SBA Office of Advocacy
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Advocacy: the voice of small business in government

November 6, 2012

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20006-4702

Re: Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)

Dear Mr. Cordray:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment on the proposed rule on *Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act ("RESPA" or Regulation X) and the Truth in Lending Act ("TILA" or Regulation Z).*[1] Advocacy incorporates its August 2012 comment on the proposed amendment to 12 CFR § 1026.4 by reference. (See attached.)

**Advocacy Background**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

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[1] 77 Fed. Reg. 51116, August 23, 2012.
[2] 5 U.S.C. § 601 et seq.
[3] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[4] The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.[5]

In July 2010, the United States Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act).[6] Section 1011 of the Act establishes the Consumer Financial Protection Bureau (CFPB) to supervise certain activities of financial institutions. Section 1100G, entitled "Small Business Fairness and Regulatory Transparency," amends 5 U.S.C. § 609(d), to require the CFPB to comply with the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel process, making it the third agency with this responsibility, joining EPA and OSHA.

The SBREFA panel process requires the CFPB to conduct special outreach efforts to ensure that small entity views are carefully considered prior to the issuance of a proposed rule, if the rule is expected to have a significant economic impact on a substantial number of small entities. This outreach is accomplished through the work of small business advocacy review panels, often referred to as SBREFA panels, consisting of a representative or representatives from the rulemaking agency, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and the Chief Counsel for Advocacy. The panel solicits information and advice from small entity representatives (SERs), who are individuals who represent small entities affected by the proposal. SERs help the panel better understand the ramifications of the proposed rule. The product of a SBREFA panel's work is its panel report on the regulatory proposal under review. The CFPB convened a SBREFA panel for this rulemaking in February 2012.

The Office of Advocacy performs outreach through roundtables, conference calls and other means to develop its position on important issues such as this one. Advocacy held small business roundtables on this issue on July 31, 2012 and September 26, 2012. Advocacy also hosted a conference call to further solicit small entity input on August 9, 2012.

**The Rulemaking**

On August 23, 2012, the CFPB published in the Federal Register a proposed rule to amend RESPA and TILA in order to establish new disclosure requirements and forms in Regulation Z for most closed-end consumer credit transactions secured by real property. In addition to combining the existing disclosure requirements and implementing new requirements in the Dodd-Frank Act, the proposed rule provides extensive guidance regarding compliance with those requirements.[7]

Initially, the comments were due on September 7, 2012, which would have given small entities that rely on the *Federal Register* for regulatory only 10 business days to prepare a response. The

[4] Small Business Jobs Act of 2010 (PL 111-240) § 1601.
[5] Id.
[6] Public Law 111-203.
[7] 77 Fed. Reg. 51116.

CFPB extended the deadline on the proposed amendment to 12 CFR § 1026.4 to November 6, 2012. Advocacy commends the CFPB for extending the comment period for that provision of this important rulemaking. This extension provides small entities with an appropriate amount of time to respond to this proposal.

**Recordkeeping Requirements**

The proposed recordkeeping requirement would require creditors to maintain electronic, machine-readable electronic records of the Loan Estimates for 3 years and the Closing Disclosures for 5 years. The CFPB is considering exempting small entities from the data retention requirements.

As noted in the panel report, most SERs do not retain records in machine-readable format. SERs whose files are not in machine-readable format could incur substantial costs to implement such a system.[8] The small entity representatives at Advocacy's roundtable asserted these same concerns could impose an economic burden on small entities. The provision to retain records in a machine-readable format is not required by Dodd-Frank. The Office of Advocacy encourages the CFPB to exempt small entities from this requirement.

**Integration of the Initial and Closing Disclosures**

The proposal requires that loan estimates be provided to consumers within 3 business days after receipt of the consumer's application, to replace the early TILA disclosure and RESPA good faith estimate (GFE). It also requires that the Closing Disclosure be provided at least 3 business days prior to consummation, to replace the final TILA disclosure & RESPA settlement statement. The CFPB is proposing the use of standard Loan Estimate & Closing Disclosure forms for mortgage loans that are subject to RESPA, other than reverse mortgages. For TILA, the forms would be model disclosures, consistent with the provisions of that statute. It also incorporates prior informal guidance.

