COMMENTS
to the
Consumer Financial Protection Bureau

regarding

12 CFR Part 1026
Docket No. CFPB-2017-0018
RIN 3170-AA61

82 Fed. Reg. 37,794 (Aug. 11, 2017)

Amendments to Federal Mortgage Disclosure Requirements Under the Truth in Lending Act (Regulation Z)

by

National Consumer Law Center (on behalf of its low income clients)[1]

October 10, 2017

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[1] 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 Truth in Lending, Mortgage Lending, and Consumer Credit Regulation. These comments were written by Andrew Pizor and Elizabeth Renuart.

I. Summary of NCLC's Position: interpret Regulation Z to prohibit the early use of closing disclosures.

NCLC strongly urges the Bureau to not adopt its proposal and, instead, to clarify[2] that a closing disclosure can only be given no more and no less than three business days before closing. Until that time, loan estimates for the purposes of resetting tolerances can be provided during the period from three business days following receipt of the loan application until four business days before closing. The comment permitting loan estimates for informational purposes should be deleted.

II. Summary of the CFPB's Proposed Change.

Regulation Z requires creditors to issue a good faith estimate of the closing costs for a mortgage loan within three days after receiving an application. Since October 2015, this disclosure has been made on the loan estimate form. Whether those *estimates* were made in good faith is assessed retroactively by comparing them with the *actual* charges shown on the closing disclosure. A determination of good faith does not require that all of the numbers on the closing disclosure be identical to those on the estimate. Instead, Regulation Z allows limited differences for certain fees. These permitted variations are called tolerances.

Regulation Z also allows creditors to reset the tolerances (*i.e.*, issue a loan estimate containing revised estimates of charges for purposes of determining good faith) in certain limited circumstances set forth in § 1026.19(e)(3)(i) and (ii). If one or more of these circumstances arises, the creditor may issue a revised loan estimate within three business days of receiving information sufficient to establish that a permissible reason for revision exists. The consumer must receive any revised loan estimate no later than four business days before consummation. Creditors must provide the closing disclosure "no later than three business days before consummation," according to § 1027.19(f)(1)(ii).

Once the creditor issues a closing disclosure, Regulation Z prohibits the creditor from giving any more revised loan estimates. Any revisions to a closing disclosure may only be made with another closing disclosure. The Bureau explained the rationale behind these timing rules as follows:

> The Bureau was concerned that the practices of providing both good faith estimates of closing costs and an actual statement of closing costs at the same time could be confusing for consumers and diminish their awareness of the transaction. The Bureau was also concerned about consumers receiving seemingly duplicative disclosures that could contribute to information overload.

82 Fed. Reg. 37,794, 37,797 (Aug. 11, 2017).

Based on comments received during an extensive rulemaking culminating in final revisions to the TILA-RESPA rules effective on October 10, 2017, the Bureau realized that there was confusion as to the meaning of the existing reset timing provisions, particularly as they relate to the

[2] Alternatively, the Bureau should amend Regulation Z § 1026.19(f)(1)(ii).

use of closing disclosures for purposes of resetting tolerances.[3] As a result, in this rulemaking, the Bureau proposes to clarify that closing disclosures may substitute for loan estimates for purposes of resetting tolerances and determining if an estimated closing cost was disclosed in good faith at any time during which a loan estimate may be issued for that purpose. Proposed section 1026.19(e)(4)(i) permits the creditor to issue a closing disclosure reflecting revised *estimates* (rather than *actual* costs) within three business days of receiving information sufficient to establish one of the reasons listed in § 1026.19(e)(3)(iv)(A) through (F) (standards applicable to loan estimates). These changes are based on the Bureau's interpretation of § 1026.19(f)(1)(ii) that creditors may provide a closing disclosure at any time up to three days before consummation.

III. The Bureau's proposed clarification will undermine the purpose of the closing disclosure and create confusion.

NCLC opposes the change, as we understand it, because its effect will be to encourage creditors to provide closing disclosures very early in the lending process and eliminate the disincentive that currently exists to provide closing disclosures before the actual closing costs are reliably available. Doing so will undermine the distinction between the loan estimate and the closing disclosure, making the latter just another version of the loan estimate.

In conjunction with the new Official Interpretation effective on October 10, 2017 that allows creditors to provide multiple loan estimates for "informational purposes" along with loan estimates issued to reset the tolerances, the proposed change will more likely than not confuse and overwhelm consumers with paperwork. Consumers will be unable to determine which loan estimates reset the tolerances and which are for informational purposes.[4] Comparing the legally operative loan estimate with multiple closing disclosures that this change encourages is a daunting task for lawyers, never mind consumers who are unfamiliar with these detailed rules.

Sending multiple versions of disclosures also risks desensitizing consumers to the need to carefully read each disclosure. The more often disclosures are sent, the less likely consumers are to scrutinize the numbers on each one. This could allow creditors to gradually ratchet up costs without alarming customers. Regardless of whether the changes are used to reset tolerances, increases may eventually exceed what the customer is willing to pay and cause consumers to shop with other lenders. If consumers are desensitized to changes, however, they will be less likely to withdraw from the transaction.

