

Comments of

Americans for Financial Reform

Center for Responsible Lending

National Consumer Law Center (on behalf of its low-income clients)

U.S. PIRG

June 7, 2018

Kristine M. Andreassen
Owen Bonheimer
Senior Counsels
Office of Regulations
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Docket No. CFPB-2018-0009 -- Request for Information Regarding Consumer Financial Protection Bureau Rulemaking Processes

Dear Ms. Andreassen and Mr. Bonheimer,

The comments below are submitted in response to the Consumer Financial Protection Bureau (“CFPB”)’s Request for Information (“RFI”) regarding the Bureau Rulemaking Processes (Docket No. CFPB-2018-0009) on behalf of the undersigned advocacy groups. All of the signatories are joined together by their long history of protecting and defending the rights of consumers through education, advocacy, policy, research, and litigation. Our organizations address a wide variety of consumer financial issues and have substantial experience with the statutes the CFPB enforces and the CFPB’s rulemaking processes. We submit our comments below in strong support of the CFPB’s inclusive, transparent, and evidence-based rulemaking processes.

I. Objection to the CFPB’s RFI Process

We first state our objection to the CFPB’s current RFI process. The very structure of these RFIs, the nature of many of the questions, and the fact that many of the RFIs focus on processes known mostly to industry actors and their lawyers, favor financial institutions. In particular, the rapid issuance of successive RFIs and the short timeline for responses favor the financial services industry with greater resources at its disposal. In addition, covered persons are more likely to have familiarity with many of the topics addressed by the RFIs. The primary mission of the CFPB is to protect consumers, who have a strong interest in the rules and processes for which the CFPB is responsible, but significantly fewer resources to respond to these requests and less access to data, leading to a

need for more time to respond. We are gravely concerned that these RFIs provide industry with the opportunity to attempt to weaken the effectiveness of the strong systems and procedures the CFPB has put into place to carry out its consumer protection mandate.

II. Summary of Comments

In line with its purpose and its responsibilities, the CFPB has crafted a rulemaking process that allows stakeholders multiple opportunities to provide input, relies upon empirical research, and maintains transparency. Our organizations commend the CFPB for creating an inclusive, transparent, and evidence-based process, and we urge the CFPB to preserve this process for rulemaking in the future.

These comments cover the following topics:

- The CFPB’s Rulemaking Authority and Statutory Obligations;
- The Inclusiveness of the CFPB’s Rulemaking Process;
- The Transparent Nature of the CFPB’s Rulemaking Process;
- The Role of Objective Empirical Research in the CFPB’s Rulemaking Process; and
- The Consideration of All Stakeholders in the CFPB’s Promulgated Rules

III. The CFPB’s Rulemaking Authority and Statutory Obligations

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) empowers the CFPB to “administer, enforce, and otherwise implement the provisions of Federal consumer financial. Law.”¹ The CFPB is given exclusive rulemaking authority to carry out this responsibility,² and “issuing rules, orders, and guidance implementing Federal consumer financial law” is one of the CFPB’s six primary functions.³

Like all federal agencies, the CFPB’s rulemaking processes must comply with the notice and comment provisions of the Administrative Procedures Act (“APA”),⁴ which ensure that the public is given an opportunity to participate in the rulemaking process and provide input. Under the APA, the CFPB must publish a Notice of Proposed Rulemaking (“NPRM”) and provide a comment period allowing the public to participate in the rulemaking process through written submissions.⁵ In addition, unless the agency can certify that the proposed rule would not have a significant impact on them, the CFPB is required to solicit feedback from small businesses prior to issuing a NPRM.⁶ The CFPB obtains this feedback by convening a review panel of a representative cross section of

¹ 12 U.S.C. §5512(a).

² 12 U.S.C. §5512(b)(1).

³ 12 U.S.C. §5511(e)(5).

⁴ 5 U.S.C. §553.

⁵ *Id.*

⁶ 5 U.S.C. §609.

affected entities called the SBREFA panel.⁷ In compliance with the Paperwork Reduction Act,⁸ the CFPB must also identify the impact of information collection requirements in the rule.

In addition to the agency's obligations, it is important to note what the CFPB is *not* required to do. While the CFPB is required to consider costs and benefits, it is not required to conduct a quantitative net benefit analysis and should not be required to do so. Industry will provide projections of financial provider costs, often slanted, but benefits to consumers are often more difficult to quantify. Any requirement that benefits be quantified will downplay the very real but often unquantifiable benefits that CFPB regulations provide, including stability and soundness in mortgage markets, preventing abusive and deceptive practices that harm consumers, and enhanced disclosures for consumers.

Furthermore, the CFPB is by design independent from the White House and is not required to, and should not, submit its rules to the Office of Information and Regulatory Affairs ("OIRA") for review. In the Dodd-Frank Act, Congress strictly prescribed the CFPB's independence from the executive branch and explicitly included the CFPB among the independent agencies not subject to regulatory review from OIRA. An OIRA review would be a fundamental violation of the CFPB's independence and contradictory to congressional intent in maintaining the agency's independence from interference by the executive branch. We also object to moving the cost-benefit analysis section into the director's office and urge that the function remain in the hands of non-political staff.

IV. CFPB's Inclusive Rulemaking Process

One of the greatest strengths of the CFPB's rulemaking process is its inclusiveness from beginning to end. The CFPB has systems in place throughout the rulemaking process to hear from a wide variety of stakeholders. That starts when it is considering a rulemaking and continues while a rulemaking is under way. The agency continues its interactions with stakeholders even after the rule is finalized to help parties understand the rule and how it will be implemented.

A. Initial Outreach and Information Gathering (Question 1a, 7)

Since its inception, the CFPB has prioritized collecting input from a broad spectrum of stakeholders to begin its evaluation. We encourage the CFPB to continue gathering information, data, and feedback from stakeholders in advance of issuing a Notice of Proposed Rulemaking ("NPRM") because that lays the foundation for a more thoughtful rulemaking process. Both RFIs and Advanced Notices of Proposed Rulemaking ("ANPRM") are useful methods of gathering information and understanding the impact a potential rule might have on a particular group. We especially encourage the CFPB to use these tools when it is considering rulemaking in new areas where issues, concerns and proposals are not yet well known. An RFI may provide valuable insight into new areas that the CFPB is exploring.

⁷ These panels are named SBREFA panels because they are governed by the Small Business Regulatory Enforcement Fairness Act ("SBREFA").

⁸ 44 U.S.C. §3501 *et. seq.*

However, an RFI or ANPRM should not be required for every rule because this requirement would unnecessarily slow down the entire rulemaking process. For areas in which there is already substantial research, feedback, and information available, the CFPB should use its existing resources to guide its review and analysis on what next steps it should consider. In particular, the CFPB should continue leveraging the information available from within the agency to gauge trends and issues that may necessitate a rule.

The CFPB should also gather as much information as possible in advance of the rulemaking process by meeting directly with stakeholders. Industry is typically well-resourced and able to ensure its positions are heard. To guarantee that the CFPB hears from all sides, it should proactively seek meetings with consumer groups and other interested members of the public to get a well-rounded perspective. It is crucial that the CFPB receive balanced information from a broad variety of stakeholders, whose ability to access the CFPB is also varied.

The CFPB should also continue to schedule meetings — including town halls and field hearings — outside of Washington, DC, to help provide more nationally representative information and perspectives. The CFPB's town halls and field hearings provide a valuable avenue for the general public and local stakeholders to share their experiences directly with the CFPB. The director and other senior staff should be present at field hearings and town halls, and they should be held in locations across the country to allow a diverse range of consumers and other interested members of the public to attend and participate. The CFPB's focus groups have been helpful in providing consumer perspective and we support their continued use.

Joint consumer and industry roundtables are also an effective mechanism for the CFPB to hear different perspectives on an issue and facilitate discussion among stakeholders. These roundtables have proven helpful, and the CFPB should arrange more of them on issues it is considering for a rulemaking.

For example, the CFPB initially implemented the mortgage periodic statement requirement in the Truth in Lending Act as part of the 2013 Mortgage Servicing Final Rules. However, in October 2013, the CFPB issued an Interim Final Rule (“IFR”) that “provisionally suspended” the periodic statement requirement with respect to consumers in bankruptcy.⁹ The IFR was to remain in effect until the CFPB could issue a final rule that would more precisely delineate the scope of the bankruptcy exemption.

Following the issuance of the IFR, the CFPB began extensive outreach and consultation with various stakeholders. A key element of this outreach effort was a roundtable discussion that the CFPB hosted on June 16, 2014, with representatives of the mortgage servicing industry, Chapter 13 trustees, the United States Trustee's Program, and consumer organizations. The CFPB invited representatives of both large and small servicers, as well as credit unions. An agenda listing the critical topics to be discussed was provided to the attendees in advance of the roundtable. Consensus positions were adopted on a number of issues by the attendees, and those positions were ultimately cited by the CFPB in proposing a final rule.

⁹ Section-by-Section Analysis, § 1026.41(e)(5)(i), 81 Fed. Reg. 72162 (Oct. 19, 2016); *see also* 78 Fed. Reg. 62,993 (Oct. 23, 2013).

The CFPB should also maintain its engagement with the Consumer Advisory Board (“CAB”) and other advisory groups. The Dodd-Frank Act requires the CFPB to meet with the CAB at least twice a year,¹⁰ but, disconcertingly, the entire CAB has not met once this year because the CFPB has canceled two of its meetings. We are particularly alarmed by the CFPB’s recent announcement that it will be restructuring its advisory boards.¹¹ The CFPB’s advisory boards in their longstanding structure provide valuable insight to the agency, and they should not be reduced or changed.

Since the CAB was formed until 2018, it has met with the CFPB three times a year. As required by law, the CFPB should meet with the CAB at least twice a year.¹² The CAB consists of a broad array of stakeholders who bring a wide range of expertise related to consumer financial products and services, come from many regions of the United States, including urban and rural areas, and represent a diversity of races, ethnicities, ages, and genders. They include industry representatives, academics, and consumer advocates, and their meetings have led to fruitful conversations and unexpected points of agreement. This diverse CAB has informed the CFPB of trends in financial products occurring across industries, demographics, and geography. The vital information the CAB provides from a range of groups is unavailable in any other forum and can lead to important interventions to prevent harm to consumers and encourage collaboration among stakeholders. It is important that the CFPB comply with its statutory obligation to maintain a wide range of voices and interests on the CAB and regularly meet with the CAB to access this wealth of information and perspectives.

CAB meetings should continue to be publicly announced and summarized to foster transparency, and the information gathered from these meetings should be used to inform the agency’s policy decisions. CAB meetings should be held with ample public notice and streamed or otherwise broadcast to allow people outside of Washington, DC, to view them, with summaries of each meeting posted on the CFPB website.

B. SBREFA (Question 2)

We support the CFPB’s practices related to the requirements of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which Dodd-Frank applies to the CFPB.¹³ As required by statute, the CFPB has engaged in the SBREFA process for potential rules “which will have a significant economic impact on a substantial number of small entities”¹⁴ — thus far, rulemakings on disclosures under TILA and RESPA, mortgage servicing, loan originator compensation, the Home Mortgage Disclosure Act, payday and vehicle title loans, arbitration clauses, and debt collection.

¹⁰ 12 U.S.C. § 5494.

¹¹ <https://www.consumerfinance.gov/about-us/blog/transforming-way-we-engage/>

¹² 12 U.S.C. § 5494.

¹³ See CFPB, Fact Sheet: Small Business Review Panel Fact Sheet, https://files.consumerfinance.gov/f/201510_cfpb_fact-sheet-small-business-review-panel-process.pdf.

¹⁴ 5 U.S.C. § 609(a).

