COMMENTS
of the
National Consumer Law Center[1] and the Center for Responsible Lending,[2] Connecticut Fair Housing Center,[3] Consumer Action,[4] National Association of Consumer Advocates,[5] and National Community Reinvestment Coalition[6] to the Board of Governors of the Federal Reserve System
[Docket No. R-1340]
Regarding Proposed Regulations under the Mortgage Disclosure Improvement Act
February 9, 2009

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[1] **The National Consumer Law Center, Inc.** (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of sixteen practice treatises and annual supplements on consumer credit laws, including *Truth In Lending* (6th ed. 2007), *Cost of Credit: Regulation, Preemption, and Industry Abuses* (3d ed. 2005), and *Foreclosures* (2d ed. 2007), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted training for thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s and regularly provide extensive comments to the federal agencies on the regulations under these laws. These comments are filed on behalf of NCLC's low-income clients and were written by Alys Cohen, Elizabeth Renuart, Margot Saunders, and Diane E. Thompson.

[2] **The Center for Responsible Lending** is dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. A non-profit, non-partisan research and policy organization, CRL promotes responsible lending practices and access to fair terms of credit for low-wealth families. CRL is affiliated with the Center for Community Self-Help, one of the nation's largest non-profit community development financial institutions.

[3] **The Connecticut Fair Housing Center** is a non-profit organization founded in 1994. CT Fair Housing specializes in protecting the public from housing discrimination and protecting low-income homeowners from predatory lending and foreclosure.

[4] During its more than three decades, **Consumer Action** has served consumers nationwide by advancing consumer rights, referring consumers to complaint-handling agencies through our free hotline, publishing educational materials in Chinese, English, Korean, Spanish, Vietnamese and other languages, advocating for consumers in the media and before lawmakers, and comparing prices on credit cards and other consumer products and services. Consumer Action is dedicated to helping individual consumers assert their rights in the marketplace and to advance pro-consumer industry-wide change for the benefit of all. Core issue areas include credit, housing, telecommunications and privacy.

[5] The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[6] **The National Community Reinvestment Coalition** is an association of more than 600 community-based organizations that promote access to basic banking services, including credit and savings, to create and sustain affordable housing, job development and vibrant communities for America's working families. Our members include community reinvestment organizations, community development corporations, local and state government agencies, faith-based institutions, community organizing and civil rights groups, minority and women-owned business associations and social service providers from across the nation. Their work serves primarily low- and moderate-income people and minorities.

I. Introduction

We welcome the opportunity to present our comments to the Board of Governors on its proposed regulations under the Mortgage Disclosure and Improvement Act of 2008 (MDIA). As the Board has previously recognized, ensuring accurate, timely disclosures in the mortgage market is imperative.[7] We find much to praise in the Board's approach. The Board has appropriately interpreted the statute in narrowly circumscribing the definition of a bona fide personal emergency and requiring that any waiver be handwritten by the consumer. We welcome the opportunity to encourage the Board to provide greater uniformity of disclosure in both timing and content between HELOCs, timeshares, and conventional closed-end mortgage loans. As for coordination with the Real Estate Settlement Procedures Act (RESPA), we are more concerned with the need for an itemization of the amount financed than the timing of the early disclosures under the Truth-in-Lending Act (TILA) and RESPA.

We urge the Board not to permit waiver of the redisclosure provision. Such waiver is not authorized by the statute, is unnecessary, and threatens to undermine the utility of the early disclosures.

II. Waiver

The Board proposes to allow waiver of both the provision of early disclosures seven days before consummation and redisclosure should the final APR vary from the disclosed by more than 1/8th of a percentage point. The Board's restrictions on waiver, requiring a hand-written statement in line with the requirements for waiver of rescission and restricting waiver to situations where the emergency occurs within the seven-day waiting period, are appropriate. Waiver of the three-day redisclosure period is not authorized by the statute and should not be permitted.

A. The Board's Proposed Restrictions on Waiver of the Early Disclosures Are Appropriate.

1. Waiver of the disclosure rights should track closely the waiver provisions for rescission and high-cost loan notices.

Congress, in authorizing limited waiver of the right to receive early disclosures, adopted several of the Board's limitations on the exercise of the waiver of rescission. In particular, Congress imposed four procedural limitations on waiver:

1) the consumer, not the creditor, must determine the existence of the emergency

2) the consumer must provide a written, dated request for waiver, describing the emergency;

3) the existence of the emergency must be documented by a written, dated description of the emergency; and

4) all the consumers with a right to receive the disclosures must sign the waiver.[8] The close parallel to existing Regulation Z § 226.23(e)(1) suggests that Congress meant for waiver to be used as sparingly with regard to the early disclosures as with rescission or high cost loans.

[7] 73 Fed. Reg. 1672, 1715-1716 (Jan. 9, 2008).

[8] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2502(a)(6), 122 Stat. 2654, 2856-57 (codified at 15 U.S.C. §1638(b)(2)(F)).

Given the critical importance to consumers of receiving the early disclosures, the need for early disclosure to safeguard the functioning of the marketplace, and the lack of market incentives for creditors to make the early disclosures as discussed below, waiver should be tightly limited. The safeguards put in place by the Board are appropriate to prevent creditors from suborning waiver.

