

June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information
Regarding the Bureau's Inherited Regulations and Rulemaking Authorities

Dear Acting Director Mulvaney,

The 42 undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau's ("CFPB") Request for Information ("RFI") regarding its inherited regulations and rulemaking authorities.

Our top priorities are to address the serious problems posed by Property Assessed Clean Energy (PACE) loans and to address overdraft fee abuses.

The CFPB should implement the ability-to-repay provisions of the recently passed banking bill and clarify that PACE loans must generally comply with the regulations governing all mortgages.

We are deeply disappointed that the CFPB has abandoned plans to address overdraft fees. We urge it to move forward with appropriate regulation of overdraft fees by requiring routine overdraft credit to comply with Regulation Z and credit laws.

If the CFPB embarks on modernization of Regulation E, we also recommend improving fee disclosures for bank accounts, protection against unauthorized charges, and protections against compulsory use of electronic repayment of credit.

We urge the CFPB to undertake a long overdue update of Regulation CC to give consumers prompt access to checks deposited to prepaid accounts and via mobile devices.

We strongly oppose any effort to weaken Regulation B, implementing the Equal Credit Opportunity Act, by straying from the use of disparate impact analysis in assessing discrimination. Disparate impact is the statutory legal standard under the ECOA, notwithstanding the congressional action on the auto loan guidance, and any amendments that undercut that statutory standard would be outside the CFPB's authority.

With respect to other regulations, while many could undoubtedly be improved, we support the existing regulations, which are important to protecting consumers, and the CFPB definitely should not weaken them or create further loopholes or exemptions that would limit their effectiveness. Should the CFPB decide to review other regulations, we make suggestions regarding the regulations that implement the Truth in Lending Act, Truth in Savings Act, Real Estate Settlement Procedures Act, and Fair Credit Reporting Act.

1. Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The due date for this RFI, which covers every regulation and rulemaking authority that the CFPB has inherited, comes only six days after the deadline to comment on all of the regulations the CFPB has adopted and its new rulemaking authorities. The CFPB has ignored our request for an extension of time to respond to this particularly burdensome RFI and the earlier one on adopted regulations.

The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

These problems have prevented us from responding in more detail, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take a lack of comments on a particular regulation, or the limited number of comments from the public, as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public. We also strongly urge the CFPB not to consider the current RFI as the sole opportunity to comment in advance of any rulemakings concerning the inherited or adopted regulations or authorities.

These comments should also be read in conjunction with earlier comments by our groups and other organizations and consumers regarding the regulations the CFPB has adopted and its new rulemaking authorities. These comments only address rules or authorities that were inherited from other agencies.

2. Regulation B (Equal Credit Opportunity Act)

Regulation B implements the Equal Credit Opportunity Act (ECOA), the primary bulwark against discrimination in credit transactions. The ECOA prohibits discrimination against any applicant at any stage of a credit transaction on the basis of race, religion, national origin, sex, marital status or age. Regulation B sets out factors that may not be considered in determining creditworthiness or in closing an existing account and addresses the ways in which information concerning spouses may be reported to credit reporting agencies. Regulation B also limits what information can be sought in the application process, restricts when a spouse can be required to co-sign an application, provides for a required notice to applicants when action is taken on an application, and provides notice of an applicant's right to a copy of any appraisal concerning the value of their home. Regulation B remains a vital tool to combat discriminatory lending practices and should not be weakened.

We strongly oppose any effort to amend Regulation B to eliminate or discourage use of disparate impact analysis in assessing unlawful discrimination. The disparate impact standard under

ECOA is the law of the land. Courts have sustained disparate impact claims under the ECOA in every case we are aware of, and the Supreme Court recently endorsed the use of disparate impact under the Fair Housing Act. Disparate impact analysis is critical to uncovering broad patterns of discrimination that cannot be easily seen in individual cases and in addressing inequalities that persist as vestiges of historical discrimination and the resulting segregation in our society.

The recent congressional decision to block the auto loan guidance does not change the disparate impact standard under ECOA and Regulation B. It did not change the law.