The manner in which the CFPB has conducted the SBREFA process has contributed to robust collection of input from small business representatives, which the CFPB has used in formulating its proposed and final rules. With respect to the payday loan rule, for example, the CFPB published the SBREFA outline in April 2015. With input from representatives of the Small Business Administration and OMB (the three together comprising the Small Business Review Panel), the CFPB selected 27 small-entity representatives, including payday and vehicle title lenders, storefront and online lenders, tribal lenders, banks and credit unions. The Panel spoke to the small entity representatives in small groups via teleconference to solicit their feedback on the proposal and responses to questions, and it also received written feedback from 24 of the entities.¹⁵ The Panel completed a report summarizing those discussions and its pursuant recommendations, which became part of the administrative record.¹⁶

The CFPB then continued work on the rule for another year, publishing a proposal in June 2016. Between the SBREFA outline and the proposed rule, and again between the proposed rule and the final rule published in October 2017, the CFPB made changes that reflected the input of the small-entity representatives—including shortening the “cooling off” period between loan sequences and providing lenders more flexibility in the underwriting process.¹⁷

In addition to soliciting input from small entities through the SBREFA process, the CFPB has also published the SBREFA outline broadly. This has enabled it to receive broad feedback relatively early in the development of a rule. Publishing the outline also helps make the rulemaking process more equitable across stakeholders: the contents of the outline are likely to end up being shared outside of the immediate SBREFA participants in any event, and making it public helps ensure they are available not only to other covered persons but to all stakeholders, including other small businesses that were not SBREFA participants.

C. Tribal Governments (Question 3)

We support the CFPB’s “Policy for Consultation with Tribal Governments,” which guides the CFPB’s solicitation of input from tribal governments on matters that would directly impact tribal members or Indian tribes.¹⁸ The CFPB has demonstrated its commitment to this policy. For example, during its formulation of the payday and vehicle title loan rule, the CFPB had three formal consultations with Indian tribes in 2014, 2015, and 2016, to which all federally recognized tribes were invited,¹⁹ in addition to meeting with individual tribal leaders, tribal lenders, and tribal lending associations.

¹⁵ 82 Fed. Reg. 52509.

¹⁶ CFPB, SBA, OMB, “Final Report of the Small Business Review Panel on CFPB’s Rulemaking on Payday, Vehicle Title, and Similar Loans” (June 25, 2015), *available at* http://files.consumerfinance.gov/f/documents/3a_-_SBREFA_Panel_-_CFPB_Payday_Rulemaking_-_Report.pdf.

¹⁷ 82 Fed. Reg. 52509.

¹⁸ CFPB, Policy for Consultation with Tribal Governments (2013), https://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf.

¹⁹ 82 Fed. Reg. 54505.

D. Public Input During Rulemaking (Questions 5, 6, 7, 8, 9, 10, 12)

We strongly support the CFPB's practice of releasing the NPRM on its website in advance of the official publication in the Federal Register. The general public is not regularly checking the Federal Register, and the CFPB website is a much more user-friendly site, allowing the agency to better reach consumers. However, in addition to the double-spaced PDF version that the CFPB customarily posts, we urge it to provide a more compact version. When the document is lengthy, a double-spaced PDF with wide margins can be impractical to print and challenging to work with.

In addition, the CFPB's press releases and summary materials are particularly useful tools, making it easier for the public to understand a proposed rule and the input the CFPB is seeking. The CFPB should continue providing the supplemental summary materials breaking down the proposed rule with the NPRM on its website. In addition to the original press release announcing the NPRM, we suggest that the CFPB issue subsequent press releases during the comment period to widely publicize and remind the public that the CFPB is accepting comments on the proposed rule and to encourage more input from the consumers it is tasked with protecting.

To give the public enough time to respond, the CFPB should continue to take into account the complexity of the issue in determining the comment period for the particular rule. We generally support a comment period of at least 60 days. For more complicated rulemakings, 90 days or longer may be appropriate. In order to provide meaningful feedback, interested parties need time to gather information and analyze the issue, and a time frame shorter than 60 days typically does not allow for all the work necessary to provide thoughtful comments. This can be particularly true for consumers and those representing them, who typically have more limited resources than financial service providers.

The CFPB should consistently permit comment submissions via email in addition to having commenters post directly on the regulations.gov website. The public is more accustomed to using email and may find the regulations.gov site difficult to contend with. Having an email address available for submissions provides a more easily accessible way to submit comments. After it has received comments, the CFPB should continue linking to the docket on the regulations.gov website from the CFPB's website. This is helpful for interested parties who may not regularly access the Federal Register.

For posting comments, we support posting identical comments as a single batch with the list of companies, organizations, or individuals submitting them. The CFPB should take into account the number and diversity of organizations signing on to group letters and differentiate them from individual letters.

Moreover, the reality is that consumers impacted by proposed rules are very often not the most likely parties to submit comments. Even when their experiences are directly relevant to the rulemaking at issue, consumers and the general public are often unfamiliar with the rulemaking process. Legal services attorneys and advocates directly assisting consumers have extensive knowledge of patterns and problems, but they often lack the time and resources to prepare

comments in the midst of their work. For certain rules, the consumers most impacted may be among the least sophisticated and the most vulnerable, with a number of possible additional barriers to commenting, such as limited English proficiency, lack of computer access, or limited literacy. In contrast, it is part of industry's job to respond to these notices, and they have substantially more resources to generate comments and fund studies supporting their positions. As a result, there may be a limited number of consumers and advocates with experiences most relevant to the proposed rulemaking who submit comments, but it is important that the CFPB give them proper consideration.

While the public should be encouraged to submit comments on a timely basis, the CFPB should not impose any hard rules against continued input after the comment period closes; relevant comments should be considered even if they arrive after the deadline. Once the comment deadline has passed, the CFPB should not provide a reply period for comments. A reply period would strain resources, particularly for resource-constrained groups representing consumers, and likely result in the rehashing of comments already submitted. Instead, the CFPB should have broad discretion to follow up with relevant stakeholders after the comment period closes as needed for clarification or additional information leading up to the final rule.

The CFPB should be allowed to consider new information that is relevant to a proposed rule, but it is important that the CFPB maintain a transparent process with regard to any new information that is considered. Any information provided outside of the comment process should be treated as an ex parte communication and posted publicly within a reasonable period of time so that the public is aware of the existence and consideration of new information. If the CFPB relies on new studies or analysis that other parts of the CFPB has done, those reports or analyses should be publicized.

The CFPB should continue its public outreach and engagement both during and after the comment period. Many rulemakings take a number of years to complete, during which time new information can become available, new issues may arise, or the public may become newly aware of the importance of a rulemaking. The CFPB should seek input on such developments as they arise. However, to ensure transparency, the CFPB should publicize the additional information it is considering and its source. All relevant information should be considered as part of rulemaking, but transparency about who is weighing in on the issue and the information being provided by a particular party is crucial to the CFPB's credibility in its rulemaking processes.

The CFPB should be proactive about reaching out to consumer groups for additional input when new information has come to light, or circumstances have changed, and in particular when industry has provided new information. Because industry forces have greater resources and often more sophisticated tools at their disposal, it can be easier for them to make sure their perspective is heard. If consumer groups are not made aware of new information or arguments, they will not have the opportunity to provide a different view.

Finally, the CFPB should continue its use of online tools and explore other innovative mechanisms to solicit additional public feedback. Interested members of the public are generally unfamiliar with the rulemaking process and may not be aware of their ability to submit comments and share their opinions of a specific proposal. For many people, reading the NPRM may be intimidating. To

maximize public feedback, the CFPB should continue programs like the Cornell University eRulemaking Initiative to make the rulemaking process more understandable and accessible. The CFPB should also continue developing videos and interactive website features that go through the steps of the rulemaking and comment submission processes. As it has done for disclosures in the past, the CFPB should continue its use of Internet tools to test prototypes of disclosures with both industry and consumers and accept online comments as part of the process. The CFPB should also consider using social media for broader public outreach. Public input has helped the CFPB make informed decisions in its rulemaking, and the CFPB should expand its public outreach to allow for even greater public participation during the process.

E. Public Outreach During Implementation (Question 12)

We commend the CFPB for the supporting materials it has released with each final rule to make the information more accessible and understandable for the public. Helping all parties better understand new rules aligns with the CFPB's mission and furthers the CFPB's consumer protection mandate. The press releases, blog posts, and fact sheets and summaries are particularly helpful in conveying the finalization of the new rule, exactly how the rule works, and when it goes into effect. Our field partners often rely on these materials to help them understand any changes that the CFPB is implementing with any given rule. These summary materials are crucial to helping everyday people understand a rule and its implications. These materials are serving their intended purpose and should continue to be provided.

For example, when the CFPB issued its final rule on prepaid accounts, it also created a separate page on the CFPB website²⁰ with a featured video and a brief description of the new rule. This page also included links to more information for prepaid account users, implementation materials for prepaid account providers, and model disclosure forms. The page also has a timeline of the rulemaking process and links to the relevant documents and supporting materials in different formats so that the reader can follow the process that led to the rule being finalized and know when it goes into effect. With all the details about the prepaid card rule in the same place, the page is simple, clear, and easy to follow, making it easier for both providers and account users to access the information they need. The CFPB should continue creating similar pages on its website for future rules.

The CFPB should also continue to issue guidance implementation guides. Although most such documents are geared towards industry, these efforts also serve consumers by giving compliance officials the information they need to most effectively implement the new consumer protections at their institutions. The implementation guides are also useful in helping consumers understand how the rules will be implemented.

For example, the CFPB has created extensive materials to assist creditors and other covered persons in complying with Regulation Z, including materials related to the Home Ownership Equity Protection Act (HOEPA),²¹ such as the 2013 Home Ownership and Equity Protection Act (HOEPA) Rule Guide (March 2016), a fact sheet for small creditors operating in rural or

²⁰ <https://www.consumerfinance.gov/prepaid-rule/>

²¹ www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/title-xiv-mortgage-rules.

underserved areas, an executive summary of the Rural-Small Interim Final Rule (March 2016), a summary of that new rule, including amendments relating to small creditors and rural or underserved areas (Sept. 2015), a small creditor qualified mortgage flowchart, and transaction coverage and exemptions for the 2013 mortgage origination rules.

As another example, the website also contains the CFPB's Supervision and Examination Manual and a Readiness Guide. The Examination Manual contains guidance on how the agency will supervise and examine consumer financial service providers under its jurisdiction for compliance with federal consumer financial law. The Readiness Guide provides guidelines for institutions to evaluate their readiness and help them comply with mortgage rule changes made through July 24, 2015. The site houses two tools for lenders doing business in rural or underserved areas. Businesses that operate predominantly in rural or underserved counties are exempt from certain requirements. One tool provides lists of rural or underserved counties or tools that determine whether a property location is in such a county. Lenders also can use the housing counselor tool to meet RESPA requirements to generate a list of housing counseling agencies for each applicant. These materials are helpful both for the industry representatives responsible for implementing these changes and for the general public to see the CFPB's plan for implementing the rule.

V. The CFPB's Rulemaking Process is Transparent

A. Content of the CFPB's Rulemaking Notices (Questions 4 and 11)

In assessing the content of the CFPB's NPRMs and the notices it issues when it announces a final rule, it is important to consider the history of rulemaking for the statutes under the CFPB's authority. Using the Truth in Lending Act ("TILA") as an example, the evolution of Regulation Z demonstrates that the nature and content of the CFPB's rulemaking notices align with well-established previous rulemaking procedures, while providing even more robust analysis and information to support its findings and inform the public about the rule.

Congress enacted TILA in 1968. From 1968 until 2011, the Board of Governors of the Federal Reserve System ("FRB") was the agency responsible for implementing TILA through regulations and guidance. The FRB published for comment the proposed inaugural version of Regulation Z in October of 1968. That Federal Register contained a short introduction followed by the text of the proposed provisions and occupied eleven pages in that publication.²² The final rules appeared in early 1969 and included an introduction, mention of the fact that comments had been received, and highlights of some of the changes, followed by the text of the rule; these items occupied ten pages altogether.²³ The format and content of the Federal Register notices for proposed and final additions and amendments to Regulation Z generally remained the same between 1968 and 1980, although the FRB included a bit more description of the changes in the introductory material.

²² 33 Fed. Reg. 15,506 (Oct. 18, 1968).