2. The Board's definition of bona fide personal emergency is appropriately narrow.

Pursuant to the statute, the Board proposes to ensure that the early disclosures are provided in a timely way to all homeowners by limiting the situations in which the time period between disclosure and closing can be changed to those in which a "bona fide personal emergency" exists.[9] We fully support the Board's strict insistence on the existence of a true emergency.

The proposed definition of a "bona fide personal emergency" would limit the bona fide emergencies to the same type as is currently allowed for the waiver of the right to rescind and the waiver of the early notice for HOEPA loans. This limitation makes sense and simplifies compliance. A standard rule is easier to comply with and easier to monitor for compliance. Moreover, the requirement of a true bona fide emergency, tightly drawn, is essential to preserving the integrity of the disclosures. Without requiring a real exigency to be present, the newly required early disclosures would fast become an anachronism. Creditors could elicit waivers whenever it suited them.

The Board requests comment on whether there are other examples where the consumer may wish to consummate before the end of the seven-day or three-day period. Two points should be made. First, the three-day period only arises if the creditor changes the terms of the offered loan. Creditors should not be permitted to change the terms of the loan in order to take advantage of a bona fide personal emergency or even a scheduled closing. Second, the disclosure requirements only work if they are applied in a uniform manner throughout the market. Clearly, Congress intended to create binding, uniform disclosures. If creditors are able to tell consumers that loans can be closed sooner if they waive disclosures, some consumers may opt for the faster closing, trusting that their lender is giving them a good deal (a trust that could be misplaced) or miscalculating that the cost of their time is worth more than any possible savings from future shopping.[10] This will defeat Congress's intent that all consumers receive disclosures in the belief that adequate and timely disclosures impose discipline upon the market. Selective disclosure allows creditors to segment the marketplace, undermining any hope that an educated minority will be able to police the entire market. Waiver must only be permitted for a genuine emergency, not as a matter of convenience. The Board's use of the foreclosure sale as an example is appropriate. Only similar, absolute emergencies, not created by the creditor—such as perhaps a tax sale or a condemnation order—should support waiver.

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[9] 73 Fed. Reg. 74,989, 74,998 (Dec. 10, 2008) (proposed § 226.19(a)(3)-1).
[10] The Board has previously articulated this dynamic. *See, e.g.,* 73 Fed. Reg. 1672, 1675-1676 (Jan. 9, 2008) ("While the cost of continuing to shop is likely obvious, the benefit may not be clear or may appear to be quite small.").

3. *The requirement that the emergency occur within the waiting period in order for waiver to be permissible is important and should be placed in Regulation Z as well as in the Official Staff Commentary.*

The proposed Official Staff Commentary permits waiver only if the personal financial emergency is expected to occur within the seven-day period.[11] This is an important restriction. There is no reason to permit waiver if the emergency will occur outside of the waiting period.[12] If the emergency occurs outside of the waiting period, it is not TILA that is delaying consummation, but the lender. TILA should not provide coverage for a creditor's delay. This restriction should be placed in the rule as well as the Commentary.

B. Waiver of the Three-Day Redisclosure Provision Is Not Authorized by the Statute and Is Unnecessary

The statute only contemplates waiver of the early disclosures. The statute does not provide for waiver of the redisclosure requirement. Moreover, the justification for waiver in this context is weak. Creditors can easily manage to make timely redisclosures in the rare instances when redisclosure is required without occasioning a delay in the consummation. The Board should not excuse creditors from compliance with the statute.

The final redisclosure period guarantees consumers a three-day cooling-off period (or a final shopping period), before they are obligated on the note, should the lender change the APR between application and closing. This is a critical period of time that allows the borrower to look for alternatives if the lender changes the loan terms from what the borrower bargained for. In addition, failure to require redisclosure before consummation when the early disclosures are inaccurate undermines the validity of early disclosures. Without mandatory redisclosure before closing, lenders have no incentive to deliver accurate early disclosures, making a mockery of TILA's core purposes of market efficiency and transparency.

Even in circumstances when the consumer waives the early disclosures, the Board should not permit waiver of redisclosure if the terms change. Congress required that final disclosures be given at the time of waiver.[13] For this term, "final disclosures," to have any meaning, creditors cannot change the APR on the note, the only event that would trigger redisclosure. A change in the final disclosures must restart the clock, as it does currently for TIL rescission purposes.[14] A consumer applying for a loan in an emergency needs to know that the terms she is agreeing to are

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[11] 73 Fed. Reg. 74,989 (Dec. 10, 2008).

[12] The Board may wish to be specific about the relationship between the seven-day waiting period prior to consummation and the three-day waiting period after consummation for purposes of determining rescission. In the case where the emergency falls outside the seven-day period but within the three-day period for rescission, it may be appropriate to permit the borrower to waive the seven-day period in order to avoid waiver of the three-day rescission period.

[13] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2502(a)(6), 122 Stat. 2654, 2857 (codified at 15 U.S.C. §1638(b)(2)(F)(iii)).

[14] Reg. Z §226.23 (a)(3) ("The consumer may exercise the right to rescind until midnight of the third business day following . . . delivery of all material disclosures . . . .").

not subject to change. If the consumer waives the early disclosures at consummation, the lender must provide the final disclosures, not a tentative one, subject to change.

