May 14, 2015

Dear Director Cordray:

The undersigned consumer, community, and civil rights organizations urge you to implement the combined disclosure rules for the Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA) as planned and to refrain from adopting a "hold-harmless" period that would exempt creditors from examination or enforcement by the Bureau or individuals. The mortgage industry has had over 20 months to implement the new disclosures. Lenders who are attempting to comply in good faith have nothing to fear.

But attempting to suspend the private enforcement provisions of the law, or announcing a blanket suspension of supervision and enforcement efforts for rules that are in effect, would be a dangerous precedent and beyond the Bureau's authority. Homeowners who would receive misleading mortgage cost disclosures during such a period would have no remedy. Should the Bureau believe that some lenders need additional time to implement the new disclosures, it would be preferable to extend the mandatory compliance date or create a temporary period during which lenders may choose to comply with either the old or the new rules.

Implementation of the Combined TILA/RESPA Disclosures is Important

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

The time has now come to let the combined TILA/RESPA disclosure rules take effect. The new disclosure form will give consumers expanded information before they make the biggest purchase of their lives. Proper integration of TILA's and RESPA's disclosures has been debated for over a decade. The Bureau adopted a lengthy implementation period for the final rules.[1] The mortgage industry has announced that it will make a good-faith effort to implement the rules properly. We applaud them for their effort and know it has been a substantial undertaking.

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

CFPB Supervision and Enforcement Can Already Account for Good Faith

The CFPB already has the authority to take into account good-faith efforts to comply with regulations. The Bureau has the discretion to decide when to prosecute or sanction someone who violates the rules. For that reason, a formal announcement of a grace period, when the rules will not be enforced, is not necessary.

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[1] *See* 78 Fed. Reg. 79730 (Dec. 31, 2013) (announcing final rules for new disclosures).

But supervision is necessary in order to ensure that industry understands that compliance is expected. The CFPB cannot know if a company is making a good-faith effort to comply unless it examines for compliance with the rules. Depending on what the CFPB finds, it can take appropriate action, including monitoring implementation efforts, providing direction about how to speed up compliance, or in rare cases of bad faith or systemically deceptive disclosures, enforcement. Because the Bureau already has the discretion to account for new rules and good-faith efforts, no suspension is needed. Moreover, the Bureau has an obligation to enforce the law and thus does not have the authority to suspend its own supervision or enforcement obligations..

The Prospect of Private Enforcement Promotes Compliance and Presents Limited Burden

Similarly, a suspension of liability in private suits is unnecessary and dangerous. RESPA liability for the disclosures is a moot point, as there is no private right of action for violations of RESPA's cost disclosure provisions. TILA already includes provisions protecting creditors from errors made in good faith. There is no liability if a creditor or assignee corrects the error within 60 days,[2] no liability if a violation resulted from a bona fide error,[3] and no liability for any act done or omitted in good-faith conformity with any rule, regulation, or interpretation, including use of model forms (other than numerical disclosures).[4] For errors involving the disclosure of the finance charge and related numbers, Congress allows creditors to overstate the actual amount without penalty.[5] In the specific context of the combined TILA/RESPA disclosures, the rule permits the aggregate amount of third-party service or recording fees listed on the closing disclosure to exceed the aggregate of these fees shown on the loan estimate by up to ten percent.[6]

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

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

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

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[2] 15 U.S.C.§ 1640(b).
[3] 15 U.S.C.§ 1640(c).
[4] 15 U.S.C.§ 1640(f).
[5] 15 U.S.C. § 1604(f). Understatements of the finance charge cannot be larger than $100 unless the mortgage loan is a refinancing or rescission is sought in which case the tolerances are much higher. Id.
[6] Reg. Z § 1026.19(e)(3)(ii).

The CFPB Does Not Have the Authority to Suspend Private Liability While Rules Are Effective

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

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

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

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

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

Appropriate Effective Dates and an Optional Phase-In Period are Preferable to a Suspension of Enforcement

Other alternatives are preferable to suspending enforcement once a rule is in effect. If the Bureau believes that the effective date was too early, it could extend it with an optional period prior to that final date. But we agree with the Bureau that industry has had over a year and a half already and more time is not warranted.

Section 1604(d) authorizes the CFPB to delay implementation of disclosure requirements to allow time for creditors to adjust their forms to accommodate the new requirements where there is a specific finding that such action is necessary to prevent unfair or deceptive disclosure practices. Indeed, it was a common practice of the Federal Reserve Board to make a rule optional on one date and mandatory on a later date. Section 1640(d) is limited to the situation where creditors need more time to make the new changes to their forms. The CFPB, however, is not authorized to delay the enforcement or private right of action for a regulation during the period before its mandatory date even for those creditors who choose to follow the new rules in this interim period.

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

Respectfully submitted,

Alliance for a Just Society
Americans for Financial Reform
California Reinvestment Coalition
Community Legal Services, Inc. (Philadelphia, PA) (on behalf of its low-income clients)
Connecticut Fair Housing Center
Consumer Action
Consumer Federation of America
Consumers Union
Corporation for Enterprise Development (CFED)
Empire Justice Center
Housing and Economic Rights Advocates
MFY Legal Services, Inc.
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low-income clients)
National Council of La Raza
National Fair Housing Alliance
New Economy Project
New York Legal Assistance Group
North Carolina Justice Center
Public Justice Center
U.S. PIRG