²³ 34 Fed. Reg. 2002 (Feb. 11, 1969). The FRB separately published a "Supplement" to Regulation Z that provided math formulas creditors could use to calculate the annual percentage rate. 34 Fed. Reg. 2017 (Feb. 12, 1969).

In 1980, Congress passed the Truth in Lending Simplification Act, which overhauled TILA in favor of a leaner approach to every significant disclosure requirement. As a result, in 1981, the FRB substantially revised Regulation Z, accompanied by a comprehensive set of Official Staff Interpretations to Regulation Z. With these rulemakings, the agency created a new format for the expanded content of the Federal Register material that formed the basis of its Federal Register notices and justification for its regulations for decades to come. The chart below compares the Federal Register document containing the 1981 proposed changes to Regulation Z with the final changes.

**Headings contained in the 1980-81
Proposed and Final Regulation Z Federal Regulations**

Proposed: 45 Fed. Reg. 29,702 (May 5, 1980)	Final: 46 Fed. Reg. 20,848 (April 7, 1981)
Summary	Summary
Date (comment deadline)	Date (effective date)
Address (to send comments)	
For Further Information Contact	For Further Information Contact
Supplementary Information Subheadings Introduction Major Changes Regulatory Options Discussion of Proposal (by section)	Supplementary Information Subheadings General Section-by Section Analysis
Text (proposed)	Text (final)

From 1980 to 2011, the FRB expanded the content of the Federal Register notices announcing proposed and final amendments to Regulation Z and the Official Interpretations to include additional discussion where appropriate and information required by other laws, such as the Paperwork Reduction Act.

The Dodd-Frank Act transferred regulatory jurisdiction over TILA (and many other federal consumer protection statutes) to the CFPB effective July 21, 2011. The format and content of the CFPB's Federal Register notices essentially follow those of the FRB. In addition, the CFPB includes the expanded cost-benefit analysis required by section 1022(b)(2) of the Dodd-Frank Act. The charts below compare the headings contained in the FRB notices just before the transfer with those contained in the CFPB notices for proposed and final regulations following the transfer.

**Headings contained in Proposed Amendments to
Regulation Z: FRB and CFPB Compared**

FRB proposed: 75 Fed. Reg. 58,539 (Sept. 24, 2010)	CFPB proposed: 77 Fed. Reg. 49,090 (Aug. 15, 2012)
Summary	Summary
Date (comment deadline)	Date (comment deadline)

Address (to send comments)	Address (to send comments)
For Further Information Contact	For Further Information Contact
Supplementary Information Subheadings Background on TILA and Reg. Z Summary of Major Proposed Changes Board’s Review of Home-Secured Credit Rules Board’s Rulemaking Authority Discussion of Major Revisions Section-by-Section Analysis Paperwork Reduction Act Initial Regulatory Flexibility Analysis	Supplementary Information Subheadings Summary of Proposed Rule Background Legal Authority Compliance Issues Section-by Section Analysis Section 1022(b)(2) Analysis Regulatory Flexibility Analysis
Text (proposed)	Text (proposed)

**Headings contained in Final Amendments to
Regulation Z: FRB and CFPB Compared**

FRB final: 76 Fed. Reg. 22,948 (April 25, 2011)	CFPB final: 78 Fed. Reg. 6856 (Jan. 31, 2013)
Summary	Summary
Date (effective date)	Date (effective date)
For Further Information Contact	For Further Information Contact
Supplementary Information Subheadings Background Statutory Authority Section-by-Section Analysis Mandatory Compliance Dates Regulatory Analysis	Supplementary Information Subheadings Summary of Final Rule Background Summary of Rulemaking Process Legal Authority Section-by Section Analysis Effective Date Dodd-Frank Section 1022(b)(2) Regulatory Flexibility Act Paperwork Reduction Act
Text (final)	Text (final)

Aligned with its consumer protection mandate, these comparisons show not only that the nature and content of the CFPB’s rulemaking notices track well-established FRB procedures, but that the CFPB notices provide more robust analysis and information to support its findings and inform the public. The overall organization of the CFPB notices and the information contained under each heading are extremely helpful when crafting comments to proposed changes. The Section-by-Section Analysis provided when revisions are finalized discusses the substance of comments received from creditors, consumer groups, and other covered persons or entities. The CFPB then addresses the changes it decided to make, reject, or amend along with its rationale. This discussion gives the public critical

information about the agency's deliberative process and reveals the purpose of and intent behind each change. The section 1022(b)(2) analysis, in particular, provides important data regarding the potential and likely effects of the changes on consumers, creditors, and other covered persons. This required analysis and the recognition that the CFPB must justify each regulatory provision that it enacts prompts extensive research and data collection before any rule is proposed (and continues throughout the regulatory process).

The CFPB's notices of proposed rulemakings and final rules provide a thorough overview of the information the CFPB has considered or will consider and its analysis. We support the continuation of these steps, which the CFPB has taken since 2011.

B. *Ex Parte* Policy (Question 9)

Another example of the CFPB's strong commitment to transparency, so that its rulemaking process will be impartial and fully informed, is its *ex parte* policy. Recognizing the danger of undue influence from one-sided communications behind closed doors, the CFPB implemented a policy requiring *ex parte* communications to be documented in writing and publicized.

The CFPB should continue these practices to stay accountable to the public about the information it is considering in its rulemaking deliberations. We urge the CFPB to complete and publish *ex parte* memoranda promptly and to post a log of each *ex parte* contact that occurs regarding a rulemaking process. Consistent with prior practice, we also recommend that the Acting Director and Deputy Director post their complete daily calendars to the website to further improve the CFPB's transparency. If the CFPB considers information after the comment period ends for a rulemaking, this information should be made public as well. Transparency has been one of the CFPB's greatest strengths; that is appropriate for an agency charged with guarding the public against abusive practices, and it should be preserved and expanded to protect the credibility of the rulemaking process.

C. Public Release of SBREFA Briefing Materials (Question 2d)

We commend the CFPB for distributing the SBREFA briefing materials to the general public before these meetings, which provides insight into what options the CFPB is considering and an opportunity for all stakeholders, including other small businesses that were not SBREFA participants, to have input before the rulemaking process begins. While the CFPB is required by law to meet with small business representatives before commencing rulemaking, limiting disclosure of the preliminary proposal to SBREFA participants would significantly limit the range of input CFPB receives. The CFPB's commitment to transparency and broad stakeholder input is demonstrated in this practice and it should be continued.

D. Proprietary Information from Businesses (Question 1b)

The CFPB has adequate protections in place to protect both consumer privacy and proprietary information from businesses through its final rule on the Disclosure of Records and Information,²⁴ which prohibits the agency from disclosing any confidential information to outside sources. Robust collection and analysis of data is essential to the CFPB's ability to fulfill its statutory responsibilities, including its authorities under the Federal consumer financial laws. Consistent with this rule and its current practice, the CFPB should continue to collect and analyze data, and publish its analyses, without directly or indirectly identifying the institutions or consumers involved. In continuation of its demonstrated commitment to transparency, the CFPB should continue to make data publicly available to the greatest extent possible, consistent with consumer privacy and the protection of truly proprietary data.

VI. CFPB's Rulemaking Relies on Objective Empirical Research

A. Comprehensive Data for Analysis (Question 1b, 10)

The CFPB has prioritized empirical research by integrating its Research and Markets team's research into its rulemaking process. One major source of quantitative data used in this research is the information the CFPB collects through its examinations, enforcement actions, and consumer complaint database. It is important for the CFPB to continue collecting this data so that it can do its own independent empirical analysis. The CFPB should closely interrogate data from sources funded by or closely associated with the industry that is a subject of the rulemaking and look carefully into the methodology for any studies it decides to consider as part of its rulemaking process.

Moreover, recognizing that numbers alone may not tell an entire story, the CFPB enhances its analysis with qualitative data and field insights. While we support the CFPB's efforts to gather nationally representative data, quantitative data is very often insufficient on its own to demonstrate the full impact of an issue, and it is dangerous to overemphasize quantitative data at the expense of other analysis. The CFPB has always considered both quantitative and qualitative data in its analyses and it is crucial that the agency continue to do so.

Qualitative data, including individual consumer stories, is a fundamentally important part of meaningful research into the impact of consumer financial products and services. Examples of consumers' experiences play a valuable role in alerting the CFPB to new issues, possible trends, emerging types of consumer harm, and gaps in or evasions of existing protections. Consumers' accounts of their experiences should be explored as a starting point for additional research. Consumers are well-equipped to describe their personal encounters with financial institutions, but in many cases neither consumers nor consumer advocates are likely able to assemble quantitative data that could show how widespread problems are, nor are they likely to have access to private quantitative data from industry or third-party vendors. Without access to industry data, consumers are often not well positioned to respond to industry's presentations of that data. Yet their

²⁴ 12 C.F.R. 1070.41(c).

descriptions of their experiences can point to market trends, and to areas where further scrutiny is needed. As the agency has done throughout its history, it should use consumer stories as a starting point for further inquiry and an essential part of its analysis.

Moreover, sometimes the process itself calls for a more qualitative analysis. For example, consumer testing of any proposed disclosures often involves a qualitative process in its analysis. We applaud the CFPB for routinely prioritizing consumer testing of disclosures and considering the results of the testing in the formulation of final rules such as the TILA-RESPA mortgage disclosures and subsequent “Know before you Owe” disclosures.

On the question of nationally representative samples, the appropriate mechanism may depend on the information the CFPB has access to, such as 1) data that is already available through public or regulatory channels; 2) information that the CFPB already has obtained through complaints, supervision, and enforcement; and 3) what kind of information the CFPB is seeking. If the CFPB does not yet have a specific set of questions and is in the early stages of exploring an issue, gathering input through an RFI may be the appropriate measure. However, if the CFPB has a specific question or set of questions, a survey may be a helpful tool. The CFPB should continue thinking creatively about different ways to gather information that adapt to the need and utilize the tools and the technologies available, including social media and the CFPB website. To the extent that surveys or other data are used, any data the CFPB relies upon in its findings should be made accessible to the public early in the process. It is crucial that the CFPB gather its own data and not rely on industry data alone.

B. Impact Analysis (Question 4c)

In compliance with its rulemaking obligations under the Dodd-Frank Act,²⁵ the CFPB rightfully considers the impact of any proposed rule, and the costs and benefits associated with it. We support the CFPB’s current practice of providing its analyses and supporting data with the NPRM and the final rule. A review of the CFPB’s impact analyses accompanying the significant rules it has issued demonstrates the CFPB’s diligence in its efforts to quantify and monetize these impacts to the extent possible. The CFPB should continue its current flexible approach to impact analysis, which complies with its statutory obligations under the Dodd-Frank Act and suitably takes into account the limitations of methodologies underlying such analysis. Financial regulatory impact analysis, particularly cost-benefit analysis, is highly speculative at best and is misleading and subject to manipulation based on arbitrary assumptions at worst. Leading academics have closely scrutinized financial agency cost-benefit analyses and have concluded that the impacts of financial regulation can be complex and, in some cases, indeterminate, such that they do not lend themselves to quantification or monetization to the degree required to compare costs and benefits or stipulate that the benefits of financial regulations exceed the costs.

In order for the CFPB to perform a meaningful analysis, the CFPB must be privy to the best available data from numerous sources, including both quantitative and qualitative data. As discussed

²⁵ 55 U.S.C. §5512(b)(2).

in Section VI(A), an important source of qualitative data is consumer accounts of their experiences, which reinforce existing data or prompt the agency to seek additional data to understand more about what is at issue and how prevalent a problem is. This type of evidence is also crucial to allowing the CFPB to value qualitative data in the framework of conducting impact analyses, thereby permitting the CFPB to stipulate benefits that are real and tangible for consumers, but cannot be reduced to monetary or quantified values. Federal agencies across the government have long been encouraged to put qualitative benefits on an equal footing with quantified benefits or costs for purposes of impact analyses in order to achieve goals set out by Congress

It is important that the CFPB not overemphasize costs in its impact analysis. Costs to industry may be easier to quantify, particularly as industry has the ability as well as the motivation to invest great effort in identifying costs, and the incentive to make them seem as large and burdensome as possible. However, treating the quantifiable benefits of a CFPB rule as the total or principal part of the benefits is a dangerous proposition because there are limits to what quantifiable data can tell us. For example, the harm caused by a deceptive or abusive practice may be quantifiable in the amount of money consumers lost to a particular scam or the number of homes lost as a result of predatory lending. This type of data rightfully plays a role in determining the CFPB's response. The resulting prevention of abusive and deceptive practices that harm consumers is a crucial benefit of many CFPB rules, but quantitative data alone cannot express the full extent of this benefit. Other benefits, such as the resulting safety and stability of the system and deterrence of bad actors, unmistakably benefit society, but may not be measurable.