The disclosures provide information to individual consumers. They also protect the integrity of the system by allowing all consumers to rely on the validity of the disclosures. Mandatory disclosures level the playing field between transparent lenders and predators, by requiring all to show the price of credit. Like vaccinations and public health, an individual decision to opt out of the system has consequences for everyone. Opt outs from the disclosures should not be countenanced lightly or for reasons of convenience alone.

Lenders can commit themselves to loan terms seven days before closing. They will if the Board does not authorize waiver of the redisclosure provision. They will have no incentive to do so, however, if the Board permits waiver of the redisclosure provision. The lack of certainty in loan terms benefits neither consumers nor honest creditors.

1. There is no statutory authority for waiving the redisclosure provision.

The statute does not authorize the waiver of the redisclosure provision. The statute only contemplates waiver of the early disclosures, not of the redisclosures. The waiver provision, codified at 15 U.S.C. §1638(b)(2)(F), refers only to subsection "A." Subsection A provides for the early disclosures to be provided at or near the time of application.[15] No mention in either the early disclosure subsection,[16] or the waiver subsection,[17] is made of the redisclosure requirement set out in 15 U.S.C. §1638(b)(2)(D). Thus, the statute explicitly authorizes the waiver of the early disclosure requirement and fails to authorize the waiver of the redisclosure requirement. As a result, there is a strong presumption that Congress did not intend to permit waiver of the redisclosure requirement.

Given the lack of statutory authority for waiver of the redisclosure requirement, the Board should proceed cautiously. The Board's exemption authority, while broad, is not unlimited.[18] Nor should the Board exercise its exemption authority without a showing of necessity. Given the relative ease of timely compliance with the minimal redisclosure requirement, the importance of the redisclosure requirement for restraining creditor overreaching and promoting consumer choice in the marketplace, and the lack of any compelling reason to use its exemption authority, the Board should not replace the statutory structure.

2. Waiver of the three-day redisclosure period is unnecessary.

Seldom, if ever, will a bona fide personal emergency unexpectedly arise in the usually short interval between the early disclosure and consummation. Moreover, given the generous tolerances, small, last minute changes in settlement amounts will not trigger the redisclosure

[15] 15 U.S.C. §1638(b)(2)(A).

[16] 15 U.S.C. §1638(b)(2)(A).

[17] 15 U.S.C. §1638(b)(2)(F).

[18] *Cf.* Household Credit Servs., v. Pfennig, 541 U.S. 232 (2004) (Board's interpretation of the statute upheld where TILA is ambiguous or does not address specific issue).

requirement. Only major changes in the cost of the loan—most of which are now prohibited by the Department of Housing and Urban Development (HUD) pursuant to its authority under the Real Estate Settlement Procedures Act (RESPA)—will trigger the redisclosure requirement. Creditors can easily prevent any delay occasioned by the necessity for redisclosure by checking the early loan disclosures three-days before the scheduled consummation.

Before the Board exercises its exemption authority to permit waiver of the redisclosure provision, it should reasonably believe that all three of the following are true: 1) that a significant number of consumers are likely to have unforeseen emergencies, such as a foreclosure, arise between application and consummation; 2) that the early disclosures creditors provide will legitimately and routinely understate the cost of credit by more than $1/8^{th}$ of a percentage point; and 3) that creditors cannot manage to finalize the terms of a home mortgage loan more than three business days before consummation. Only if all three of these are true are waivers needed.

i. Creditors can and should close loans on time.

Creditors already must prepare the final loan documents before consummation. The process of preparing the documents is largely automated and mechanized. Creditors can, as a matter of routine, set their computer programs to spit out the final documents sufficiently before consummation that any changes between the final documents and the applied-for, agreed-upon terms can be supplied to borrowers in advance of consummation. Three business days before consummation strikes a reasonable balance between preserving consumer choice and imposing cumbersome limitations upon creditors. The creditor should be required to address potential changes in loan terms before closing or abide by the early disclosures.[19]

Without mandated disclosure, creditors often are unwilling to disclose, precisely because of a perceived competitive disadvantage: if the creditor's prices are high, the creditor risks being underbid; if creditor's prices are fair or even low, the creditor still risks being underbid by a predator that has no intention of following through. A California advocate recently reported to us that a large national lender refused to supply her grandfather with any loan documents prior to closing. When she called directly to ask for the documents, so that she could review them before consummation, the banker confirmed that it was bank policy never to provide the loan documents, except when provision of the documents was mandated by law. The banker said the policy was in place to prevent consumers from shopping around. Allowing creditors to wait until consummation to disclose changes fosters an anticompetitive climate.

