooperatives as real property and some classify them as personal property.[83] Under the current rule, consumers in different states, shopping for nearly identical loans, could receive disclosures on different forms. There is no valid reason for that difference.

Many of the changes proposed in the August rulemaking notice are intended to "provide a uniform rule regarding application of the . . . disclosure requirements to cooperative units."[84] The Bureau proposes to eliminate any difference and require the integrated disclosures for all cooperatives regardless of how they are classified under state law.

We support this change. From the consumer's perspective there is no reason why the format of the disclosures should depend on whether a cooperative is classified as real estate under state law. Consumers receive the integrated disclosures for condominiums, which are functionally the same as cooperatives. So the disclosures should be the same too. Providing the improved, integrated disclosures to all cooperative owners and buyers will carry out the purposes of TILA and RESPA by promoting the informed use of credit, by better disclosing the costs of settlement, by facilitating

[83] 81 Fed. Reg. at 54,328.

[84] *Id.* at 54,318.

comparison with transactions involving other properties, and by ensuring that consumers receive advance notice and time to digest the details of their mortgage transactions.

6.2 The Bureau should also amend Regulation X to clarify that RESPA applies to all cooperatives, regardless of whether the ownership interest is classified as real or personal property.

The question of whether a cooperative is classified as real property affects not only the application of TILA but also RESPA. The CFPB correctly states that "RESPA includes cooperatives within the definition of federally related mortgage loans."[85] However, the language of Regulation X is not clear on this point. The statute and Regulation X define "federally related mortgage loan" as applying only to loans "secured by a first or subordinate lien on residential real property . . . ."[86] Therefore, there could be confusion over whether cooperatives in some states are subject to RESPA when the shares are treated as personalty under state law.

The legislative history of RESPA and Regulation X suggests that all cooperatives should be subject to RESPA, regardless of how they are treated by state law. Due to some confusing amendments, as discussed below, the current text of Regulation X could imply otherwise. The CFPB should amend Regulation X to eliminate any ambiguity over which cooperatives are subject to RESPA.

When Regulation X was first adopted by the Department of Housing and Urban Development (HUD) in 1975,[87] it clearly applied to loans secured by cooperative shares, regardless of whether they were personalty or realty under state law. At

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[85] *Id. at* 54,328.

[86] 12 U.S.C. § 2602(1)(A); 12 C.F.R. § 1024.2(b).

[87] 40 Fed. Reg. 22,448 (May 22, 1975).

that time, the original Regulation X included the following provisions, located in different parts of the regulation:

- "This part applies to certain 1 to 4 family mortgages, defined as 'Home Mortgages' in this part."[88]
- "'Home Mortgage' means a loan . . . which meets all of the following four requirements: * * * (2) The loan is secured by a lien on . . . real estate . . . designed principally for the occupancy of from 1 to 4 families . . . or the loan is secured by a pledge of cooperative stock or interest corresponding to a 1 to 4 family residential cooperative unit; (3) the Mortgaged Property is located in a State; . . . ."[89]
- "'Mortgaged Property' means the real property covered by the Home Mortgage, or the cooperative unit with respect to which stock is pledged to secure the Home Mortgage loan."[90]

Thus, real estate and cooperatives were identified separately and treated as equivalents in the original version of Regulation X. This eliminated any ambiguity created by the statutory definition.

Changes made to the regulation in 1976[91] eliminated this clarity. As amended, the term "Home Mortgage" was replaced by "Federally Related Mortgage Loan." The definition of Home Mortgage was deleted entirely,[92] and a new definition, for

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[88] 24 .C.F.R. § 82.1 (1975). Note that the regulation was then located at 24 C.F.R. Part 82. It is now housed in 12 C.F.R. Part 1024.

[89] 24 C.F.R. § 82.2(e)(2) (1975).

[90] 24 C.F.R. § 82.2(i) (1975).

[91] 41 Fed. Reg. 1672 (Jan. 9, 1976).

[92] 24 C.F.R. § 82.5(a) (1976) ("RESPA and this part are applicable to all Federally Related Mortgage Loans.").

Federally Related Mortgage loan, was added.[93] This definition was similar—but not identical—to the statutory version. And the definition of Mortgaged Property was retained without significant change.[94] After the amendments, Federally Related Mortgage Loan was defined in relevant part as follows:

> "'Federally Related Mortgage Loan' means a loan . . . which meets all of the following four requirements: * * * (2) The loan is secured by a first lien . . . covering real estate . . . (v) Which is a 1 to 4 family residential condominium unit (or the first lien covering a cooperative unit); (3) The Mortgaged Property is located in a State;"[95]

Notably, the 1976 version referred to the definition of Mortgaged Property.