*Disclosure Forms*

As noted in the IRFA, the integration of the RESPA/TILA forms could be costly to small entities. Small entities have told Advocacy that they will need to rely on outside vendors to update software in order to comply with the requirements of the proposal.[9] Those that maintain their own computer systems could incur costs of roughly $100,000.[10] Although the CFPB states in the IRFA that it believes that the updates to the forms would be included in the annual updates of the technology vendors and, therefore, not be a cost for small creditors who use vendors,[11] the SERs did not agree. Some of the SERs reported paying substantial one-time fees to vendors for the costs of upgrades resulting from the 2008 RESPA rule. In addition, SERs stated that there

[8] *FINAL REPORT of the Small Business Review Panel on CFPB's Proposals Under Consideration for Integration of TILA and RESPA Mortgage Disclosure Requirements*, April 23, 2012, page 25.
[9] 77 Fed. Reg. 51288.
[10] Id.
[11] Id.

would be training costs associated with the proposal,[12] as well as increased costs for compliance reviews, training, and external audits of the new integrated forms.[13]

Because of the ambiguity in the RESPA disclosure requirements, the SERs stated that they incurred substantial costs in the form of legal fees, staff training, and form preparation. As such, they requested that the CFPB provide clear guidance on how to fill out the new forms.[14] In addition, the SERs estimated that it will take 12 to 18 months after the issuance of the final rule to comply.[15] Advocacy encourages the CFPB to provide clear guidance to small entities as well as a minimum of 18 months to comply with the requirements for the integrated disclosure forms.

**Provision of the Closing Disclosure**

The proposal requires delivery of the integrated Closing Disclosure document three business days before consummation. Alternative One places sole responsibility on the creditor. Alternative Two places responsibility on the creditor and the settlement agent.[16] Both alternatives allow the consumer to waive the three-day waiting requirement if there is a bona fide personal emergency.[17] Proposed Section 1026.19(f) (2) sets forth subsequent changes that are not subject to the timing requirement.[18]

As noted in the panel report, the SERs strongly opposed requiring the closing documents to be provided three days before closing. They stated that it will interfere with consumers who wish to close as quickly as possible. They also stated that it would delay the process because some cost changes almost always occur shortly before closing. Issues that may arise include a delayed resolution of judgment liens, delinquent real estate taxes the consumers' selection of insurance policy, appraisal issues, etc.[19] These concerns were reiterated at Advocacy's roundtable. In addition, some attendees asserted that the requirement may conflict with various state laws.

Dodd- Frank provides the CFPB with broad discretion in integrating RESPA/TILA. Advocacy encourages the CFPB to not implement a three day waiting period for changes. If that is not possible, Advocacy encourages the CFPB to provide clear guidance on what changes are subject to the timing provision and any waivers that may apply.

**Definition of Application**

The proposal also revises the regulatory definition of loan application to encourage earlier provision of the Loan Estimate to consumers. Under TILA and RESPA, a creditor or mortgage broker is not required to provide the GFE until it has received an application. The current

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[12] *FINAL REPORT of the Small Business Review Panel on CFPB's Proposals Under Consideration for Integration of TILA and RESPA Mortgage Disclosure Requirements,* April 23, 2012, page 18.
[13] Id. at page 19.
[14] Id.
[15] Id.
[16] 77 Fed. Reg. 51290.
[17] 77 Fed. Reg. 51427.
[18] 77 Fed. Reg. 51429.
[19] *FINAL REPORT of the Small Business Review Panel on CFPB's Proposals Under Consideration for Integration of TILA and RESPA Mortgage Disclosure Requirements,* April 23, 2012, page 23.

regulations require the following information for an "application": 1) Borrower's name; 2) monthly income; 3) social security number; 4) property address; 5) an estimate of the value of the property; 6) loan amount sought; and 7) any information deemed necessary by the lender. The proposal removes the provision of "any information deemed necessary by the lender" from the definition of "application."

At the SERs meeting, they were divided on the issue of whether the "any information deemed necessary by the lender" should be struck from the definition of application. Some stated that eliminating it was not a concern. Others stated that removing the seventh item would create uncertainty about when provision of the Loan Estimate is required and would require them to provide the Loan Estimate earlier in the loan process, which could lead them to give less accurate cost estimates and increase their re-issuance of the Loan Estimate. They stated that they generally use the seventh item to require the consumer to select the loan product before providing the consumer with the disclosures. These SERs said that issuing a separate Loan Estimate for each product would be burdensome and that they would have to change their systems so that each Loan Estimate would not be treated as a separate application for Home Mortgage Disclosure Act ("HMDA") reporting purposes. There was also disagreement among SERs who opposed the elimination of the seventh item about what additional information was needed to provide a reasonably accurate Loan Estimate. [20]

At Advocacy's roundtable, the industry representatives were concerned about the requirement that the property address be included. They stated that sometimes a property address is not available. This echoed the concerns raised by ICBA in its April 13, 2012 letter to the CFPB. In that letter, ICBA recommended that "property address" become an optional application item for the initial Loan Estimate for purchase transactions. According to ICBA, this would enable the borrower to shop for a mortgage loan, compare costs and make an informed decision. They asserted that the lender would then provide a revised Loan Estimate once a property has been selected. The consumer could then clearly see the changes and it would reduce confusion for the borrower.[21]

Since some SERs stated that eliminating the "any information deemed necessary by the lender" provision was not a concern and others stated that removing the seventh item would create uncertainty, Advocacy encourages the CFPB not to eliminate that provision. However, since the address requirement will be problematic, Advocacy encourages the CFPB to strike it from the definition of an application.