A dangerous dynamic may result when a devious creditor knows that the borrower has a date by which the loan closing must occur. If the waiver is simply to allow a loan closing to occur within seven days of receiving the creditor's first early—*and final*—disclosure, there is not much danger of misunderstanding and deceit. The danger is much greater if the waiver is allowed after

[19] Contract law in some circumstances may require the lender to close on the agreed upon date. If a lender fails to close as schedule, borrowers may be able to bring a contract claim against the lender for any damages the borrower suffers. Lenders can protect themselves from this risk in one of two ways: reviewing the final documents sufficiently in advance of closing to redisclose, if necessary, or retaining, within the APR tolerances, the original offer made to the consumer.

the creditor changes the APR. If waiver of redisclosure is permitted, lenders are encouraged to wait until consummation to reveal the changed terms. As the Board has recognized, most consumers cannot back out of a loan at consummation, even if they are able to see and appreciate the change of terms amid all the other paperwork at closing.[20] Finding out at closing that your home loan is not closing will feel like—and may indeed create—an emergency. For example, a home purchaser who fails to close on the date specified in the sales agreement may be liable to the seller for breach of contract. At best, a homeowner who applied a month before the loan closing, and scheduled the moving van, will be understandably perturbed to find out there is a problem at closing. If the creditor knows ahead of time about the exigency that requires the loan to be closed on a date certain, waiver simply allows unscrupulous creditors to take advantage of the known emergency by increasing the APR without prior notice to the borrower. After all, if the emergency is real, then the borrower will be forced to accept the new terms and waive the three-day shopping period.

Lenders should not be encouraged to create emergencies; lenders should be encouraged to close loans on time, with full disclosure. The Board runs the risk of sanctioning lender-created emergencies if it permits waiver of the redisclosure right. Waiver of the redisclosure period encourages lenders to create emergencies for consumers by waiting until consummation to reveal the final terms, thus forcing consumers to confront the Hobson's choice of a delayed closing or the waiver of their rights to early disclosure. If creditors know that they must supply consumers with the final documents three-days before consummation or honor their original disclosures, they will supply consumers with the final documents three-days before consummation. If lenders can get consumers to waive the redisclosure at closing, they no longer will face the discipline this choice imposes to get the disclosures done correctly, before closing. The Board must not allow the creditor's delay to become the homeowner's emergency. The Board should not ratify creditors' sloppy business practices.

The Board should not succumb to the false dichotomy: closing on time or pre-closing disclosure. Creditors can and should manage loan closings to provide for complete and timely disclosure.

ii. Given the generous APR tolerances, redisclosure should seldom be necessary.

The redisclosure requirement is only implicated if there is a significant change in the APR. The APR is the key TIL price disclosure. The redisclosure requirements under TILA for closed-end, home-secured loans set generous tolerances for the APR. Lenders need only redisclose when there is a relatively large change in the cost of credit; these large changes should happen rarely and never unexpectedly.

In order for redisclosure to be required three-days before consummation, the APR must change by more than $1/8^{th}$ of one percentage point for a "regular" transaction (most fixed rate loans) or more than ¼ of one percentage point for an irregular transaction.[21] For many loans—

[20] 73 Fed. Reg. 1672, 1715-1716 (Jan. 9, 2008).

[21] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2502(a)(6), 122 Stat. 2654, 2856 (codified at 15 U.S.C. §1638(b)(2)(D)).

including those adjustable rate mortgages with an initial teaser rate that have made up a majority of the subprime and Alt-A markets in recent years—the more generous ¼ of one percentage point tolerance applies. This is a sufficiently large tolerance that lenders will not be caught out by small, inconsequential changes—or mistakes—in the disclosed interest rate, finance charges, or payment schedule.

A change in the APR most commonly happens either if the interest rate changes or if the non-interest finance charges change. A major change in the payment schedule could also cause a change in the APR, but such changes are less common.

Given HUD's recent rulemaking under the Real Estate Settlement Procedures Act (RESPA), significant changes in the finance charge between consummation and closing are less likely (at least after January 1, 2010, when the new rule goes into effect).[22] Under this new regime, most finance charges, including all of the fees imposed directly by the lender, cannot change at all between application and consummation.[23] Most third-party finance charges are covered by a 10% cap on the amount of the aggregate increase.[24] Much larger changes in the non-interest finance charge are required to move the APR by even 1/8th of one percentage point. In most cases, the fees must increase by at least 1% of the *total loan amount* in order to move the APR by even 1/8th of one percentage point. On a $300,000 loan, for example, finance charge fees must rise by more than $3,000, before redisclosure is triggered in a "regular" transaction. For "irregular" transactions, fees must increase by more than $7,000. Only if the fees are over 10% at application, or more than $30,000 on a $300,000 loan, could lenders increase the fees between application and closing sufficiently to trigger the redisclosure requirement without running afoul of HUD's rulemaking.

Interest rate increases are even more predictable than fee increases and should be disclosed in advance to consumers. An increase in even an 1/8th of a percentage point in the interest rate is significant and surely should be disclosed before consummation. On a $300,000 fixed rate loan, for example, an increase of an 1/8th of a percentage point in interest increases the monthly payments by more than $25, and increases the total payments over the life of the loan by over $9,000. If the increase is doubled to the irregular transaction tolerance of ¼ of a percentage point, the increase in payments also doubles to more than $50 a month, with an increase in payments over the life of the loan of more than $18,000. Consumers should be told before closing the true cost of their loan.

The redisclosure requirement will not come into play merely because the index on an adjustable rate mortgage has moved. If the loan is an adjustable rate mortgage, under the Official Staff Commentary, lenders are free to use an index in effect in advance of consummation, as well as the one at consummation.[25] Lenders need only identify the index and the margin before closing; the disclosures need not reflect the actual value at consummation.