In 1992 Regulation X was amended again,[96] giving us the current version for purposes of this discussion. This time the reference to cooperatives in the definition of "Mortgaged Property" was deleted. As a result, Mortgaged Property was defined as "the real property which is security for the federally-related mortgage loan."[97] HUD gave no explanation

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[93] 24 C.F.R. § 82.2(b) ("'Federally Related Mortgage Loan' is defined in 82.5.").

[94] 24 C.F.R. § 82.2(e) ("Mortgaged Property means the real property covered by the Federally Related Mortgage Loan, or the cooperative unit with respect to which stock is pledged to secure the Federally Related Mortgage Loan.").

[95] 24 C.F.R. § 82.5(b) (1976).

[96] 57 Fed. Reg. 49,600 (Nov. 2, 1992). The definition was changed to "Mortgaged property means the real property which is security for the federally-related mortgage loan." *Id.* at 49,608 (publishing *24* C.F.R. § 3500.2(a)(9)).

[97] See 57 Fed. Reg. 49,600 (Nov. 2, 1992). The definition was changed to "Mortgaged property means the real property which is security for the federally-related mortgage loan." *Id.* at 49,608 (publishing 24 C.F.R. § 3500.2(a)(9)).

for this change and made no reference to cooperatives. Instead the description in the Federal Register merely stated: "Mortgaged Property. The term remains substantially the same."[98]

In summary, Regulation X originally included a clear reference to all cooperatives—realty and personalty. The regulation was amended several times and the clarity of that reference gradually dissolved. While HUD never explained the changes in regard to cooperatives, the Department never disavowed its original belief that RESPA covered cooperative shares that were treated as personalty.

Because the regulation originally included all cooperatives and nothing has clearly changed that position, there is an ample basis for clarifying that Regulation X still applies to all cooperatives. The evolution of Regulation X suggests that the rule should still be interpreted as applying to all cooperatives, regardless of how they are treated under state law. Both the 1975 and 1976 regulation retained the reference to cooperatives in the definition of "mortgaged property." That suggests that HUD originally intended to apply RESPA to all loans secured by all cooperative shares and intended to continue doing so after the first set of amendments. The change in 1992, when HUD deleted the reference to cooperatives, does not clearly mean HUD intended to eliminate the coverage of some cooperatives. While the plain text of the revised regulation implies that cooperatives are not subject to RESPA, HUD's terse statement that the definition of Mortgaged Property "remains substantially the same" suggests that Regulation X still applied to all cooperatives to the same extent as in 1976.

Until Congress transferred responsibility for RESPA to the CFPB, HUD's informal RESPA guidance appeared to say that RESPA applied to all cooperatives. In a "FAQs About RESPA for Industry" posted on HUD's website (until recently), HUD

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[98] 57 Fed. Reg. 49,600, 49,603 (Nov. 2, 1992).

unequivocally stated that loans secured by cooperatives are covered by RESPA.[99] The only caveat was that such loans could not be used for business purposes.[100] Notably, the FAQ for manufactured homes, immediately following the one for cooperatives, specifically refers to a lien on "real property."[101] The lack of a similar caveat for cooperative shares suggests HUD believed all cooperatives are covered.

The CFPB should eliminate these potential ambiguities by amending Regulation X to clearly apply to all cooperatives regardless of how they are treated by state law. This will ensure that all cooperative borrowers receive the many important protections in RESPA and Regulation X, including the ban on kickbacks, the regulations for escrow accounts, and the new servicing rules. Treating cooperative owners differently based solely on the location of the cooperative would be irrational.

7. Excluding transfer taxes and recording fees from the one-percent limit in section 1026.3(h)'s partial exemption should not negatively impact consumers so long as additional protections are included to prevent abuse.

Under Regulation Z § 1026.3(h), one category of subordinate-lien loan transactions is exempt from the disclosure requirements of § 1026.19(e), (f), and (g) if the transaction meets certain conditions. Two of those conditions are

- The costs payable by the consumer must total less than one percent of the amount borrowed; and

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[99] HUD, FAQs About RESPA for Industry, ¶ 4, available at https://web.archive.org/web/20160325054914/http://portal.hud.gov/hudportal/documents/huddoc?id=faqsjuly16.pdf (undated).

[100] *Id.*

[101] *Id*. at ¶ 5.

