Comments

to the Consumer Financial Protection Bureau

in response to

Request for Information Regarding the CFPB's Adopted Regulations and New Rulemaking Authorities

Docket No. CFPB-2018-0011

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Introduction

The undersigned organizations submit these comments in response to the agency's Request for Information on adopted regulations. This submission focuses on housing-related regulations promulgated by the Consumer Financial Protection Bureau (CFPB) since its inception and strongly supports preservation of these essential rules.

The CFPB began its work in the wake of a foreclosure crisis that devastated homeowners, communities, and the economy. The percentage of all outstanding residential mortgage loans in the nation ninety days or more delinquent or in foreclosure peaked at 9.67% (or almost 4.3 million loans) by the end of 2009.[1] As more and more homes went into foreclosure, the effects of this disaster triggered devastation in the broader economy.[2] As of the beginning of 2011, over twenty-six million Americans had no jobs, could not find full-time work, or had given up looking for work.[3] Almost four million families had lost their homes to foreclosure. Nearly $11 trillion in household wealth had vanished, including retirement accounts and life savings.[4]

While many of the housing rules were required by Congress, the CFPB endeavored to tailor the rules to ensure they took into account the needs of smaller institutions, rural areas, and underserved borrowers. These regulations ensure that incentives for lenders and servicers are better aligned with those of borrowers, investors, and the broader market.

These comments address seven housing-related rules that the CFPB has adopted or substantially amended:

- The Mortgage Servicing Rule, 12 C.F.R. §§ 1024.1 to 1021.41, 1026.17 to 1026.20, 1026.36, 1026.39, 1026.41
- The Ability to Repay and Qualified Mortgage Rule, 12 C.F.R. § 1026.43
- The TILA-RESPA Integrated Disclosure Rule, 12 C.F.R. §§ 1026.19, 1026.37, and 1026.38
- The Loan Originator Compensation Rule, 12 C.F.R. § 1026.36
- The Higher-Priced Loan Escrow Rule, 12 C.F.R. § 1026.35(b)
- The Higher-Priced Loan Appraisal Rule, 12 C.F.R. § 1026.35(c)
- The High-Cost (HOEPA) Mortgage Rule, 12 C.F.R. § 1026.32

As spelled out in detail in consumer groups' earlier comments regarding the CFPB's rulemaking process, the CFPB took great care in crafting all of these rules. The rules put in place critical safeguards to prevent a return to the market dysfunctions that led to the 2008 mortgage meltdown and the resulting foreclosure crisis. They provide key consumer protections for

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[1] Mortgage Bankers Association, National Delinquency Survey, Q1 2007, Q4 2009. This data is derived from the "seriously delinquent" columns. "Seriously delinquent includes mortgage loans that are ninety days or more delinquent or are in foreclosure.

[2] Kathleen C. Engel & Patricia A. McCoy, The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps 142-148 (2011).

[3] Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, xv (2011) [hereinafter FCIC Final Report], *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (last visited Aug. 31, 2011).

[4] *Id.*

mortgage borrowers that make the market safer for consumers and more stable for all market participants. These rules should not be opened at this time; the CFPB should allow the implementation periods to continue in order to better assess their effect at a later time. Any adjustments to the rules should aim to preserve the balance between consumer rights and industry flexibility in the current provisions.

Before moving on to our analysis, 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 over consumers. In particular, the rapid issuance of successive RFIs and the short timeline for responses favor the financial services industry, which has significant 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 the 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. Rather, time would be better spent researching and investigating abusive financial practices that harm consumers and put the economy at risk and using the CFPB's authority to ensure financial markets are fair, transparent, and help consumers to save and build wealth.

1. The Mortgage Servicing Rules (Regulations X and Z)

1.1. The mortgage servicing rules provide important protections for consumers and promotes fairness in the market.

The 2013 RESPA and TILA Servicing Rule and the 2016 Mortgage Servicing Final Rule have made a significant, positive impact in the lives of homeowners and have contributed to preventing avoidable foreclosures. Following in the wake of the foreclosure crisis, the rules are intended to preserve homeownership for borrowers in distress and to limit the losses of investors and guarantors. The rules have also made significant improvements to many of the general servicing requirements under RESPA.

In a survey of consumer advocates conducted by NCLC in June 2017, 85% of respondents believed the rule had benefited homeowners, and 86% believed it had helped more homeowners avoid foreclosure.[5] The rule has improved transparency and accountability in the loss mitigation process and in other areas of servicing, such as force-placed insurance. While further improvements to the rule are needed, as discussed below, the rule has helped align the incentives of servicers with investors, homeowners, and communities and should not be eroded.