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[22] 73 Fed. Reg. 68,204, 68,204 (Nov. 17, 2008).

[23] *Id.* at 68,240 (codified at 24 C.F.R. §3500.7(e)(1)) (all fees charged directly by lender cannot change from GFE).

[24] *Id.* at 68,241 (codified at 24 C.F.R. §3500.7(f)(2)) (title services and services both required by the lender and where the service provider is selected or recommended by the lender subject to 10% tolerance).

[25] Official Staff Commentary § 226.17(c)(1)-(10)(i).

The Board should discourage, not encourage, lenders from increasing the cost of credit between application and consummation. Allowing waiver of the redisclosure provision risks undermining the meaningfulness of the early disclosures and prevents consumers from using the APR to shop. If the APR is to have any utility for consumers as a shopping tool, consumers must receive notice of any significant changes to the disclosed APR sufficiently in advance of closing that consumers can choose not to proceed with the loan. The generous tolerances already in place offer ample protection to both consumers and lenders from the risk of delay because of a small, insignificant change.

iii. Post-application emergencies are rare events.

In the supplementary information and proposed staff commentary, the Board identifies only one emergency that would require waiver of the disclosures: a foreclosure.[26] Rare indeed is the foreclosure (or similar emergency) that catches a homeowner unawares between the application for refinancing and consummation. Even in such a case, only if the creditor significantly increases the cost of the loan, are redisclosures required. And even if redisclosures are required —as they would only if the creditor increased the cost of credit—the creditor should be able to accommodate the borrower by expediting its review and completion of the closing documents.

C. If the Board Permits Waiver of the Redisclosure Right, It Must Narrowly Circumscribe the Circumstances in Which Redisclosures Can Be Waived.

Waiver of the redisclosure right should be more tightly limited than waiver of the early disclosures. It is the guarantee that the disclosures received are binding that creates their utility for shopping purposes. It is the requirement that the disclosures be binding that restricts creditors from baiting and switching. If the Board exercises its exemption authority to permit waiver of redisclosure, it must impose strict limits on that waiver. Whether the emergency triggering waiver is a foreclosure, the threatened repossession of other property, or even the promise to purchase the home on a certain day, the existence of the “emergency” should not be the excuse for the creditor’s change in the terms at the last minute. The Board must prevent creditors from taking advantage of a borrowers’ known emergency to change the loan terms to consumers’ disadvantage.

- Only emergencies that develop between the time of application and consummation should trigger the possibility of a waiver of the redisclosure right. These will be rare and should be well documented.

- If the borrower at application seeks an expedited closing or a closing by a date certain, the lender should be permitted to increase the APR and trigger the redisclosure

[26] 73 Fed. Reg. 74,989, 74,992, 74,998 (Dec. 10, 2008) (proposed comment 226.19(a)(3)-(1)).

requirement *only* if the lender is able to redisclose three days before the scheduled consummation.[27]

- Only significant emergencies, such as foreclosures, that must be addressed before the expiration of the three-day redisclosure period should count as bona fide.
- Lenders should provide a statement to the consumer documenting why redisclosure was necessary: Did the interest rate increase? Were fees added? Why were these changes not known to the lender at the time the early disclosures were provided?
- The Board should require lenders to provide all homeowners with a statement as to whether or not there are any changes to the loan terms three days before closing, to reduce the incentive for lenders to wait until the scheduled closing to identify known changes to borrowers, thus creating an emergency and inducing waiver.
- The Board should require creditors to report to the Board the incidence of redisclosure and of waiver of redisclosure.

Without these limitations, there will be nothing to prevent waiver of the redisclosure right from becoming routine. If waiver of the redisclosure right becomes routine, the early disclosures will remain as meaningless as they currently are, used more often for bait and switch than for shopping.

III. Definition of "Business Day" for Delivery and Receipt

The Board appropriately opted to apply the objective definition of "business day" currently in Regulation Z to two of the timing issues under the proposed regulations. The objective definition measures "business day" by counting all calendar days except Sundays and legal holidays specified in the rule.[28] Creditors and supervisory agencies can easily determine if accurate deadlines were provided or met under this method. The Board has previously applied this precise and objective definition to the rescission rules since at least 1981[29] and to high-cost

[27] To ensure that creditors do not use the existence of an emergency to change the terms of a loan for which an early disclosure has already been provided, we suggest the following language be added to the end of Section 226.19(a)(2):

> A creditor who knows, or has reason to know, of the existence of a *bona fide* personal financial emergency may not change the terms of a loan such that a new disclosure under this section is required, unless the creditor can provide a corrected disclosure as required by this section, without necessitating a waiver by the consumer under paragraph (a)(3) in order for the emergency to be addressed.

[28] Reg. Z § 226.2(a)(6).

[29] 46 Fed. Reg. 20,848 (April 7, 1981).

mortgage rules since 1996.[30] In the July 2008 final rule, the Board applied the precise business day definition to determine how long after providing the early disclosures the creditor had to wait before imposing fees.[31]

In contrast, the subjective definition of "business day" counts all days on which "the creditor's offices are open to the public for carrying on substantially all of its business functions."[32] Under this standard, it appears that a creditor can consider every day of the week as a business day as long as it maintains at least two open offices anywhere in the country (or world?) that carry on substantially all of its business functions. It is irrelevant where these offices are located in relation to the consumer. More problematically, only the creditor has the knowledge necessary to decide if any particular day is a "business" day.