VII. CFPB's Rulemaking Reflects Consideration from All Stakeholders.

The best illustration of the CFPB's thorough and balanced rulemaking process is found in its own adopted regulations. As described in detail below, the CFPB received recommendations, information, and feedback from a variety of stakeholders and made its own decisions on its final rules. The CFPB's rulemaking process engages with a broad spectrum of stakeholders and considers a wide range of data. Recommendations were provided by consumers, by industry, and by other interested parties. Sometimes the CFPB rejected their suggestions, and at other times the final rule reflected a compromise. As described in further detail below, the CFPB's adopted regulations demonstrate that its rulemaking process is broad, objective, and well-considered, and thus should be maintained.

A. The Mortgage Servicing Rule issued under Regulations X and Z involved a rulemaking process responsive to industry's concerns.

The foreclosure crisis that began in 2008 made it plain that problems with mortgage servicing were contributing to an unprecedented number of needless, avoidable foreclosures. The CFPB's Servicing Rule, first adopted in 2013 and then amended in 2016, has had a significant, positive impact in the lives of homeowners and has contributed to preventing avoidable foreclosures. The rule has improved transparency and accountability in the loss mitigation process and in other areas of servicing, such as force-placed insurance. While the rule has not gone as far as consumers would

have liked, it has helped align the incentives of servicers with investors, homeowners and communities.

The CFPB's processes for arriving at the 2013 RESPA and TILA Servicing Rule and the 2016 Mortgage Servicing Final Rule incorporated concerns of both mortgage servicers and consumer advocates. Neither side prevailed in every argument. In its rulemaking process, the agency adopted certain recommendations from consumer advocates and declined to adopt others. Likewise, it adopted a number of recommendations from the lending industry and declined to adopt others. Finally, a number of elements of the final rule involved a compromise between the interests of industry and consumers. Industry and consumer advocates alike have now made substantial investments in learning and adapting to the rule.

1. The CFPB adopted a number of proposals made by the servicing industry.

a. The CFPB adopted the servicing industry's request for limitations on borrower information and dispute rights.

RESPA gives borrowers important rights to help them obtain account information and resolve disputes with servicers, by sending a "qualified written request."²⁶ Prior to January 10, 2014, Regulation X did not permit servicers to refuse to respond to such requests based on the scope or subject matter of the dispute notice or information request. When the CFPB considered amendments to Regulation X, the mortgage industry requested that the agency limit the type of information that could be sought or matters that could be disputed. This request was adopted by the CFPB. A servicer is not required to comply with a notice of error if the servicer reasonably determines that the asserted error is substantially the same as an error previously asserted by the borrower.²⁷ A servicer may also refuse to comply with an overbroad notice of error.²⁸ The CFPB also added a list of exclusions from compliance for requests for information, including requests that are unduly burdensome or seek information that is irrelevant, confidential, proprietary, or privileged.²⁹ The exclusion for overbroad or unduly burdensome information requests was a direct response by the CFPB to servicer complaints raised during the CFPB's Small Business Review Panel outreach.³⁰

b. The CFPB granted broad exemptions to small servicers from many of the new servicing requirements.

The servicing industry sought exemptions for small servicers from the new loss mitigation and other

²⁶ 12 U.S.C. § 2605(e).

²⁷ Reg. X, 12 C.F.R. § 1024.35(g)(1)(i).

²⁸ Reg. X, 12 C.F.R. § 1024.35(g)(1)(ii).

²⁹ Reg. X, 12 C.F.R. §§ 1024.36(f)(1)(ii), 1024.36(f)(1)(iii), 1024.36(f)(1)(iv)

³⁰ See Section-by-Section Analysis, § 1024.36(f)(1)(iv), 78 Fed. Reg. 10,760 (Feb. 14, 2013) ("During the Small Business Review Panel outreach, small entity representatives expressed that typically qualified written requests received from borrowers were vague forms found online or forms used by advocates as a form of pre-litigation discovery. Servicers and servicing industry representatives indicated that these types of qualified written requests are unreasonable and unduly burdensome.").

requirements in the 2013 TILA and RESPA Servicing Rules. Although opposed by consumer organizations, the CFPB granted the industry's request and adopted small servicer exemptions for many of the new requirements. If a servicer is a small servicer (*see* Section VI(A)(2)(h) for a discussion of this definition), it is exempt from the Regulation Z requirement to provide periodic statements for residential mortgage loans.³¹ It is also exempt from the requirements under Regulation X relating to (1) obtaining force-placed insurance;³² (2) general servicing policies, procedures, and requirements;³³ and (3) early intervention contacts with borrowers about loss mitigation, continuity of contact with borrowers, and evaluation of applications for loss mitigation options.³⁴

2. While the CFPB adopted certain recommendations from consumer advocates, it also declined to implement numerous consumer recommendations.³⁵

a. The CFPB rejected consumers' pleas to do away with the complete application rule.

Critical borrower protections under the CFPB's loss mitigation rule are triggered only upon the servicer's receipt of a borrower's "complete" application.³⁶ Reliance on submission of a complete application complicates attempts to address dual-tracking (the servicer's pursuit of foreclosure at the same time that it is negotiating or purporting to negotiate a loan modification) or wrongful foreclosures, due to the lack of an objective standard for when an application is complete and inconsistent implementation by servicers. Moreover, that standard creates the wrong incentive—to drag out the application process in order to increase servicers' default servicing fee income. It has also generated unnecessary litigation, as borrowers seek court determinations that servicers have improperly treated applications as incomplete. Consumer advocates have repeatedly requested that the CFPB abandon this rule and replace it with one based on an initial submission of a loss mitigation package, similar to the "Initial Package" under the former HAMP program. However, the CFPB has not adopted this recommendation from consumer advocates.

b. The CFPB has not adopted consumer proposals to address major problems in servicing transfers.

Consumer advocates have repeatedly urged the CFPB to adopt a comprehensive regulatory framework for addressing the many servicing problems that occur at or near the time of a transfer of servicing. These problems are often caused by transferor and transferee servicers' inability to communicate with each other and reconcile account records. While the issuance of 12 U.S.C. §

³¹ Reg. Z, 12 C.F.R. § 1026.41(e).

³² Reg. X, 12 C.F.R. § 1024.17(k)(5).

³³ Reg. X, 12 C.F.R. §§ 1024.30(b)(1)

³⁴ Reg. X, 12 C.F.R. §§ 1024.30(b)(1), 1024.39 through 1024.41.

³⁵ A more detailed discussion of many of these issues is found in the comments NCLC and other consumer groups submitted in response to the Notice of Assessment of 2013 RESPA Servicing Rule and Request for Public Comment (Docket No. CFPB-2017-0012) on July 10, 2017.

³⁶ Reg. X, 12 C.F.R. § 1024.41(b)(1).

1024.41(k) as part of the 2016 Mortgage Servicing Final Rule made some progress on this problem, it was far from the broad, systemic fix that advocates sought. The CFPB has not explicitly banned servicers from making duplicative and burdensome requests for information and documents that have been previously provided to a transfer or servicer. The regulation does not require the transferor or transferee servicer to provide clear information to the borrower regarding the status of a pending loss mitigation application. The rule does not explicitly require transferee servicers to honor pending loss mitigation offers that have been made to the borrower prior to transfer. Finally, the CFPB has not defined industry-wide standards and protocols to ensure the compatibility of transferred data between servicers. All of these improvements to the rule were requested by consumers and their advocates.

c. The CFPB has not eliminated the duplicative request rule.

Consumer advocates have urged the CFPB to remove the carve-out that allows servicers to avoid the requirements of section 1024.41 if a borrower has been evaluated previously by that servicer for loss mitigation options for the borrower’s mortgage loan account.³⁷ Consumer groups have argued that this exclusion from the application of section 1024.41 undermines the effectiveness of the CFPB’s loss mitigation rule and presents challenges for borrowers and their advocates. Oftentimes, a second or third application results in a loss mitigation offer – either because the borrower’s circumstances have changed or because the servicer failed to properly evaluate the prior application. Servicers typically accept and process additional applications, so the exclusion has had no effect in limiting servicer costs. The only function it serves is to provide a free pass in litigation to servicers who violate the CFPB’s rules. So far, the CFPB has made only a minor adjustment to this rule: the 2016 Servicing Rule allows a loss mitigation request to be covered by the rules if the borrower has at some point cured the default since the prior request. The agency has not adopted the advocates’ other recommendations.

d. The CFPB has declined to adopt consumer advocates’ proposals for increased protections for Successors in Interest during the process of confirming successor status.

The CFPB has expanded the servicing rules to address some problems faced by successors in interest trying to preserve their homes. However, the amendments it made to the Servicing Rule in 2016 do not provide successors with any enforceable rights until the servicer has “confirmed” the successor’s status, a process that is fully controlled by the servicer. Consumer advocates had asked the CFPB to write the rule so that successors would be able to enforce their rights once they provided documentation establishing their identity and ownership interest in the home. The CFPB did not take this position, and its rule grants successors only limited enforcement rights during the confirmation process.

³⁷ Reg. X, 12 C.F.R. § 1024.41(i).

e. The CFPB has declined to fully address problems with force-placed insurance.

In responding to force-placed insurance abuses, one of the rules in the 2013 RESPA Servicing Rule requires servicers to advance homeowners' insurance premiums for borrowers with escrow accounts and reinstate the homeowner's insurance coverage rather than force-placed insurance.³⁸ However, consumer advocates also pointed out that many homeowners struggling with wrongfully force-placed insurance do not have escrow accounts. NCLC urged the CFPB to expand the rule to cover borrowers without escrow accounts and to ban all forms of kickbacks and non-monetary compensation. The CFPB has not adopted these recommendations.

f. The CFPB has failed to bar foreclosure when a borrower identifies a servicing error related to the default.

The 2013 RESPA Servicing Rule permits servicers to proceed with foreclosures during the response period for a notice of error. Foreclosures may proceed even if there is a payment dispute that goes to the very right of the servicer to declare the account in default. NCLC has pointed out that the CFPB missed an opportunity in the 2013 rule to implement two provisions of RESPA that are intended to help borrowers avoid foreclosure: the error resolution procedure under § 2605(e) and the servicer prohibition in § 2605(k)(1)(C) from “fail[ing] to take timely action to respond to a borrower's requests to correct errors relating to ... avoiding foreclosure.” To fully implement these provisions, we have previously requested that the CFPB amend § 1024.35(h)(i) to provide that a servicer shall not proceed with a foreclosure proceeding if a borrower has sent a notice of error (1) challenging the alleged basis for the default or grounds for foreclosure or (2) asserting that the servicer has not properly evaluated a loss mitigation application, until such time as the servicer has conducted a reasonable investigation of the notice of error and provided a response in accordance with § 1024.35(e). Such a rule has not been adopted.

g. The CFPB has maintained a broad HELOC exemption.

The CFPB's servicing rule exempts home equity lines of credit (HELOCs),³⁹ even if the HELOC is a first lien (and only mortgage of the borrower) on the property. Consumer advocates have asked the CFPB to reconsider its decision to exempt HELOCs. Consumer advocates have argued, among other things, that servicers have ample experience regarding loss mitigation on HELOCs since HELOCs in first lien position were eligible for HAMP review, and thus compliance with the servicing rule's loss mitigation provisions should not be difficult for HELOC lenders to master. Nonetheless, the CFPB has not adopted this recommendation from consumers.

h. The CFPB has created and maintained a small servicer exemption.