Any effort to weaken the disparate impact standard would be outside of the CFPB's authority.

3. Regulation E (Electronic Fund Transfer Act)

Regulation E implements the Electronic Fund Transfer Act (EFTA) and protects consumers in connection with various forms of electronic payments and protections for accounts that hold funds that can be accessed electronically.

We are extremely disappointed that the CFPB has removed an overdraft fees rulemaking from the agency's semi-annual regulatory agenda. We do note that modernization of Regulation E is on the agenda, and we hope that addressing overdraft fee abuses will be part of that effort. We also make other suggestions below for modernizing Regulation E.

Our top Regulation E issue -- indeed, one of our top issues overall -- is to reform the treatment of overdraft fees. Overdraft fees drain \$14 billion from working families every year, and nearly 80% of overdraft and nonsufficient fund fees are borne by only 9% of accounts, vulnerable families who tend to carry low balances averaging \$350.

Overdraft fees imposed for more than an occasional courtesy are a form of credit and should be required to comply with credit laws and Regulation Z, rather than being regulated by Regulations E and DD. In particular, the CFPB should ban overdraft fees on one-time debit and ATM transactions unless overdraft credit is provided in compliance with Regulation Z. The Regulation E opt-in rules governing overdraft fees on one-time debit and ATM card transactions have not worked, as banks have actively deceived consumers to encourage opt ins.

Until overdraft credit is fully covered by Regulation Z, the CFPB should retain but strengthen the Regulation E opt-in rules by limiting overdraft fees to one a month and no more than six a year. In addition, consistent with the common law governing penalty fees in contracts, the CFPB should require fees to be reasonable and proportional to the cost to the institution of covering the overdraft.

With respect to bank accounts and electronic payments generally, the CFPB should:

- Require clear fee charts for bank accounts, available online, similar to the ones in the prepaid rule or those recommended by Pew Charitable Trusts.
- Improve the methods for providing periodic statements electronically to ensure that consumers see critical information such as fee totals.

- Specify and strengthen the authorization requirements for electronic payments and clarify that consumers have the right to revoke authorization of payments that are authorized in advance.
- Protect consumers from liability for fraudulent transfers in new, faster payments even when consumers are defrauded into initiating the payment.
- Reject calls to allow banks to impose liability for unauthorized transfers if the consumer is purportedly negligent, a standard that is not in the EFTA.
- Prevent coercive measures used by online lenders to evade the ban on compulsory use of electronic repayment as a condition of credit.
- Facilitate safe methods of allowing consumers to use their account data and stop banks from threatening consumers with loss of protection against unauthorized charges.

4. Regulation V (Fair Credit Reporting Act)

Regulation V implements many, but not all, of the provisions of the Fair Credit Reporting Act (FCRA). The FCRA provides critical protections when information is collected about consumers for use in credit, insurance, employment and other important purposes. While there are serious problems in the credit reporting area, many of these stem from failure to comply with existing rules rather than gaps in those rules. Thus, the most critical task for the CFPB is to ensure vigorous supervision of larger participant consumer reporting agencies and to enforce existing law.

While it would be helpful to issue regulations setting strong standards for accuracy and consumer access to their own reports, such rulemaking should only be conducted after a cautious, deliberative process that brings in the multitude of stakeholders. Moreover, we especially urge that FCRA regulations not be weakened.

To the extent that there are focused, limited improvements for Regulation V, we have the following suggestions:

- Adopt the Federal Trade Commission’s FCRA Staff Report with Summary of Interpretations as an official interpretation of the FCRA.
- Prevent disputes or delays over medical insurance or billing from impacting consumers’ credit reports and scores.
- Require employers to provide 35 days’ notice, allowing time to address errors, prior to a final action taken in reliance on a consumer report.
- Eliminate overbroad exceptions to the requirement to notify consumers when a consumer report or credit score results in a higher price.