Fortunately, in the proposed rule, the Board applied the objective standard to the receipt-upon-mailing presumption it created in section 226.19(a)(1)(ii) and to the three-day delivery rule if the creditor must correct the early disclosure in section 226.19(a)(2). The Board seeks comment on whether to use the objective definition when counting the seven business days before consummation contained in section 226.19(a)(1)(i).

NCLC strongly urges the Board to clarify that the seven business days be counted using the objective standard. The use of the objective standard is critical in these circumstances because it provides certainty and best supports one of the most important goals of the Act—assuring "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms . . . ."[33] Rights and responsibilities under TILA should not rest on the vagaries inherent in the subjective rule. Further, the use of the subjective definition raises the likelihood that the timeframe between early disclosures and closing will be reduced, thereby providing less time for borrowers to shop and reconsider the loan information provided prior to consummation, since some creditors are open (somewhere) for business on Sundays.[34]

In order to facilitate coordination with the disclosures required under RESPA,[35] the Board proposes to apply the subjective definition to the requirement that delivery or mailing of the early disclosures occurs within three business days after application. We agree that coordination with HUD and the simultaneous provision of the both the TIL and RESPA disclosures is important. Unfortunately, use of the subjective definition creates difficulties in compliance and enforcement.

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[30] 61 Fed. Reg. 49,237 (Sept. 19, 1996).

[31] *See* 73 Fed. Reg. 44,522, 44,599 (July 30, 2008).

[32] *Id.*

[33] 15 U.S.C. § 1601(a).

[34] A brief review of several creditors' office hours reveals that most creditors' business hours conform to the precise, objective rule, but that at least one major national lender has Sunday hours at some locations. Use of the subjective rule would mean that borrowers from that one national lender would often have a day less to review their documents compared to borrowers from other lenders. Moreover, some creditors have different hours across offices, or between branches and the home office.

[35] *See* 24 C.F.R. §§ 3500.2(b), 3500.7.

These difficulties can likely be avoided without sacrificing contemporaneous delivery of the two documents. It is likely that, if the precise definition were used, creditors would mail the disclosures together on the earlier of the dates required by RESPA or TILA—and compliance also would be clearer for TIL compliance purposes. (Moreover, this TIL disclosure rule is a more pressing matter for creditors since there is no private right of action under RESPA for failure to make the disclosures). Creditors are likely, for cost-saving reasons, to mail both RESPA and TIL disclosures together. And for most creditors, the use of either rule produces the same result, since most creditors have Saturday hours but are closed on Sundays (and most people can neither send nor receive mail on Sundays, anyhow).[36] A different measurement for TILA and RESPA disclosure purposes is unlikely to have any practical impact on consumers or impose additional costs on creditors and will facilitate compliance review.

We support the use of the precise, objective definition for all components of the timing rules under the MDIA, whether measuring delivery or receipt. If the Board chooses to apply the general definition to the requirement that disclosures be mailed or otherwise delivered to borrowers within three days of application, we nevertheless strongly support the application of the precise rule to the seven-day waiting period prior to closing.

IV. The Notice that the Borrower Is Not Obligated on the Loan by Receipt of Disclosures Should Be Retained.

The MDIA requires that the early disclosures contain a clear and conspicuous notice with the following statement: "You are not required to complete this agreement merely because you have received these disclosures or signed a loan application." The Board proposes that these be included in the early as well as the corrected disclosures—a recommendation we support.

We agree that such notice imposes "minimal, if any, burden" on creditors in this digital age. Any burden primarily comes in the form of better informed consumers—an outcome that any properly functioning market should welcome. The notice does provide an important benefit to consumers who read it. As the Board has recognized, borrowers are likely to feel pressure to go through with a closing after investing the time in the loan application process and in the relationship with the broker or lender.[37] This is even truer when pressure is applied from the closing agent. While a notice does not relieve all of that pressure, it gives borrowers essential information—that they are not obligated yet and that they can walk away. This may be enough for some borrowers to be able to negotiate terms prior to closing or confront a closing agent at closing about terms (not affecting the APR) that changed at closing. The scale of information is already tipped so greatly in the direction of the creditor; this rule simply gives borrowers a little more information to help manage that relationship.

The Board also asks whether the statement should be provided in substantially similar form but with different terms. We recommend that the Board defer to the statute unless there is a compelling reason to do otherwise. The language in the notice is consistent with HOEPA and is

[36] Use of the precise, objective rule does the one major lender in our survey that had Sunday business hours no harm, since delivery by mail cannot, in most parts of the country, be initiated on Sundays.

[37] 73 Fed. Reg. 1672, 1715-16 (Jan. 9, 2008).

sufficiently clear. Abandoning deference to the statute should occur only when the matter is substantial and pressing.

V. Special Timing Issues: HELOCs and Timeshares

Consistency and uniformity in disclosures across product types promotes more informed consumer behavior. The Board should ensure that this goal is achieved during this rule-making regarding home equity lines of credit (HELOCs) and timeshares. HELOCs in particular have been increasingly used as second mortgages for both purchase and refinance transactions.