“Small servicers” are exempt from several of the requirements imposed on servicers by the 2013 TILA and RESPA Servicing Rules. A small servicer is defined in part as a servicer that services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an

³⁸ Reg. X. 12 C.F.R. § 1024.17(k)(5)(i).

³⁹ Reg. X. 12 C.F.R. §§ 1024.30(a), 1024.31 (definition of “mortgage loan”).

affiliate) is the creditor or assignee.⁴⁰ Advocates who assist borrowers with loss mitigation and foreclosure defense find it difficult to determine whether a particular servicer meets the exemption definition based on publicly available information. We have requested that the CFPB create a registry of servicers who claim to be covered by the small servicer definition, which could be accessed on the CFPB's website. While information reported on the registry would not be controlling as to whether the entity is in fact a small servicer, it would give advocates the opportunity to check whether an entity is claiming to be exempt. Public notice about small servicers would also reduce the number of complaints to the CFPB and other parties. To date the CFPB has not eliminated this carve-out or made it more transparent.

i. The CFPB has maintained a reverse mortgage exemption.

Reverse mortgages are currently exempted from almost all provisions of the servicing rule. Other than the ability to send a notice of error or request for information, reverse mortgage borrowers have few protections against servicing abuses. Reverse mortgage servicers typically evaluate borrowers for loss mitigation after a default on property charges. Consumer advocates have argued that there is no logical reason to exclude reverse mortgage servicers from the rules governing loss mitigation, continuity of contact, and early intervention. However, the CFPB has declined to cover them.

j. The CFPB has not adequately protected borrowers with Limited English Proficiency.

The lack of adequate protections for borrowers with Limited English Proficiency (LEP borrowers) in the servicing (and origination) markets raises fair lending concerns. Consumer advocates have urged the CFPB to consider additional rulemaking and other steps to require servicers and other market participants to effectively meet the needs of LEP borrowers.⁴¹ The CFPB has not acted on this issue.

k. The CFPB has not mandated affordable loan modifications.

Consumer advocates have urged the CFPB to mandate affordable loan modifications as part of its servicing rules, consistent with investor interests, for qualified borrowers facing hardship. Without broad, transparent minimum standards, discretionary reviews under the current rules create the potential for discriminatory results. The lack of alignment between servicers' incentives and the interests of investors and homeowners makes it unlikely that servicers across the market will offer sustainable modifications now that HAMP has ended. However, the CFPB has not adopted such a mandate.

⁴⁰ 12 C.F.R. § 1026.41(e)(4)(ii)(A).

⁴¹ For a discussion of the Bureau's authority and recommendations for improving access, see Americans for Financial Reform, *Issue Brief: The CFPB and Other Federal Agencies Should Adopt Strong Language Access Protections for Homeowners and Other Consumers* (May 2016), available at http://ourfinancialsecurity.org/wp-content/uploads/2016/05/AFR_LEP_Issue_Brief_05.26.2016.pdf.

3. The CFPB’s final rule adopted a compromise position on a number of issues of concern to consumer advocates.

- a. The CFPB adopted a compromise position on whether a borrower can use the notice of error procedure to challenge an improper loan modification denial.**

When the CFPB initially proposed the error resolution rule as part of the 2013 amendments to Regulation X, it contained an exclusive list of nine covered errors.⁴² As proposed, borrowers would not be permitted to use the dispute procedure to challenge servicer errors that were not on the list. Absent from the proposed list of covered errors was an improper denial of a loss mitigation application. Moreover, the list did not include a general category for errors related to the servicing of the borrower’s loan, and the existing definition of “servicing” in Regulation X did not describe loss mitigation as a servicer function. Consumer organizations requested that the CFPB address these issues in the final rule, and the mortgage industry opposed any expansion of the dispute procedure. In response, the CFPB adopted a compromise position. The final rule added a catch-all category for “any other error relating to the servicing of a borrower’s mortgage loan,”⁴³ but it did not add a wrongful loan modification denial to the list of covered errors or amend the definition of servicing to specifically include loss mitigation activities.

- b. The CFPB adopted a compromise position on whether the dual tracking protections apply to a borrower when the servicer is seeking additional documents to make a loss mitigation application complete.**

As discussed above, the CFPB’s proposed loss mitigation rule provided borrower protections only upon the servicer’s receipt of a borrower’s “complete” application. Consumer advocates noted that the rule would deny borrowers dual tracking protections even in situations where an application was initially complete but later became incomplete because additional documents were requested by the servicer or the servicer had mistakenly deemed the application to be complete. The mortgage industry insisted that servicers should be able to control when an application is complete for purposes of the loss mitigation rule. The CFPB adopted a compromise position that treats a loss mitigation application in certain situations as being “facially complete.” If after notifying a borrower that an application is complete, a servicer later discovers a need for more information or corrections to previously submitted documents, the servicer must promptly request the missing information and must treat the application as complete for purposes of the dual tracking protections in sections 1024.41(f)(2) and 1024.41(g) until the borrower is given a reasonable opportunity to complete the application.⁴⁴

⁴² See Section-by-Section Analysis, § 1024.35(b)(11), 78 Fed. Reg. 10,743–44 (Feb. 14, 2013).

⁴³ Reg. X, 12 C.F.R. § 1024.35(b)(11).

⁴⁴ Reg. X, 12 C.F.R. § 1024.41(c)(2)(iv).

B. The Ability to Repay and Qualified Mortgage Rule Demonstrates that the Process Incorporated Input from Industry and Consumer Groups at the Outset and that Industry-Tailored Exceptions Continue to Develop.

Making mortgage loans without evaluating the borrower's ability to repay the loan was one of the prime drivers of the surge of unsustainable mortgage lending that produced the mortgage meltdown by 2008. When Congress passed the Dodd-Frank Act, it created a requirement that mortgage lenders reasonably evaluate the borrower's repayment ability, with a special category of "qualified mortgages" that were presumed affordable because they are considered to be free of unsafe features.⁴⁵ The Act directed the CFPB to prescribe rules to implement the exception for qualified mortgages.⁴⁶

From the outset, the CFPB's development of the Ability to Repay and Qualified Mortgage rule involved extensive evaluation of stakeholder concerns and proposals. Even before the CFPB came into existence, the Federal Reserve Board published for public comment a proposed rule to implement these requirements in May 2011.⁴⁷ The Board received approximately 1,800 letters. Once the Board's rulemaking authority passed to the CFPB, all of those comment letters were also transferred over. In light of comment letters and the CFPB's own data collection and analysis, the CFPB re-opened the comment period in May 2012 to solicit further comment. The CFPB received 160 comments from a range of stakeholders,⁴⁸ including consumer advocates.

The CFPB published the final Ability to Repay rule in January 2013.⁴⁹ While it was clear that the CFPB had considered the consumer groups' extensive comments, the agency's rule adopted the industry's positions on a number of key issues. In addition, even since adopting the rule, the agency has shown a high level of responsiveness to industry concerns. It has continued to modify it by expanding exceptions for smaller institutions.

1. The CFPB did not adopt a residual income test for affordability despite statutory language supporting its inclusion and strong support from consumer organizations.

The statute provides that in general, a creditor can comply with the Ability to Repay requirement by reviewing a borrower's debt-to-income ratio or the residual income available after paying both mortgage debt and non-mortgage debt.⁵⁰ The statutory definition of a Qualified Mortgage similarly allows for compliance through either debt-to-income ratios or residual income.⁵¹ While debt-to-income ratios measure certain aspects of affordability, a residual income measure ensures that borrowers have sufficient cash available for reasonable expenses. This issue was a prominent concern for consumer groups. Thus, consumer organizations advocated that the CFPB incorporate

⁴⁵ 15 U.S.C. § 1639c.

⁴⁶ 15 U.S.C. § 1639c(b)(3).

⁴⁷ 76 Fed. Reg. 27390 (May 11, 2011).

⁴⁸ This process is described in the publication of the final rule. 78 Fed Reg 6408, 6418 (Jan. 30, 2013).

⁴⁹ 78 Fed. Reg. 6408 (Jan. 30, 2013).

⁵⁰ 15 U.S.C. § 1639c(a)(3).

⁵¹ 15 U.S.C. 1639c(b)(2)(A)(vi).

residual income measures into the Qualified Mortgage definition.⁵² The CFPB, however, only implemented the debt-to-income ratio measure.⁵³

2. The CFPB sought to incorporate concerns of consumer groups, lenders and investors in establishing a two-tiered Qualified Mortgage rule, rather than using a rebuttable presumption approach across the board as consumer groups urged.

The final Ability to Repay and Qualified Mortgage Rule created what the CFPB called “carefully calibrated presumptions of compliance”⁵⁴ The final rule distinguishes between two types of qualified mortgages based on the Annual Percentage Rate and the relative relationship to the Average Prime Offer Rate. For higher-priced mortgage loans, the rule provides a rebuttable presumption of compliance, meaning that while the creditor will be presumed to have complied with the Ability to Repay requirements if it meets the Qualified Mortgage elements, the borrower can rebut this presumption with certain evidence. For the majority of loans, however, the rule provides a “conclusive presumption,” a complete safe harbor, that the creditor has satisfied the Ability to Repay requirement if the creditor proves it has in fact made a qualified mortgage.⁵⁵

The CFPB described its approach as striking a balance between protecting vulnerable borrowers and providing market certainty while promoting access to credit. Yet, many consumer advocacy groups had supported a rebuttable presumption across the board as a means of providing recourse to homeowners who received patently unaffordable loans from creditors.⁵⁶ The groups cited the clear definition and measurable remedies as reasons why a rebuttable presumption could be compatible with maintaining access to credit. Nevertheless, the CFPB provided a complete safe harbor for the majority of the mortgage market.

3. The CFPB has expanded the original exceptions to the Qualified Mortgage requirements.

a. The CFPB’s concurrent proposal paved the way for new exceptions.

In the final Ability to Repay rule, the CFPB also released a concurrent proposal to seek comment on whether to exempt non-profit lenders, homeownership stabilization programs, and certain federal

⁵² *Id.*

⁵³ 78 Fed. Reg. 6408 (Jan. 30, 2013).

⁵⁴ 78 Fed. Reg. 6408, 6506 (Jan 30, 2013).

⁵⁵ *Id.*

⁵⁶ *See* Comments of National Consumer Law Center & National Association of Consumer Advocates (July 9, 2012), *available at*

https://www.nclc.org/images/pdf/foreclosure_mortgage/predatory_mortgage_lending/comments-ability-to-pay-2012.pdf; Comments of Center for Responsible Lending, Consumer Federation of America, National Association of

Consumer Advocates, & National Consumer Law Center (May 11, 2011), *available at*

https://www.nclc.org/images/pdf/foreclosure_mortgage/predatory_mortgage_lending/comment-ability-to-pay-qm.pdf

agency and GSE refinancing programs from the Ability to Repay requirements due to specialized underwriting criteria. The proposal sought comment on whether to create a new category of qualified mortgages (similar to the one authorized by statute for rural balloon-payment mortgages) for non-balloon loans held in portfolio by small creditors.⁵⁷ The proposal also sought comment on whether to increase the threshold for determining the distinction between the safe harbor and rebuttable presumption for rural balloon payment and small creditor portfolio qualified mortgages. The CFPB received many comments from industry members supporting these proposals.

On June 12, 2013, the CFPB published a final rule creating a series of new exemptions, all generally supported by industry comments.⁵⁸ The new rule created a number of exemptions for non-profit and governmental lenders that were not controversial. Moving beyond the non-profit and government realm, the final rule also contained several provisions focused on small creditors, defined as creditors with up to \$2 billion in assets that (along with affiliates) originate no more than 500 first-lien mortgages covered under the Ability to Repay rules per year. The CFPB had previously exercised authority under the Dodd-Frank Act to allow certain balloon-payment mortgages to be designated as qualified mortgages if they were originated and held in portfolio by small creditors operating predominantly in rural or underserved areas. In this final rule, the CFPB also adopted an additional category of qualified mortgages for certain loans originated and held in portfolio for at least three years by small creditors, even if they do not operate predominantly in rural or underserved areas. The loans are not subject to a specific debt-to-income ratio as they would be under the general qualified mortgage definition.

b. In 2015, the CFPB further amended the exceptions for small creditors and those operating in rural or underserved areas.