[5] There were 233 respondents to the survey from 41 states. Of the respondents, 171 were housing counselors, 49 were attorneys, and 13 were employees of other nonprofits. *See* detailed discussion of survey results in Section III, Comments of the National Consumer Law Center in Response to the Notice of Assessment of 2013 RESPA Servicing Rule and Request for Public Comment (Docket No. CFPB-2017-0012), July 10, 2017.

1.1.1. The requirement to provide periodic mortgage statements, promptly credit payments, and provide prompt payoff statements enables borrowers to keep their mortgages current.

These common sense rules regarding clear communication with borrowers about their loan have already helped a significant number of borrowers remain current or cure a default. In the absence of regular mortgage statements, too often borrowers lacked the information they needed to quickly address a delinquency situation before it got out of hand. The decision to provide statements even to borrowers in and post-bankruptcy whose actions reflect a decision to maintain their home provides this information to the borrowers who need it most. Applying payments as of the date of receipt, to prevent spiraling late fees, and giving accurate and prompt payoff statements also facilitates performance by borrowers.

1.1.2 The rules help borrowers obtain loan information and correct servicing errors.

The improvements made to the RESPA process for sending a Qualified Written Request have allowed more borrowers to access information and correct problems with the servicing of their loans. In a survey of consumer advocates conducted in June 2017, sixty-five percent of respondents said borrowers have been more able to obtain servicing information and correct servicing errors due to the final servicing rule.[6]

1.1.3. The rules facilitate loss mitigation and prevents avoidable foreclosures.

Eighty-six percent of respondents to NCLC's 2017 survey agreed with the statement, "The CFPB's mortgage servicing rules have allowed me to help more homeowners avoid foreclosure and obtain loss mitigation than I could have without them." Over half of respondents believed the rule had reduced the frequency of dual tracking (58%), improved transparency and predictability (62%), and made it more likely that a denial letter would provide a specific reason for the denial (52%). Nearly 70% of respondents believed the rules had increased the frequency of borrowers being evaluated for all available loss mitigation options and allowed more homeowners to save their homes from avoidable foreclosures.

1.2. It is crucial that the CFPB not erode the mortgage servicing rules.

The CFPB should preserve the crucial protections of the mortgage servicing rules in light of the significant benefits they provide to consumers. An assessment of the costs and benefits of the rules would be out of alignment if it did not put appropriate weight on the ways the rule has improved outcomes for consumers. To some extent, these benefits will be difficult to measure because we do not have data about the harms incurred before the rules were in place and because loss mitigation data are still to a great extent not publically available. Although it is difficult to quantify the extent to which the servicing rule has increased positive outcomes from loss mitigation applications, successful loan modifications and other loss mitigation offers are one part of this benefit. Survey data from consumer advocates show that nearly 70% of advocates believe the rules have allowed more homeowners to save their homes from affordable foreclosures, and

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[6] *Id*.

nearly 70% say that the rules have increased the frequency of borrowers being evaluated for all available loss mitigation options. Borrowers have also benefited from clearer communication and better access to information about their loans due to the force-placed insurance, periodic statements, and request for information (RFI) and notice of error (NOE) rules.

1.2.1. Further exemptions from the servicing rules based on institution type or size are not warranted.

The CFPB should maintain the current coverage of the servicing rules and not create new exemptions. "Small servicers" are already exempt from several of the requirements imposed on servicers by the 2013 TILA and RESPA Servicing Rule. 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 affiliate) is the creditor or assignee.[7]

Advocates who assist borrowers with loss mitigation and foreclosure defense find it difficult to determine whether a particular servicer is subject to the exemption. We continue to urge the CFPB to create a registry of servicers who claim to be covered by the small servicer definition, which could be accessed on the CFPB's website.

But most importantly, the small servicer exemption as set forth in the original 2013 rule appropriately balances the interests of consumers with those of truly small servicing entities. The benefits to consumers of being protected by the servicing rule, in the form of greater transparency and access to reasonable loss mitigation procedures, are easily significant enough to justify the costs for entities which are currently required to comply.

1.2.2. Contrary to arguments advanced by certain mortgage industry players, the servicing rules have been a net benefit for homeowners, and reports of adverse consequences are significantly exaggerated.