- Those costs may only include recording fees, “a bona fide and reasonable application fee,” and “a bona fide and reasonable fee for housing counseling services.”[102]

The Bureau now proposes to exclude recording fees and transfer taxes from the one-percent cap on fees. This change is reasonable if, as the Bureau states, those fees and taxes are the reason housing finance authorities and nonprofits are having difficulty making legitimately exempt loans within the one-percent cap.[103]

While there is a risk that creditors will inflate the remaining fees subject to the cap (the application fee and fee for housing counseling), we believe that risk is mitigated by the existing directive that these fees must be “bona fide and reasonable.” The Bureau should, however, require creditors to maintain adequate documentation of these fees so borrowers and regulators can verify that the fees are truly bona fide and reasonable. We discuss an appropriate definition of “bona fide and reasonable” in § 3, *supra*.

8. The proposed definition of the “Loan Amount” will help distinguish it from the “Amount Financed.”

Currently, Regulation Z refers to both the “loan amount” and the “amount financed.”[104] Unfortunately, the rules use similar descriptions for both terms even though they refer to different numbers. The amount financed is described as “the amount of credit provided to you on your behalf.”[105] And the loan amount is described as “The amount of credit to be extended under the terms of the legal obligation . . . .”[106]

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[102] Reg. Z § 1026.3(h)(5).

[103] 81 Fed. Reg. at 54,325.

[104] *See, e.g.*, Reg. Z § 1026.37(b)(1) (requiring disclosure of loan amount); § 1026.18(b) (requiring disclosure of amount financed).

[105] Reg. Z § 1026.19(e).

[106] Reg. Z § 1026.37(b)(1).

Therefore, the Bureau proposes to change the description of the loan amount to "The total amount the consumer will borrow, as reflected by the face amount of the note . . . ."[107] This change is clearly an improvement and we support it.

9. Creditors should always be required to specifically identify the settlement services for which consumers are permitted to shop—even if the service is part of a package.

Settlement services are one of the major expenses of a mortgage closing. Sometimes creditors require consumers to use a specific service provider (or one from a list). Other times the consumer is allowed to shop for a service provider. Regulation Z § 1026.19(e)(1) requires creditors to identify which services the consumer is allowed shop for.

The Bureau proposes additional commentary requiring creditors to "specifically identify [those services] unless, . . . the creditor knows that the service is provided as part of a package . . . offered by a single service provider."[108] As proposed, specific identification of each service in the package would not be required if "all such services are services for which the consumer is permitted to shop."[109]

We agree that creditors should be required to specifically identify all of the services for which a consumer may shop. But we oppose allowing creditors to omit services included in a package. Doing so will discourage consumers from shopping for services. Consumers are unlikely to know about services that are included in packages unless they are listed separately. So, by failing to specifically identify those services, the creditor will be favoring the company offering the package. Package deals obscure the cost of the

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[107] 81 Fed. Reg. at 54,338, 54,365.

[108] 81 Fed. Reg. at 54,330.

[109] Proposed Official Interpretation § 1026.19(e)(1)(vi)-4; 81 Fed. Reg. at 54,330.

constituent items and make overpricing easier. There is already too little price competition in the market for settlement services. The Bureau should not adopt a rule that would further reduce clarity or competition.

10. Requiring one location for disclosure of certain charges on the Closing Disclosure promotes consistency and consumer understanding.

The CFPB proposes to eliminate creditor discretion regarding where to list the construction costs in connection with the transaction, payoff of existing liens secured by the real property, and payoff of unsecured debt on the Closing Disclosure. These items must be shown in the Other Costs table, unless the creditor uses alternative Calculating Cash to Close table.[110] We agree with the Bureau that "this is an appropriate and consistent place to list the three items, because they are all other closing costs of the mortgage transaction."[111] Consumer understanding is enhanced when these amounts appear in corresponding tables on the Loan Estimate and Closing Disclosure.

11. The final rule should be effective prospectively.

The effective date of all final changes to Regulation Z and the Official Interpretations made pursuant to this rulemaking should be prospective. The CFPB describes four substantive changes, which by definition are not clarifications of current law and can only be prospective. Moreover, most, if not all, of the other changes affect the location of fees on the Loan Estimate and Closing Disclosure, the amounts disclosed, the placement of information related to simultaneous loans and pre-existing loans and liens, and the good faith standard. Given the volume of the amendments, determining which might be mere clarifications and which are changes that must be applied prospectively is a daunting task. For this reason,

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[110] Proposed Official Interpretations § 1026.38(g)(4)-1.

[111] 81 Fed. Reg. at 54,348.

the entire rulemaking should be effective to applications received on or after a date certain. This creates a bright line for creditors and clarity for enforcement agencies and consumers.