On January 29, 2015, the CFPB proposed several amendments, including proposals relating to small creditors and rural or underserved areas.⁵⁹ On October 2, 2015, the CFPB published a final rule that again revised the definitions of small creditor and rural and underserved areas.⁶⁰ These amendments expanded the group of creditors who qualified for small-creditor status and were broadly supported by industry comments. Specifically, the final rule raised the loan origination limit for determining eligibility for small-creditor status from 500 to 2,000 originations of covered transactions secured by a first lien, while excluding originated loans held in portfolio by the creditor and its affiliates from that limit. In addition, the rule established a grace period from calendar year to calendar year to allow a creditor exceeding the origination or asset limit in the preceding calendar year to operate, in certain circumstances, as a small creditor with respect to transactions with applications received before April 1 of the current calendar year. The final rule also included in the calculation of the \$2 billion asset limit for small-creditor status the assets of the creditor's affiliates that regularly extended covered transactions.

The rule also modified the definitions of rural and underserved. It expanded the definition of "rural" by adding census blocks not in an urban area as defined by the U.S. Census CFPB (Census CFPB) to

⁵⁷ 78 Fed. Reg. 6408, 6409 (Jan. 30, 2013).

⁵⁸ 78 Fed. Reg. 35,430 (June 12, 2013).

⁵⁹ 80 Fed. Reg. 7769 (Feb. 11, 2015).

⁶⁰ 80 Fed. Reg. 59944 (Oct 2, 2015).

an existing county-based definition. It also added two new safe harbor provisions related to the rural or underserved definition for creditors that rely on automated tools.

c. In 2016, the CFPB further expanded opportunities for a rural designation.

On March 3, 2016, the CFPB further expanded the opportunity for a creditor to qualify for the rural or underserved areas exemption. It adopted a procedural rule that allowed a creditor to ask the CFPB to designate as rural an area that had not previously been so designated.⁶¹

C. The TILA/RESPA Integrated Disclosures show that CFPB was responsive to industry's concerns.

1. While the CFPB adopted certain recommendations from consumer advocates, the CFPB also declined to implement numerous consumer recommendations.

In 2010, after decades of consumer and industry advocacy, Congress directed the CFPB to create a single, integrated disclosure form combining the existing RESPA HUD-1 and TILA disclosure forms.⁶² As part of a program called Know Before You Owe, the CFPB put an extensive amount of time and effort into developing the proposed rules, including hiring a consultant to conduct consumer testing and focus groups. The agency also solicited input from the public, including consumer advocates and industry participants.

Ultimately, the CFPB issued proposed regulations to implement this mandate on August 23, 2012⁶³ and finalized its rules on December 31, 2013.⁶⁴ Both Federal Register documents are substantial, the proposed version consisting of 343 pages and the final version occupying 638 pages. The length of these notices, however, should not be a source of criticism. Rather, it indicates the effort the CFPB has invested in explaining how it developed the new rules, why it made certain decisions—including responses to industry and consumer comments—and how the new rules should be implemented.

Although the CFPB adopted some recommendations from consumer advocates, it also rejected many and was careful to address the credit industry's requests and concerns. Since the rule became final and effective, the CFPB has continued to be responsive to industry's concerns. Industry advocates have requested numerous changes to the disclosure rules. The CFPB has put industry requests out for comment and often accepted the industry's recommendations. Some of the changes recommended or accepted during this process are described below.

⁶¹ 81 Fed. Reg. 11099 (Mar 3, 2016).

⁶² Codified at 15 U.S.C. § 1604(b).

⁶³ 77 Fed. Reg. 51,226 (Aug. 23, 2012).

⁶⁴ 78 Fed. Reg. 79,730 (Dec. 31, 2013).

a. Early consumer comments on testing and disclosure of the annual percentage rate were not adopted.

NCLC and other organizations submitted comments on the Know Before You Owe program before the CFPB proposed the first version of the integrated disclosures.⁶⁵ The comments identified concerns about the CFPB's consumer testing methods and made recommendations. Most significantly, the comments pointed out that aspects of the consumer tests reflected a preconceived bias against using the Annual Percentage Rate (APR) as a disclosure tool, and the test subjects selected were also more financially sophisticated than the typical consumer. The consumer comments urged the CFPB to preserve the APR as the most prominent disclosure on the required forms because it works as a comparison shopping tool even if consumers are not able to explain the calculation itself. Nevertheless, citing evidence that consumers do not understand the APR, the CFPB rejected these recommendations and moved the APR to the back of the new disclosures.⁶⁶

b. Exceptions to the finance charge definition were not eliminated.

In response to the notice of proposed rulemaking, and as part of recommendations for improving disclosure of the APR, the consumer groups encouraged the CFPB to eliminate exceptions to the finance charge definition that distort the resulting APR. The comments were supported with extensive citations to scholarly publications and research. Industry participants objected to this change, arguing that it would make loans appear more expensive and would confuse the public. The CFPB ultimately agreed with industry concerns and left the finance charge definition unchanged.⁶⁷

2. The final rule was adjusted to accommodate industry concerns.

a. Rate locks⁶⁸

After the rule became final, industry asked for refinements based on experience. The CFPB has been receptive and made changes as needed. For example, the integrated disclosure rule requires creditors to provide a revised Loan Estimate after the borrower obtains a rate lock. Originally the rule required the revised disclosure to be provided on the date the interest rate was locked. But at the request of creditors, the CFPB changed the rule to allow the new disclosure to be given three business days after the rate lock. The CFPB specifically noted that this was done at the request of creditors, especially small creditors.

b. Informational loan estimates⁶⁹

Another example of how the CFPB has adjusted the final rule to meet industry concerns is the rule change permitting informational loan estimates. The integrated disclosure rules require the creditor to issue a Loan Estimate with a good faith estimate of the closing costs. Whether an estimate is made in good faith is determined by comparing the disclosed estimate with the final, actual amount

⁶⁵ <https://www.nclc.org/images/pdf/legislation/comments-tila-respa-forms-sbrefa.pdf>

⁶⁶ 78 Fed. Reg. at 79,979-81.

⁶⁷ 78 Fed. Reg. at 79,732, 79,774-80.

⁶⁸ 80 Fed. Reg. 8767 (Feb. 19, 2015).

⁶⁹ 82 Fed. Reg. 37656 (Aug. 11, 2017).

shown on the Closing Disclosure. If the amount has increased beyond the permissible tolerance, the original estimate will be considered in violation of the good faith requirement. The CFPB has always recognized that creditors may need to update the Loan Disclosure to reflect legitimate cost increases. Therefore, under certain circumstances, the creditor may issue a revised Loan Estimate and thereby “reset” the tolerances—meaning the test of a good faith disclosure will be measured from the revised disclosure rather than the original one.

Creditors, however, requested permission to issue revised Loan Estimates even in circumstances that would not reset the tolerances. These disclosures would be irrelevant for testing the creditor’s good faith and would only be for “informational” purposes. Consumer groups opposed this proposal out of concern that the information disclosures would confuse consumers and would make enforcement of the good-faith disclosure requirement more difficult. As a compromise, the groups encouraged the CFPB to at least require creditors to label these information disclosures (“for informational purposes only”) so as to distinguish them from the official ones with a binding legal effect. The CFPB rejected both of our recommendations and now allows creditors to issue as many Loan Estimates as they want.

c. Effect of four-day limit⁷⁰

One more example of how the CFPB has been responsive to industry needs is its adjustment of a time limit in its disclosure rules to avoid an issue that creditors were experiencing. As originally issued, the TILA/RESPA disclosure rules included a provision that creditors interpreted as allowing them to issue a Closing Disclosure at any time before the closing but that prohibited them from issuing a second, revised version of the Closing Disclosure more than four business days before the closing. This interpretation created the possibility that one rule would require a creditor to issue a revised closing disclosure by a specific date but the creditor would be prohibited from doing so by the four-day limit.

In response to industry concerns, the CFPB proposed to eliminate the four-day limit despite recognizing the risk to consumers. Consumer groups opposed the change and proposed a simple fix that would eliminate the black hole and avoid the risks to consumers: the rule could simply say that no Closing Disclosure may be provided until four business days before the closing. If there were subsequent changes or a rescheduled closing, the creditor could still issue a revised closing disclosure, but not more than four days before the original closing date. The CFPB, however, adopted the industry’s proposal.

3. The CFPB has gone to great lengths to educate industry on how to implement the new rules.

In addition to the many changes the CFPB has made since finalizing the rule, it has also provided industry with information and resources for implementing the new disclosures. The CFPB maintains a website with links to various compliance resources.⁷¹ The following resources are housed at that site:

⁷⁰ 83 Fed. Reg. 19159 (May 2, 2018).

⁷¹ [TILA-RESPA Integrated Disclosure Rule Implementation](http://www.consumerfinance.gov), available at www.consumerfinance.gov.

- Compliance Guide—a plain-language guide to the new rules in a FAQ format that makes the content more accessible for industry constituents, especially smaller businesses with limited legal and compliance staff;
- Guide to the forms—provides detailed, illustrated instructions on completing the loan estimate and closing disclosure forms;
- Disclosure timeline—illustrates the process and timing of disclosures for a sample real estate purchase transaction;
- Closing fact sheet—an overview of the limited circumstances when changes to the loan require a new three-day review;
- Integrated loan disclosure forms and samples (including a loan estimate and closing disclosure annotated with rules citations); and
- Detailed summary of changes and clarifications contained in the 2017 revisions to the TILA-RESPA rules.

The compliance guide, guide to the forms, and disclosure timeline are especially helpful. The compliance guide provides an easy-to-use summary of the rules, using a Q and A format. The guide to the forms is designed as a companion to the compliance guide. The disclosure timeline illustrates, in calendar form, the process and timing of disclosures for a sample real estate purchase.

The website also contains a series of webinars to address implementation of the new rule, accompanied by the powerpoint slides in pdf that can be downloaded. Topics include:

- Session 1—An [overview of the rule](#) (June 17, 2014);
- Session 2—[Frequently Asked Questions](#) (Aug. 26, 2014);
- Session 3—[Loan estimate](#) form (Oct. 1, 2014);
- Session 4—[Closing disclosure](#) form (Nov. 18, 2014);
- Session 5—[Implementation challenges](#) (May 26, 2015);
- Session 6—Construction lending (March 1, 2016); and,
- Session 7—Post-effective date questions and guidance (April 12, 2016).

In addition, the agency provides screen shots of the forms annotated with statutory and regulatory citations on its website. For the public, the CFPB added an interactive closing disclosure sample using the numbers appearing in H-25(B) Mortgage Loan Transaction Closing Disclosure—Fixed Rate Loan Sample.⁷² Finally, the agency also posted its Supervision and Examination Manual 2.0 (Oct. 2012) and updates on its website.⁷³

D. The Loan Originator Compensation Rule Process Took Account of Industry Interests

As part of the Dodd-Frank Act, Congress amended the Truth in Lending Act to restrict compensation structures that created incentives for mortgage loan originators to steer consumers into unsuitable mortgages or to pile on third-party fees.⁷⁴ In its rule implementing the statute, the

⁷² Consumer Fin. Prot. Bur., [Closing Disclosure Explainer](#), available at www.consumerfinance.gov.

⁷³ See Consumer Fin. Prot. Bur., [Supervision and Examinations](#), available at www.consumerfinance.gov.

⁷⁴ 15 U.S.C. § 1639b(c).

CFPB included certain details in the final Loan Originator Compensation rule that responded to industry recommendations. For instance, although the final rule generally prohibits loan originator compensation from being reduced to offset the cost of a change in transaction terms (i.e., a pricing concession), it permits loan originators to reduce their compensation to defray certain unexpected increases in estimated settlement costs.