5. Regulation X (Real Estate Settlement Procedures Act)

a. Settlement Costs

The Real Estate Settlement Procedures Act (RESPA), implemented by Regulation X, is the primary federal law directly addressing residential mortgage settlements. RESPA was enacted after a report showing that settlement costs were more than 10% of the average purchase money

mortgage and that charges often were based on factors unrelated to the cost of providing the service. RESPA and Regulation X are intended to ensure that consumers in real estate transactions receive timely information about the nature and cost of the settlement process and to protect consumers from unnecessarily high settlement charges caused by certain abusive practices. This is accomplished through a combination of disclosure and restrictions on kickbacks and referral fees.

After more than 40 years, the mortgage industry has long been accustomed to Regulation X compliance and the rule continues to meet the needs of mortgage borrowers. We support Regulation X and oppose any effort to weaken its protections.

In particular, the regulations implementing the ban on kickbacks and referral fees are effective and should not be weakened. This rule is vital to RESPA's original purpose by preventing consumers from being steered into high-cost settlement services by hidden incentives.

If the CFPB does revisit the Regulation X provisions governing settlement costs and disclosures, we recommend that the bureau clarify that the rule applies to *all* manufactured homes titled as real property and that it limit the loophole for affiliated businesses.

b. Servicing

RESPA was amended in 1990 to address increasing consumer complaints about mortgage servicers. These amendments and the implementing rules in Regulation X generally require servicers to respond to consumer inquiries, correct account errors, disclose information relating to the transfer of servicing operations, and make timely payments out of escrow accounts. These rules have been effective in curbing some of the worst abuses, establishing minimum standards in the servicing industry, and making servicers more responsible to consumers. The CFPB made some minor revisions to these inherited rules in 2013 (which are now found in Subpart C of Regulation X), improving them further.

We oppose any effort to weaken the current protections. Should the CFPB revisit the inherited provisions of Regulation X, our top priorities are to:

- Eliminate or revise the exemptions from certain escrow account requirements when the borrower is more than thirty days delinquent in making mortgage payments or in a bankruptcy proceeding.
- Ensure that the error resolution process adequately protects borrowers from threatened foreclosure when the asserted error relates to the alleged default or grounds for foreclosure.
- Eliminate several of the exemptions that apply to reverse mortgages and home equity lines of credit.
- Restore the requirement that the transfer of servicing notice inform borrowers of their RESPA dispute rights, and provide additional information about account loan status.

6. Regulation Z (Truth in Lending Act)

a. PACE Loans

Serious problems have emerged in the rapidly growing market for Property Assessed Clean Energy (PACE) loans. These loans become part of the property tax assessment and are repaid through payment of taxes. PACE providers rely on a loophole to claim that these loans are not covered by Regulation Z or TILA, depriving homeowners of critical protections for large loans that are often unaffordable and jeopardize homes. PACE loans often have little connection to deep energy savings and are pushed aggressively by door-to-door contractors targeting seniors, frequently with false or deceptive claims about free government programs or savings that do not materialize.

Addressing the problems with PACE loans and closing the misinterpreted loophole in Regulation Z is of critical importance. It is also a congressional priority: a provision directing the CFPB to adopt ability-to-repay rules for PACE loans is included in the bipartisan banking bill package recently passed by Congress and signed by President Trump. We urge the CFPB to swiftly enact the rules mandated by Congress and to ensure that PACE providers comply with the other mortgage protections required by Regulation Z, with appropriate modifications as necessary to address the unique structure of PACE loans.

As with other mortgages, property owners should be reviewed for their ability to repay the PACE loan while meeting other expenses prior to signing the contract and the commencement of any work. TILA-type pricing and term disclosures with additional PACE-tailored disclosures should be provided in writing three business days in advance of signing the contract unless there is a bona fide emergency confirmed in writing by the consumer. Door-to-door contractors should not be allowed to provide disclosures solely by showing the disclosures to the homeowner on the contractor's electronic tablet.

PACE contracts should provide for full amortization, with monthly payments made through the original mortgage lender, the PACE provider, or the government authority. Homeowners should receive monthly statements. The term of PACE assessments should not exceed the useful life of the improvement.

PACE rules and loan contracts should include provisions ensuring the borrower will have access to loss mitigation and tax foreclosure avoidance options.