A. Early, Loan-Specific Disclosures Should Be Provided for HELOCs

In the Supplementary Information accompanying the proposed rule, the Board announced that it is undertaking a review of the disclosure rules related to home equity lines of credit later this year. Nevertheless, the Board seeks comment on whether the transaction-specific disclosures should be required after application but significantly earlier than account opening.[38]

One of the major problems caused by the differences in both content and timing between closed-end mortgage loan and HELOC disclosures is the effect on the consumer's ability to effectively comparison-shop between two types of loan products that are both secured by the borrower's home. If consumers do not receive similar information in comparable formats at the same time, they cannot make meaningful choices.

Under current rules, closed-end mortgage loan and HELOC disclosures are poles apart in format and substance.[39] In particular, the HELOC disclosures are not loan-specific and cannot facilitate meaningful comparison shopping. Indeed, a California advocate recently reported that a major lender refused to provide any loan-specific disclosures for HELOCs prior to closing—with the stated objective of preventing comparison shopping. As this lender recognized, the generic plan disclosures provided for HELOCs do not provide meaningful information for consumers when they are deciding whether or not to enter into a loan. Consequently, consumers would benefit greatly from having loan-specific disclosures provided sufficiently before closing. Loan-specific disclosures would permit consumers to make a meaningful decision as to whether a HELOC or a closed-end loan would be a better bet for financing home repairs or paying off consumer debt—or, indeed, which HELOC would be the better choice.

As NCLC has repeated on numerous occasions over the years, the information gap between closed-end and open-end loans needs to be significantly reduced. So, too should differences in when consumers receive disclosures.[40]

We urge the Board to adopt timing rules for loan-specific disclosures for all mortgage products, however designed by the industry, that are consistent. This should cause the industry

[38] *See* 73 Fed. Reg. 74,989, 74,993 (Dec. 10, 2008).

[39] *Compare* 15 U.S.C. § 1637A(a)(generic plan disclosures) *with* § 1638(a)(loan-specific information).

[40] *Compare* 15 U.S.C. § 1637A(b)(at application) *with* § 1638(b)(early disclosures within 3 days after receipt of application).

little expense beyond that which it will experience as a result of the congressionally-mandated changes to the early disclosure rules in the MDIA and the rules the Board adopted on July 30, 2008 and proposes to amend in this proceeding. Once lenders must re-tool, we believe it will be more efficient and cost-effective if they treat all mortgage loans similarly, regardless of product structure. For example, if the computer creates similar loan-specific information for all products for distribution based on the same timing rules, this should lead to more efficiency and less confusion within the lender's shop.

As to the cost to retool a lender's system when regulatory changes occur, the Board analyzed data from survey answers obtained from banks following the enactment and implementation of the Truth in Savings Act (TISA) in 1991-1992.[41] This Act is a recent example of the imposition of an entirely new disclosure regime upon the banking industry. The Act applies to depository accounts. It requires written disclosures at account opening, advance notice of adverse changes in account terms, and the inclusion of certain information in periodic account statements.[42] In addition, TISA requires banks to calculate interest based on the full principal balance.[43]

The authors identified TISA compliance costs as follows: cost management and in-house legal services, outside legal counsel and consultants, training, data processing and information system changes, redesign and replacement of disclosure statements, and notification to customers where relevant.[44] Of these expenses, data processing and information system changes accounted for the largest share of the total bank outlay (37.9%), followed by management and in-house legal services costs.[45] Banks reported spending about $29,390 on average to implement TISA.[46] The price tag was not high. Even if this price tag doubles to implement the changes proposed by this rule-making, the cost should be negligible.[47]

B. Timeshare Disclosures Should Be Based on Date of Consummation

Timeshare transactions were exempted from the new MDIA early disclosures, under an amendment to the Stabilization Act. They are, however, still subject to the same pre-MDIA early disclosure requirements that apply to "residential mortgage transactions." Thus, creditors originating timeshare transactions must make good faith estimates of the disclosures required by Regulation Z before credit is extended, or must deliver or place the early disclosures in the mail

[41] GREGORY ELLIEHAUSEN & BARBARA R. LOWERY, BOARD OF GOVERNORS, FED. RESERVE SYS., THE COST OF IMPLEMENTING CONSUMER FINANCIAL REGULATIONS: AN ANALYSIS OF EXPERIENCE WITH THE TRUTH IN SAVINGS ACT (1997), *available at* http://federalreserve.gov/pubs/staffstudies/1990-99/ss170.pdf.

[42] 12 U.S.C. §§ 4301, 4305, 4307, 4313 (2000).

[43] 12 U.S.C. § 4306 (2000).

[44] ELLIEHAUSEN & LOWERY, *supra* note 41,41 at 8-9.

[45] *Id.* at 9.

[46] The amount varied from smaller to larger banks, with small banks spending an average of $16,110, medium sized banks $25,860, and large banks $194,270. *Id.* at 8. The large banks benefited from economies of scale. *Id.* at 9-10. Accounting for inflation since 1991, the average cost rises to $44,343. The inflation calculator used for this example was the Federal Reserve Bank of Minneapolis—Consumer Price Index Calculator, http://minneapolisfed.org/research/data/us/calc (last visited Aug. 2, 2007).