Several consumer groups expressed strong opposition to this proposal, asserting that the CFPB should not allow reductions in loan originator compensation to bear the cost of pricing concessions under any circumstances. Many industry commenters supported in principle the CFPB's interpretation to permit reductions in loan originator compensation under the circumstances described in the proposed revised comment. The CFPB concluded that it was appropriate to finalize the basic approach to pricing concessions outlined in the proposal, while expanding the scope of circumstances in which the compensation paid to a loan originator may be reduced to bear the cost of pricing concessions provided to consumers in response to unforeseen settlement cost increases. The CFPB believed this approach would "balance the concerns of industry that the proposed commentary provision regarding permissible reductions in loan originator compensation to bear the cost of pricing concessions was too narrowly crafted, and thus ultimately would have hurt consumers and industry alike, with the concerns of consumer groups that any exception to the existing prohibition would vitiate the underlying rule."⁷⁵

Additionally, the final rule generally prohibited loan originator compensation based upon the profitability of a transaction or a pool of transactions. However, over objections from many consumer advocates, the final rule clarified the application of this prohibition to various kinds of retirement and profit-sharing plans. For example, mortgage-related business profits can be used to make contributions to certain tax-advantaged retirement plans, such as a 401(k) plan, and to make bonuses and contributions to other plans that do not exceed ten percent of the individual loan originator's total compensation. The CFPB found that this form of compensation, when appropriately structured, "can provide inducements for individual loan originators to perform well and to become invested in the success of their organizations."⁷⁶

Furthermore, the CFPB expanded on several areas where the industry requested clarity. For example, numerous manufactured housing industry commenters stated that the CFPB should further clarify what activities would be considered "assisting the consumer in obtaining or applying to obtain" credit, "taking an application," "offering or negotiating terms," or "advising" on credit terms. In response to industry, the CFPB included several clarifications of these elements of the definition of "loan originator" in its final rule and comments.⁷⁷ The above examples demonstrate that the CFPB was responsive to industry concerns in the rulemaking and that the rulemaking process was an adequate tool for airing concerns and evaluating how to address them.

⁷⁵ Final Rule, Loan Originator Compensation Requirements under the Truth in Lending Act, 78 Fed. Reg. 11279, 11333 (Feb. 15, 2013), available at <https://www.gpo.gov/fdsys/pkg/FR-2013-02-15/pdf/2013-01503.pdf>.

⁷⁶ *Id.* at 11350.

⁷⁷ *Id.* at 11305.

E. The CFPB's Escrow Rule Established Exemptions for Industry

In the lead-up to the mortgage crisis, some lenders were marketing unaffordable loans by quoting a monthly payment that included only principal and interest, without taxes and insurance. Lenders were also failing to require taxes and insurance to be escrowed, which increased the likelihood that homeowners would default on these payments, leading to force-placement of much more expensive insurance and the possibility of a tax sale. Prompted by these concerns, Congress included in the Dodd-Frank Act a requirement that an escrow for taxes and insurance be maintained for at least the first five years of any higher-priced mortgage loan.⁷⁸ It also, however, gave the CFPB the authority to create certain exemptions.⁷⁹ The CFPB used this authority to create an exemption to the escrow requirement for creditors operating in rural or underserved areas.⁸⁰

In the spring of 2011, when the Board of Governors of the Federal Reserve System first published a proposed rule to implement the escrow provisions,⁸¹ many industry commenters argued that the definition of rural (for the purpose of exemption) was too narrow. In its 2013 final rule, the CFPB agreed with industry that a broader definition of “rural” was appropriate.⁸²

The CFPB's March 2016 Interim Final Rule⁸³ further expanded the definitions of “small creditor” and “rural area.” The interim final rule amended the definition of rural areas and replaced the requirement that a small creditor operate *predominantly* in rural or underserved areas to be eligible for the escrow exemption with a requirement that a small creditor simply operate in a rural or underserved area. The revised rural-or-underserved test extended eligibility to small creditors that *originated at least one covered loan* secured by a first lien on a property located in a rural or underserved area in the preceding calendar year. Several consumer groups strongly opposed the one-rural-mortgage threshold for exempting small lenders from multiple consumer protection rules, arguing it would weaken restrictions on high-cost HOEPA mortgage loans, would allow risky loans to be designated as qualified mortgages, and would have other broad impacts.⁸⁴

F. The Appraisal Rule Established Exemptions for Industry

Appraisal fraud had facilitated much of the irresponsible lending that led to the breakdown of the mortgage market and the Great Recession. As amended by the Dodd-Frank Act, the Truth in

⁷⁸ 15 U.S.C. § 1639d.

⁷⁹ 15 U.S.C. § 1639d(c).

⁸⁰ Final Rule, Escrow Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 4725 (Jan. 22, 2013), available at <https://www.gpo.gov/fdsys/pkg/FR-2013-01-22/pdf/2013-00734.pdf>; TILA Higher-Priced Mortgage Loans (HPML) Escrow Rule, Small Entity Compliance Guide (March 2016), available at https://files.consumerfinance.gov/f/201603_cfpb_tila-hpml-escrow_compliance-guide.pdf. See also 15 U.S.C. § 1639d(c)(1).

⁸¹ The Board's proposal occurred prior to July 21, 2011, the date that authority transferred to the CFPB.

⁸² *Id.* at 4750.

⁸³ Interim Final Rule, Operations in Rural Areas Under the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 16074 (March 25, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-03-25/pdf/2016-06834.pdf>.

⁸⁴ Comment Letter to CFPB from AFR, Empire Justice Center, NACA, and NCLC (Apr. 25, 2016), available at <https://www.nclc.org/images/pdf/rulemaking/comments-rural-lender-exception2016.pdf>.

Lending Act prohibits creditors from making higher-priced mortgage loans without obtaining a written appraisal that meets certain requirements, subject to rules that the statute required a group of six agencies to adopt.⁸⁵

To implement this mandate, the CFPB, in partnership with five other federal regulatory agencies,⁸⁶ adopted the Higher-Priced Mortgage Loans Appraisal Rule in 2013.⁸⁷ Late in that same year,⁸⁸ the agencies adopted additional exemptions, effective January 18, 2014, from the HPML appraisal rules for extensions of credit of \$25,000 or less, indexed every year for inflation; certain types of refinance products commonly referred to as streamlined refinances; and certain covered HPMLs secured by manufactured housing. In addition, the agencies broadened the exemption for qualified mortgages (QMs) adopted in the January 2013 Final Rule beyond the CFPB's QM definition to include any transaction that falls under the statutory QM criteria. These expanded exemptions provide evidence that the regulators endeavored to accommodate industry concerns and did so through the appropriate rulemaking process.

G. High Cost Mortgages

1. The CFPB adopted consumer comments only if the industry expressed similar concerns regarding the rule or remained silent.

The Home Ownership and Equity Protection Act (HOEPA), enacted in 1994, was Congress's first attempt to address the problem of predatory mortgage lending. HOEPA defined a subset of high-cost mortgage loans and subjected them to certain restrictions designed to make them less unsafe. These steps were insufficient to prevent the surge of unsustainable mortgage lending that led to the collapse of the mortgage market in 2008. The Dodd-Frank Act amended HOEPA substantially by expanding the loans to which it applied and the requirements that apply to them.

Soon after the CFPB came into existence, it initiated a major rulemaking addressing these amendments. The agency proposed amendments to Regulation Z on August 15, 2012 and finalized the changes on January 31, 2013.⁸⁹

Throughout this rulemaking, the CFPB was meticulously open and data-driven. It received and considered many comments, and followed up with both industry and consumer representatives, seeking data and additional comments and analysis. As illustrated by the examples recited below, consumer advocates made a number of recommendations, only some of which were ultimately

⁸⁵ 15 U.S.C. § 1639h. The statute refers to "higher-risk" mortgage loans, but the CFPB's rule uses the term "higher-priced."

⁸⁶ Specifically, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Housing Finance Agency.

⁸⁷ See Final Rule, Appraisals for Higher-Priced Mortgage Loans, 78 Fed. Reg. 10367 (Feb. 13, 2013), available at <https://www.gpo.gov/fdsys/pkg/FR-2013-02-13/pdf/2013-01809.pdf>; TILA Higher-Priced Mortgage Loans (HPML) Appraisal Rule Small Entity Compliance Guide, available at https://files.consumerfinance.gov/f/201401_cfpb_tila-hpml_appraisal-rule-guide.pdf.

⁸⁸ 78 Fed. Reg. 78,520 (Dec. 26, 2013).

⁸⁹ 77 Fed. Reg. 49,090 (Aug. 15, 2012) (proposed); 78 Fed. Reg. 6856 (Jan. 31, 2013) (final).

adopted, while the CFPB agreed to many industry recommendations. In a number of instances, it adopted neither industry nor consumer representatives' recommendations, but chose a middle way.

a. The CFPB took great care to hear in detail from all sides regarding HOEPA triggers.

A mortgage loan is considered a high-cost loan subject to HOEPA if its APR exceeds a certain level, if the points and fees payable in connection with the loan exceed a certain amount of the total transaction amount, or if the loan includes a prepayment penalty above a certain amount.⁹⁰ HOEPA gives the CFPB rulemaking authority to adjust these “triggers” within certain parameters. The CFPB’s resolution of competing views about whether it should adjust these triggers exemplifies its careful analysis and transparency. It listened to both sides, but ultimately stuck with a middle approach that did not make adjustments—either up or down—to the triggers set by the statute.

The Dodd-Frank Act generally lowered HOEPA’s APR trigger to cover more loans, but it also created a separate, higher APR trigger (8.5% above the average prime offer rate) for dwellings (such as many manufactured homes) that are classified as personal property when the total loan amount is under \$50,000. In addition, the Act set the points-and-fees trigger at 5% for total loan amounts of \$20,000 or more, and 8% for smaller amounts.⁹¹ The CFPB sought comment on whether it should make changes to these triggers. Consumer groups urged the CFPB to set lower triggers, which would subject more loans to HOEPA’s restrictions, arguing that setting higher triggers for smaller loans condoned giving the lowest-income, least sophisticated consumers more expensive, higher-risk credit without regard to their underlying creditworthiness. The groups suggested that before the CFPB accepted the argument that higher triggers would be necessary to preserve access to credit, the CFPB should solicit data and further research the impact of the higher triggers.

On the other hand, industry commenters did not support lowering the triggers, and some urged the CFPB to raise them.⁹² The manufactured home industry in particular asked the CFPB to raise the APR trigger for manufactured home loans.⁹³

In addition to considering these comments, the CFPB engaged in many meetings with industry and consumer groups to deepen its understanding of their concerns and enhance its analysis. It also gathered and analyzed a great deal of data to assess the effect of various versions of the triggers on the mortgage lending market. After considering the suggestions and the data, the CFPB did not adopt any of the recommendations regarding the APR or points and fees trigger made by consumers or industry.⁹⁴

⁹⁰ 15 U.S.C. § 1602(bb).

⁹¹ 15 U.S.C. § 1602(bb)(1)(A).

⁹² 78 Fed. Reg. at 6875-76.

⁹³ 78 Fed. Reg. at 6876-77.

⁹⁴ Regarding the manufactured home industry concerns, the CFPB stated: “Congress weighed the interests of consumers and creditors concerning the costs and risks associated with manufactured housing loans by specifying a higher APR threshold of 8.5 percentage points above the average prime offer rate for personal property-secured loans with a loan amount of \$50,000 or less. (At today’s rates, for a 10- or 15-year, fixed-rate

b. The CFPB responded to concerns about the clarity of its definition of the points and fees trigger.

Throughout the HOEPA rulemaking process, the CFPB demonstrated its openness to concerns about the clarity of its rule. For example, consumer advocates were concerned that the statute and Regulation Z were inconsistent and confusing regarding when amounts must be payable to be included in the definition of points and fees for purposes of that trigger. The statute and/or regulation used the following phrases: “payable in connection with the transaction,” “payable at or before consummation,” “known at or before closing,” “payable at or before account opening.”⁹⁵ Industry also raised this issue and asked for clarification.