As required in the recent banking bill, homeowners must have the right to pursue TILA remedies for any violations. Consumers should have seller-related defenses to repaying PACE loans, similar to the rights they have under the FTC's holder rule for other seller-related home improvement financing, in order to protect homeowners who are defrauded or deceived by a contractor when entering into a PACE contract. Government entities should be indemnified by PACE providers for any liability.

b. Credit Cards and Other Open-End Credit

Regulation Z contains several provisions that protect consumers when they use credit cards and other forms of open-end credit. Of special importance, the Credit CARD Act and its implementing provisions are a compelling example of how strong consumer protections benefit ordinary Americans and industry players alike. Since the Credit CARD Act, issuer practices have become more transparent and thus more competitive. Bait-and-switch interest rate hikes have been dramatically curtailed, late fees substantially reduced, and over-the-limit fees virtually disappeared. Consumers saved over \$18 billion in just the first few years. Prices are down, access to affordable credit has not been reduced, responsible industry players have happier customers and do not have to compete in a race to the bottom for who can make more profits on the back-end.

Revising Regulation Z's open-end regulations is not a top priority. We especially oppose any effort to weaken the protections. Should the CFPB choose to revisit the open-end provisions of Regulation Z, our top priorities are to:

- Calculate the APR for open-end credit and closed-end credit in the same way, that is, include non-interest finance charges in the APR. Making the APR comparable across products provides a more complete and honest price tag that consumers can use to comparison shop. All fees also should be included in the advertising APR and the CFPB should restore the fee-inclusive effective APR disclosed on statements for open-end credit.
- Ban deferred interest promotions, which result in surprise retroactive interest charges.
- Extend unauthorized use protections to credit card convenience checks.

Home equity lines of credit are not covered by the TILA/RESPA integrated disclosure rules. Rather, they are governed by their own set of requirements, primarily found in Reg. Z § 1026.40. The Appendix G to Regulation Z provides extensive model forms to aid creditor compliance. The CFPB need not revisit this regime with one exception. As with other open-end transactions, the APR disclosed for HELOCs suffers from the same defect--it only reflects the interest rate and does not include non-interest finance charges. The CFPB should eliminate these differences in the event it reopens Regulation Z.

c. Mortgages, Auto Loans, Student Loans and Other Closed-End Credit

i. In General

While every regulation can be improved, and we have our own suggestions if the CFPB chooses to revisit Regulation Z, the closed-end credit provisions of Regulation Z are generally working well. We oppose any effort to weaken Regulation Z, add exemptions, or otherwise undercut the protections that it offers.

The TILA provisions that apply to closed-end credit primarily focus on disclosure of the credit terms (in addition to the mortgage-specific provisions, discussed below). The rules require disclosures in a uniform, consistent format so that consumers can compare credit terms and shop

for credit. In general, a reliance on disclosures alone is a weak approach to protecting consumers. Substantive rules to limit unaffordable credit and to prevent abuses are much more effective. Nonetheless, the TILA disclosure rules do provide an important function, and if any changes are made, the disclosures should be strengthened, not weakened.

If the CFPB decides to undertake revisions to the closed-end requirements of Regulation Z, we urge it to implement an all-in finance charge definition that incorporates all fees and other charges. The current rules allow a swiss-cheese approach, omitting some fees from the APR price tag, leading to evasions that make it difficult for consumers to understand the cost of credit or to comparison shop.

ii. Mortgage-Specific Provisions

Many of the Regulation Z provisions that govern mortgages have been amended or adopted by the CFPB and were addressed in our comments on adopted regulations. In addition, inherited regulations govern high-cost mortgages, remedies for TILA violations, and other aspects of mortgages.

The Regulation Z provisions implementing the Home Ownership Equity Protection Act (HOEPA) have worked well to discourage dangerous high-cost mortgages and should not be weakened. Prior to the enactment of HOEPA, scammers engaged in loan flipping and added dangerous features to mortgages that increased the cost of mortgages and jeopardized homes. HOEPA has successfully discouraged those practices. The Federal Reserve Board's higher-priced mortgage loan rules added in 2009 layered protections to the previously rogue subprime market and also are working well. It was this segment of the market that sparked the foreclosure crisis and these rules are essential to prevent future recklessness.