[47] This discussion first appeared in Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending,* 25 Yale J. on Reg. 181, 237 (2008).

within three business days (general definition) after the creditor receives the consumer's application, whichever is earlier.[48]

If the APR must be redisclosed, the Board proposes that creditors disclose all the changed terms no later than consummation or settlement of the transaction—a rule consistent with existing rules for residential mortgage transactions in Regulation Z.[49] Proposed Commentary section 226.19(a)(5)(iii) bases its discussion of disclosing changed terms no later than consummation or settlement for timeshares on current Commentary sections 226.19(a)(2)-3 and 226.19(a)(2)-4. Commentary section 226.19(a)(2)-3 notes that consummation is defined in section 226.2(a) and settlement is defined under RESPA's Regulation X. Commentary section 226.19(a)(2)-4 currently explains that when a creditor delays redisclosure until settlement, which may be later than consummation, disclosures may be based on settlement, rather than the terms in effect at consummation (for example, for variable rate loans).

The timeshare disclosure requirements thus are perfectly consistent with existing law but not with post-MDIA measurements. The MDIA only has one measure of when the terms must be redisclosed. That measure is linked solely to consummation, not settlement. The Board asks about the costs and benefits of basing the timing requirements for corrected disclosures solely on the time of consummation for purposes of non-timeshare transactions under MDIA, but on consummation or settlement for purposes of timeshares. The Board asks whether Regulation Z should require creditors' timing of disclosures to be based on consummation only for all transactions, even timeshares, or whether the settlement or consummation formulation should be used for just timeshares, or whether the Board should, using its exemption authority, reinstate the settlement or consummation formulation for all loans.

With regard to timeshares, settlement and consummation are usually contemporaneous. Timeshare deals generally happen on a quick timeline (and under heavy marketing pressure), with settlement occurring within a day of application. Thus, there is likely no meaningful distinction for timeshares between a "consummation" rule and a settlement or consummation rule.

As between a rule keyed to consummation or one based on consummation or settlement, consummation is the better measure for timing purposes and for the content of the disclosures because consummation marks the borrower's legal obligation. Thus, for the purposes of MDIA disclosure timing and content, the Board should not override the statute's reliance on consummation to replace it with a less advantageous (for the borrower) system.

A single standard facilitates compliance for all creditors and compliance review. The Board should require that the time of redisclosure when there are changed terms from the early disclosures should be measured from consummation for all covered transactions.

VI. Itemizations of the Amount Financed Are Necessary in All Mortgage Transactions

[48] Reg. Z §226.18.

[49] *Compare* proposed Reg. Z § 226.19(a)(5(iii) *with* Reg. Z § § 226.19(a)(2).

On November 17, 2008, the Department of Housing and Urban Development (HUD) released final changes to its RESPA regulations.[50] Among other things, HUD revised the format of the settlement statements that lenders must provide to borrowers at the mortgage loan closings.[51] The new HUD-1 and HUD-1A require the "loan originator" to bundle all "origination" charges and disclose them on line 801. Charges for "origination" services include a wide array of fees that currently are itemized, many of which are finance charges under the Board's current interpretation but some of which are not. HUD defines origination service as "any service involved in the creation of the mortgage loan, including but not limited to the taking of the loan application, loan processing, and the underwriting and funding of the loan, and the processing and administrative services required to perform these functions."[52]

As a result, the HUD-1 will no longer itemize the fees most often listed in the "800" and "1300" series on the current form with the exception of the appraisal, credit report, tax service, flood certification fees.[53] These latter fees are recorded on the new form in lines 804-807. Lines 808 and following may contain fees for other third party services required by the loan originator. However, origination services performed by the lender and the broker are lumped into lines 801.

The bundling of the origination fees presents concerns under the Truth in Lending Act. Since most origination fees will be added together on the new GFE and settlement statement, supervisory agencies and consumers (and their advocates) will have a difficult time determining if the TIL "federal box" disclosures are accurate. The two key disclosures of the cost of credit are the finance charge and the APR. Currently, the Official Staff Commentary allows lenders to forego giving consumers an itemization of the amount financed (which lists all items included in the amount financed disclosure plus the total of all prepaid finance charges) in loans to which RESPA applies and where the lender has provided the consumer with a RESPA good faith estimate and settlement statement.[54] Because the new GFE and settlement statement require fee bundling for origination charges, they no longer adequately substitute for the itemization of the amount financed. The Federal Reserve Board should amend its Commentary to reflect this new reality. A mortgage lender should provide an itemization of the amount financed routinely at the closing with the TIL disclosure statement.

[50] 73 Fed. Reg. 68,204 (Nov. 17, 2008). Most of these changes are effective on January 1, 2010.

[51] *Id.* at 68,241, 68,243-68,249.

[52] 24 C.F.R. § 3500.2(b). "Loan originator" includes both a lender and a mortgage broker.

[53] 73 Fed. Reg. at 68,244-68,245 (Appendix A to Part 3500--Instructions for Completing HUD-1 and HUD-1A Settlement Statements; Sample HUD-1 and HUD-1A Statements).

[54] Official Staff Commentary § 226.18(c)-4.