The CFPB agreed with these comments, concluding that one phrase should be used consistently in the open-end and closed-end loan context. It selected the phrase “known at or before consummation” which was added by the Dodd-Frank Act for purposes of the trigger for open-end loans.⁹⁶

c. The CFPB rejected many consumer recommendations.

While the CFPB engaged in extensive outreach during the HOEPA rulemaking process, and listened to consumer representatives’ perspectives, it by no means demonstrated a pattern of always adopting consumer groups’ recommendations. A few of the many examples in which the CFPB declined to adopt consumer representatives’ recommendations are described below.

Declining to go beyond the minimum protections mandated by the statute for negatively amortizing mortgage loans, despite having authority to do so. Another example of the CFPB’s deliberative approach in its HOEPA rulemaking is its treatment of negatively amortizing loans. Negatively amortizing mortgage loans had contributed to the instability of the mortgage market. In response, the Dodd-Frank Act amended TILA to require creditors to obtain sufficient documentation demonstrating that a first-time borrower has received homeownership counseling from a HUD-certified organization or counselor, prior to extending credit in connection with a residential mortgage loan that may result in negative amortization.⁹⁷ At the same time, Congress added a pre-loan counseling requirement to HOEPA, applicable to any consumer in the process of obtaining a high-cost mortgage loan.⁹⁸ The agency issued regulations under both statutory provisions at the same time.⁹⁹ Consumer advocates argued that negative amortization poses such a risk to homeownership and is so difficult for borrowers to understand that it should be banned in non-HOEPA loans (as it is in HOEPA loans). Alternatively, consumer advocates urged, the CFPB

loan, the 8.5 percentage-point threshold translates into an APR of approximately 12.5 or 11.25 percent, respectively.) The Bureau thus declines to depart from the APR thresholds prescribed by Congress.” *Id.* at 6876. The Bureau then articulated several reasons for its decision.

⁹⁵ 78 Fed. Reg. at 6891-92

⁹⁶ 78 Fed. Reg. at 6892. *See* 15 U.S.C. § 1602(bb)(5).

⁹⁷ 15 U.S.C. § 1639c(f)(2).

⁹⁸ 15 U.S.C. § 1639(u).

⁹⁹ 78 Fed. Reg. at 6938.

should at least adopt alternative measures that would better protect consumers than the general counseling requirement in section 1639(u).

As it had with respect to the HOEPA triggers, the CFPB again declined to go beyond the minimum protections mandated by Congress. While it noted these consumer concerns, it made no revisions based on them.

Ending the disparity between protections for open-end and closed-end mortgages. In the HOEPA rulemaking, the CFPB showed sensitivity to industry concerns even when industry representatives did not submit comments on a question. Through Dodd-Frank, Congress extended HOEPA to include home equity lines of credit (HELOCs), an important improvement. Congress did not, however, address the question of whether the APR trigger for a HELOC loan should be calculated in the same way as for a closed-end mortgage loan. (The difference is that the APR trigger for a closed-end mortgage loan takes non-interest finance charges into account, but for a HELOC the APR trigger is based solely on the interest rate.) Consumer advocates noted that failing to make the APRs comparable for purposes of the APR trigger would undermine these improvements by increasing a pre-existing and dangerous gap between the rules for open- and closed-end mortgages. This gap would encourage lenders to seek the path of least resistance by making HELOCs instead of closed-end loans in order to avoid the more stringent rules for closed-end credit. In its announcement of the final rule, the CFPB described the consumer advocates' request in some detail but did not identify any industry comments on this issue.¹⁰⁰

And yet, the CFPB did not adopt any of the consumer recommendations related to the differences between HELOCs and closed-end mortgage loans, notwithstanding the lack of industry pushback. Its rationale, however, rested upon concerns for creditors. “[T]he Bureau notes that creditors have been required to use the (interest rate) APR for HELOC disclosures for more than twenty years, and this APR is consistent with the APR used for other open-end credit.”¹⁰¹ In addition, the CFPB raised the specter of increased compliance costs for creditors.¹⁰²

Basing the APR on the maximum possible rate for all variable rate transactions. Another question regarding the APR calculation for purposes of the HOEPA trigger is how to treat variable rate loans. In accordance with Dodd-Frank amendments to section 1602(bb)(1)(B), proposed Regulation Z § 1026.32(a)(2) would require the APR for loans whose rate varies in accordance with an index to be based on the index rate at the time of consummation plus the maximum possible margin -- in other words, on the fully indexed rate. For loans in which the rate may vary at any time during the loan and the rate does not vary in accordance with an index, the APR is based on the maximum rate that may be charged during the loan term. Consumer representatives noted that borrowers with variable-rate loans already bear the full risk of rate increases and, therefore, it is only fair for the HOEPA APR trigger for all variable rate loans to be based on the maximum rate cap for the loan.

¹⁰⁰ 78 Fed. Reg. at 6872.

¹⁰¹ 78 Fed. Reg. at 6872.

¹⁰² 78 Fed. Reg. at 6872-73.

After considering all the stakeholder comments, the CFPB did not adopt this recommendation.¹⁰³ The agency observed that at least one industry commenter opposed the idea, while others raised additional concerns about undue coverage of loans under HOEPA as a result of utilizing the maximum rate for all variable rate loans.¹⁰⁴ Two industry commenters objected to the requirement that the index be “outside the creditor’s control.”¹⁰⁵ As a result, the agency removed that requirement.

Expanding the ban on modification and deferral fees for high-cost loans to all mortgages. The Dodd-Frank Act added a prohibition against charging a consumer a fee to modify, renew, extend, or amend a high-cost mortgage loan or to defer any payment due thereunder.¹⁰⁶ Consumer advocates recommended adopting commentary that would clarify how this rule would be implemented in relation to: 1) unemployment forbearances; 2) modifications that involve a change in the name of the obligor due to an event that would be covered by the Garn-St. Germain Act’s restriction on due-on-sale clauses or other modifications arising from a death in the family, or divorce; and 3) situations when the servicer demands partial payment of arrearages that, in effect, constitutes a fee to modify.

The CFPB did not adopt changes to address any of these consumer concerns. The agency noted that the industry specifically opposed the concern regarding the demand for partial payment of arrearages as a condition of modification.¹⁰⁷

Preserving the strength of the ban on recommending default. The Dodd-Frank Act amended HOEPA to prohibit creditors from encouraging consumers to default on existing debt in connection with a transaction that would refinance that debt. Consumer advocates supported the CFPB’s proposal to expand the prohibition to include mortgage brokers pursuant to its authority under section 1639(p)(2). But they also urged the CFPB to revise its proposed commentary, which, they argued, improperly transformed a bright-line strict-liability standard into a factual one of whether recommending or encouraging default depends on the relevant facts or circumstances. The CFPB did not adopt this recommendation.

2. The final HOEPA rule shows that industry obtained additional guidance it sought regarding several HOEPA issues.

a. Guidance regarding calculation of points and fees.

“The CFPB received numerous questions from industry seeking guidance regarding the treatment of third-party-paid charges and creditor-paid charges for purposes of calculating the points-and-fees trigger. Based on these questions, the Bureau determined that additional clarification concerning the treatment of charges paid by parties other than the consumer, including third parties, for purposes

¹⁰³ 78 Fed. Reg. at 6888-89.

¹⁰⁴ 78 Fed. Reg. at 6888-89.

¹⁰⁵ 78 Fed. Reg. at 6889.

¹⁰⁶ 15 U.S.C. § 1639(s).

¹⁰⁷ 78 Fed. Reg. at 6934-35.

of inclusion in or exclusion from points and fees would be beneficial to consumers and creditors and facilitate compliance with the final rules. The Bureau therefore proposed to add new commentary to § 1026.32(b)(1) to clarify when charges paid by parties other than the consumer, including third parties, are included in points and fees.”¹⁰⁸ One change provided that compensation paid to employees of retail manufactured home sellers counts in the points-and-fees trigger if the seller knows that it has been included in the home price, but not otherwise. However, the seller is not obligated to investigate whether the sales prices was inflated to cover this compensation.¹⁰⁹ Consumer advocates opposed this lack of duty on the seller’s part.

Generally, the CFPB adopted the proposed changes with some modifications suggested by industry commenters.¹¹⁰ Regarding Regulation Z § 1026.32(b)(1)(ii)(D) and (b)(2)(ii)(D), the agency invoked its exception authority under section 1604(a).¹¹¹ Industry commenters supported these changes.

b. Exceptions to balloon-payment rule.

The Bureau proposed to revise the exception to the prohibition on balloon payments for high-cost mortgages in § 1026.32(d)(1)(ii)(c) for transactions that satisfy the criteria set forth in § 1026.43(f). The Bureau proposed to extend an exception that allows all small creditors, regardless of whether they operate predominantly in “rural” or “underserved” areas, to continue originating balloon high-cost mortgages if the loans meet the requirements for qualified mortgages.

In response to “substantial” comments from trade associations, credit unions, and other industry advocates supporting exceptions to the balloon-payment rule both before and after it published its proposal, the CFPB adopted these exceptions.¹¹²

H. The Payday and Vehicle Title Rule Was Responsive to Industry Concerns.

The Dodd-Frank Act authorizes the CFPB to issue rules to address unfair, deceptive, and abusive acts and practices.¹¹³ After studying the payday loan and vehicle title loan markets and engaging in stakeholder outreach with a broad spectrum of interested parties for over five years, the CFPB published the final Payday, Vehicle Title, and Other High-Cost Loans Rule in October 2017.¹¹⁴ Throughout the multi-year process, the CFPB consistently sought and was responsive to input from lenders.¹¹⁵ This process included the SBREFA process (see Section IV(B) for further discussion). The CFPB’s responsiveness to industry concerns is reflected in both the proposed and final rules. Between the SBREFA outline and the proposed rule, for example, the CFPB overrode the objections of consumer advocates by doubling the length of the cooling-off periods between loan sequences from 30 to 60 days. Between the proposed rule and the final rule, again over the

¹⁰⁸ 78 Fed. Reg. 60,382, 60,408 (Oct. 1, 2013).

¹⁰⁹ See Regulation Z § 1026.32(b)(1)(ii)(D) and (b)(2)(ii)(D) and related commentary.

¹¹⁰ 78 Fed. Reg. 60,409-10.

¹¹¹ 78 Fed. Reg. 60,412.

¹¹² 78 Fed. Reg. 60,414.

¹¹³ 12 U.S.C. 5531.

¹¹⁴ 82 Fed. Reg. 54472 (Nov. 17, 2017).

¹¹⁵ 82 Fed. Reg. 54503 *et seq.*

objections of consumer and civil rights groups, the CFPB provided lenders greater flexibility in underwriting requirements for ability-to-repay determinations; narrowed the range of costs included in the annual percentage rate threshold that determines whether longer-term loans are subject to the rule's payment protections; and established or broadened exemptions from the rule for relatively lower risk loans, among other lender-encouraged changes.

VIII. Conclusion

From beginning to end, the CFPB's rulemaking process ensures that a broad array of stakeholders will have the opportunity to weigh in and that the CFPB has data and information from a wide variety of sources to make informed decisions. Its history of rulemaking, illustrated by the many examples in these comments, shows that the CFPB takes these concerns into consideration and makes an independent decision on how to address them. The CFPB has adopted recommendations both from consumer advocates and from industry on various rules, and at other times taken its own initiative based on the information it has gathered. These results demonstrate that the CFPB's rulemaking process is not subject to undue influence from any one stakeholder.

The CFPB's rulemaking process is inclusive, transparent, evidence-based, comprehensive, thoughtful, and thorough. It is essential to preserve this process so that the CFPB can continue carrying out its consumer protection mandate through rulemaking. This robust and responsive rulemaking process is effective and should be maintained for the CFPB's future rules.

Sincerely,

Americans for Financial Reform

Center for Responsible Lending

National Consumer Law Center (on behalf of its low-income clients)

U.S. PIRG