TILA's statutory remedies are also of high importance, and it would be outside of the CFPB's authority to weaken them. In particular, the consumer's right to rescind a mortgage under limited circumstances following the initial three-day cooling off period is critically important. This right is only available for a subset of the mortgage market: non-purchase mortgage loans secured by the consumer's principal dwelling. Despite these limitations, rescission plays an especially important role in protecting against creditor malfeasance. Without such a right, a creditor that misrepresented credit terms could trap a consumer in a loan as long as the misrepresentation remained undiscovered for the first three days.

7. Regulation CC (Expedited Funds Availability Act)

Regulation CC implements the Expedited Funds Availability Act (EFAA), which sets out timelines under which consumers must be given access to deposited funds. However, the regulation has not been updated in decades, and it is unclear what timelines apply to funds deposited to prepaid accounts or to checks deposited by uploading images via mobile devices.

The CFPB should update Regulation CC to treat deposits to prepaid accounts the same as deposits to checking accounts. It should also give consumers the same prompt access to checks

deposited through mobile devices as is required for ATM deposits. At most, a one-day delay should be imposed if necessary to prevent fraud or accidental double deposits.

8. Regulation DD (Truth in Savings Act)

Regulation DD implements the Truth in Savings Act, which governs disclosures and periodic statements for bank accounts and an annual percentage yield (APY) disclosure regarding the interest rate on savings accounts.

The CFPB should update Regulation DD to:

- Prevent banks from advertising “free checking” if the bank uses measures that result in a substantial amount of overdraft fee revenue;
- Require a box of clear fee disclosures that is also available online;
- Address fees on savings accounts that make interest disclosures deceptive or result in savings accounts that lose money.

9. Electronic disclosures and records

The CFPB asks whether aspects of the inherited regulations are “incompatible or misaligned with new technologies, including by limiting providers’ ability to deliver, electronically, mandatory disclosures or other information that may be relevant to consumers ...” This question fails to ask whether electronic disclosures can be improved for the benefit of consumers or whether information delivered electronically adequately protects all consumers.

We support clear, well-designed and tested electronic disclosures and information for consumers who elect to receive information in that format. But we note that it is important that information be provided in a form that consumers can keep, and some transactions are too complex to be adequately understood on mobile devices. We oppose removing the choice of paper disclosures, statements, records or other information for consumers who prefer to receive information on paper.

In 2007, the FRB exempted application disclosures for certain variable rate mortgage loans from E-Sign requirements. If the CFPB addresses electronic disclosures, we urge it to remove this exemption. There is no reason why creditors should not have to obtain consumer consent before providing a fairly long list of mandated information in electronic format at the application stage.

10. Other regulations

The CFPB has inherited several other regulations and rulemaking authorities. While there are undoubtedly improvements if the CFPB were to revisit them, we support the existing consumer protections and oppose any effort to weaken them.

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Thank you for considering these comments.

Yours very truly,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
Baltimore Neighborhoods, Inc
CASH Campaign of Maryland
Center for Economic Integrity
Center for NYC Neighborhoods
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Equal Justice Society
Florida Alliance for Consumer Protection
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Housing Options & Planning Enterprises, INc.
Illinois People's Action
Jacksonville Area Legal Aid, Inc.
Leadership Conference on Civil and Human Rights
Legal Services NYC
Main Street Alliance
Maryland Consumer Rights Coalition
Mississippi Center for Justice
NAACP
National Association of Consumer Advocates
National Association of Social Workers
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
National Housing Law Project
Neighborhood Housing Services of Baltimore
New Jersey Citizen Action
People's Action Institute
Public Citizen
Public Counsel
Public Justice Center
Public Law Center
Texas Appleseed
U.S. PIRG
UnidosUS
West Virginia Center on Budget and Policy
Woodstock Institute