Moreover, this proposed change will encourage creditors to provide closing disclosures that are not intended to reset tolerances. Like "informational" loan estimates, "informational" closing disclosures will confuse consumers about whether to compare the final closing disclosure to earlier loan estimates or to earlier closing disclosures. In other words, if closing disclosures are issued more

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[3] Some commenters interpreted the current rules to allow a closing disclosure to reset the tolerances only if there are less than four business days before consummation. Others commenters perceived the 2016 proposal to allow closing disclosures to reset the tolerances even if there were four or more business days before closing. 82 Fed. Reg. at 37,798.

[4] During the 2016 rulemaking, NCLC opposed the use of loan estimates for informational purposes and, if the agency adopted the change, urged the Bureau to require creditors to label loan estimates used for informational purposes to make the purpose of the disclosure clear. Apparently, the Bureau rejected this suggestion because the final commentary mirrored the proposal.

than three business days before closing, consumers will have difficulty in determining which early closing disclosure was intended to reset tolerances, if any, and which was for informational purposes. Using the closing disclosure for revised estimates also undermines the purpose of the two different forms and their related timing rules and will create confusion about the purpose and standards for the forms.

If a closing disclosure issued early under the proposed rule is later corrected four or more business days before closing, the creditor must comply with both the loan estimate standards and the closing disclosure standards in § 1026.19(f)(2)(i) or (ii). This rule appears to apply to situations when the closing disclosure is used by the creditor to reset the tolerance and when the creditor is providing "actual" closing costs per § 1026.19(f)(1). But none of the proposed examples in the accompanying comments provide guidance regarding this situation. *See* proposed Official Interpretations § 1026.19(f)(e)(4)(ii)-1-iii-iv.

The following factual scenario presents the concerns expressed in the preceding paragraph:

1. Assume that the creditor gives the consumer the initial loan estimate within three business days of receipt of the loan application.
2. The closing is scheduled for thirty days from application.
3. Changes in the costs trigger the need to reset the tolerances. The creditor provides a revised loan estimate per § 1026.19(e)(4) twenty days before closing.
4. The creditor provides the first closing disclosure ten days before the closing.

The lack of a bright-line rule raises questions about how creditors should handle that scenario:

- Must the creditor comply with both the standards for issuing a revised loan estimate and a corrected closing disclosure at the same time even if the creditor does not intend this revision to necessarily contain the *actual* closing costs?
- If the creditor intends this closing disclosure to both reset the tolerances and contain the actual closing costs, how does the creditor comply with the "no later than three business days before consummation" rule contained in § 1026.19(f)(1)(ii)?
- Can a closing disclosure be used to both reset and contain actual costs if the creditor gives it to the consumer four or more business days before consummation?
- Or could the creditor give the same closing disclosure twice--once to reset the tolerances at four or more business days before consummation and again no later than three business days before closing to provide the actual costs?[5]

IV. The Bureau should clarify that a closing disclosure cannot be provided no more and no less than three business days before consummation.

The Bureau's proposal will cause more problems than it will solve. Instead, the Bureau should clarify that creditors may not issue a closing disclosure no more or less than three business days before consummation, unless redisclosure of the closing disclosure occurs thereafter in in accordance with current § 1026.19(f)(2)(i)-(ii). This bright-line rule will

[5] If these questions reveal a misunderstanding on our part as to how the proposal is intended to work or will actually work, this underscores the needless complexities of the proposal.

encourage creditors to make every effort to identify and disclose the actual costs on the first closing disclosure they provide. At the same time, such a rule will grant creditors the leeway to reset tolerances by providing revisions to the loan estimates until a few days before the closing.

This approach clearly separates the standards applicable to resetting tolerances via revised loan estimates in § 1026.19(e)(4) from the standards applicable to the provision of amended closing disclosures § 1026.19(f)(2). The Bureau's proposal confuses this distinction by allowing closing disclosures to substitute for loan estimates when resetting tolerances if provided four or more business days before consummation.

Creditors assert that the present rule creates a so-called "gap" problem.[6] This gap arises, according to creditors, in the following circumstances:

1. The creditor issues a closing disclosure more than seven business days before consummation;
2. There is a change in costs that exceeds the tolerances; and
3. The creditor would like to issue a corrected disclosure to reset the tolerances.

Under those circumstances, the creditor has three business days to issue a corrected disclosure. The creditor may not issue a revised loan estimate because it has issued a closing disclosure. But if the three-business-day period ends while there are still four or more days to consummation, the creditor may not issue a corrected closing disclosure either.[7]

A bright-line rule eliminates the "gap" problem more effectively and with greater simplicity than the Bureau's proposal. If creditors may not provide a closing disclosure no more and no less than three business days before consummation, they can continue to use revised loan estimates to reset the tolerances until that time. Thus, the gap never occurs. If changes occur between the issuance of the first closing disclosure and the closing, the creditor may provide a corrected closing disclosure in accordance with current § 1026.19(f)(2)(i)-(ii).

V. Conclusion

NCLC urges the Bureau to clarify that a closing disclosure can only be given no more and no less than three business days before closing. This creates a bright line rule and will enhance the distinct roles that the loan estimate and closing disclosure were designed to play. In contrast, the proposed rule and commentary unnecessarily creates more confusion and complexity.

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[6] 82 Fed. Reg. at 37,798.
[7] *Id.*