**Permissible Changes to Settlement Costs and Re-disclosure of Initial Disclosures**

The proposal revises current rules regarding the circumstances in which a consumer may be charged more at closing for settlement services than the creditor estimated in the disclosure provided to the consumer three business days after application. The proposal applies the zero tolerance category to a larger range of charges, including fees charged by an affiliate of the creditor and charges for services for which the creditor does not permit the consumer to shop.

[20] Id. at pages 20-21.
[21] Letter from ICBA to the Consumer Financial Protection Bureau, April 13, 2012. See attached.

The SERs and the small entity representatives at Advocacy's roundtables asserted that this provision of the proposal was problematic because there are a number of things that are not known at the time of the initial application. According to the SERs, there may be unintended consequences for reducing the tolerances for certain charges from ten percent to zero. For example, zero tolerances may encourage lenders to steer consumers to services provided by affiliates and lender-selected providers which could potentially reduce or eliminate the independent service providers in favor of affiliates.[22] Advocacy asserts that a reduction in competition is not only harmful to small entities, it is also potentially harmful to consumers.

As stated by the SERs, exact estimates of the potential costs are not always possible.[23] A zero tolerance policy would create a situation where even a small increase in the cost of a service could not be passed on to a consumer without a valid changed circumstance and a re-issued Loan Estimate. [24] Reissuances are costly to small entities.[25] Small entities may also be required to absorb the difference in cost if it cannot be passed on to the consumer.

The SERs stated that they are currently able to operate within the ten percent tolerances of the 2008 rule that was issued by the Department of Housing and Urban Development (HUD). As noted above, the zero percent tolerances could potentially reduce or eliminate independent service providers, many of which are small. Advocacy encourages the CFPB to maintain the status quo of ten percent tolerances.

**Three Day Presumption that the Documents Were Received**

The proposal also has a three-day presumption that a document was received.[26] For example, if a document is mailed by first-class mail, it is presumed that the consumer has received it in three days. This applies even to documents that are emailed to the consumer unless the business can prove that the document was received faster than three days.[27]

At Advocacy's roundtable, the participants voiced concerns about the proposal's failure to represent the instantaneous methods of delivery that are available today. They asserted that a receipt should suffice as proof of delivery. Advocacy encourages the CFPB to develop a rule that recognizes the instantaneous methods of delivery and provide clear guidance on what forms of proof are adequate for complying with the rule.

**Saturday as a Business Day**

In the provisions of the proposal that require a certain number of days for notice, the CFPB considers Saturday a business day. At Advocacy's roundtable, the small entity representatives stated that Saturday should not be a business day. Advocacy asserts that including Saturday in

[22] *FINAL REPORT of the Small Business Review Panel on CFPB's Proposals Under Consideration for Integration of TILA and RESPA Mortgage Disclosure Requirements*, April 23, 2012, page 22.
[23] Id.
[24] Id.
[25] Id.
[26] 77 Fed. Reg. 51428.
[27] Id.

the definition of a business day will cause confusion for consumers and small businesses. Advocacy encourages the CFPB not to include Saturday as a business day.

**Implementation of New Disclosures Mandated by the Dodd-Frank Act**

The proposal exempts creditors temporarily from compliance with certain requirements added to RESPA and TILA until the RESPA/TILA rule takes effect. The mortgage industry is experiencing several changes. Advocacy commends the CFPB for exempting creditors from certain requirements added to TILA and RESPA until the RESPA/TILA rule takes place.

**Conclusion**

On September 9, 2012, several mortgage industry trade associations sent the CFPB a letter on proposed rule amending Regulation Z and Regulation X to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. In it, the trade associations stated:

> "… we urge the CFPB to simplify its approach to forthcoming RESPA and TILA rulemakings by focusing only on those elements that are truly needed to implement Dodd-Frank requirements and will have maximum impact on promoting consumer understanding."[28]

Advocacy echoes their concerns and encourages the CFPB to take the necessary steps to decrease the economic burden on small entities, including exempting them from requirements if possible.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

/s/
Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/
Jennifer A. Smith
Assistant Chief Counsel
For Economic Regulation & Banking

Cc: Boris Bershteyn, Acting Administrator, OIRA

[28] Letter dated September 10, 2012 to Ms. Monica Jackson, Office of the Executive Secretary, The Consumer Financial Protection Bureau, Docket No. CFPB-2012-0028 or RIN 3170-AA28, page 2.