1.2.2.1. The CFPB should look behind industry claims regarding servicing cost increases and their causes.

The mortgage servicing industry often claims that regulatory compliance in general, and the servicing rules in particular, are a significant driver of rising servicing costs. To the extent that the CFPB relies on such industry data, we urge the CFPB to look behind these claims and demand greater data transparency.

It is not disputed that handling defaulted loans involves much greater discretion, expertise, and manpower, and therefore servicing such loans involves greater costs. MBA data indicate that the annual cost of servicing non-performing loans has gone from $482 per loan in 2008 to $2,386 per loan in 2015. The component parts of these servicing costs are not publicly known. Therefore, it cannot be determined whether increased costs are driven by regulatory compliance or by aged technology and inefficient "siloed" operations. Even within the industry, it is well known that lack of investment in technology has led to "redundant, inefficient, incompatible systems that are increasingly costly to maintain."

When viewed out of context, the aggregate "cost per loan" for servicing a loan in default does not provide meaningful information. Primarily because of the servicers' own decisions, the

[7] 12 C.F.R. § 1026.41(e)(4)(ii)(A).

length of default periods increased dramatically during the past six to seven years. Servicers largely imposed these delays and the ensuing costs on themselves. Any attempt to tie changes in servicers' costs to the Bureau's rules is likely to be based on conjecture and needs to be documented in great detail. Similarly, the frequency of loan modifications and the impact of modifications on borrowers' payments were very different in the three years before 2013 and in the years since then. These differences had much to do with the volume of loans in default and the financial circumstances of the borrowers facing foreclosure at a given time. To be reliable, any evaluation technique must isolate the effect of the rules from all the other factors affecting the volume and nature of loss mitigation demands as the foreclosure crisis grew and subsided. A better approach would be to focus on data collection for the future, when the long-term delinquency and foreclosure trends will hopefully be more stable.

While servicing costs have undoubtedly increased over the years, we urge the CFPB to take a closer look at industry data before using it to justify any changes to the existing rules. While increased compliance costs may have had an impact on cost to service and thus been a factor in reducing profitability, this is only one of several factors that have impacted pricing and liquidity in the MSR market. Other factors have included the Basel III standards, interest rate policy, capital requirements, fair value accounting rules, and the rise of non-bank servicers. The value of Mortgage Servicing Rights increased by up to 25% in the last three months of 2016 due in large part to interest rate changes.[8] It is impossible to isolate the impact of regulatory requirements on liquidity in light of these other significant factors. But regardless, the market for Mortgage Servicing Rights remains a large and liquid market with routine and active trading.

Moreover, in evaluating the costs and benefits of the servicing rules, the CFPB should take into account the costs and benefits to all parties involved—not just borrowers and servicers but also parties such as investors and court systems. Of note, foreclosures are particularly expensive for all parties—lenders and servicers expend more resources in dealing with foreclosed property compared to modifying a loan, the borrower suffers extreme financial and personal harm in losing their home, and foreclosures have substantial negative economic effects on the surrounding neighborhood. Increasing investment in high-quality servicing and loan modifications provides significant benefits compared to expediting foreclosures.

Further, prior to the rule, servicing practices were chaotic and lacked meaningful oversight The servicing industry had no standards or systems for dealing with the massive level of mortgage defaults caused by the mortgage meltdown. Miscommunication, lost documents, and inconsistent decisions were the rule. Fundamental errors about the status of a loan were commonplace, and any systems for correcting them were inadequate. Unnecessary foreclosures were causing great losses for investors and significantly increasing courts' workloads. The chaotic non-system also meant that foreclosure cases had to be redone, which imposed more costs on everyone – including foreclosure courts. The servicing rules have brought order, predictability, and standardization to a system that was highly dysfunctional, benefiting many parties in addition to servicers and borrowers. Moreover, the revisions to the origination rules have eliminated a great deal of product risk and reduced delinquencies not associated with borrower credit risk, thus greatly reducing the volume of loans needing default servicing.

[8] Kroll Bond Rating Agency, "Mortgage Servicing Rights: Rising Yields are Good," U.S. Financial Institutions Research (Mar. 2, 2017)

Finally, concerns about successor servicer liability have also been overstated. It is true that a transferee servicer is responsible for having access to the material documents that make up a loan file, and that the transfer of these documents to a transferee servicer may in rare instances occur where a transferor servicer does not have key loan documents. However, nothing in the mortgage servicing rule makes a transferee servicer liable for violations of Regulation X or Z made by the prior servicer, and there is no evidence that purported "successor liability" has had any significant impact on the market for mortgage servicing rights.

1.2.2.2 The rule promotes necessary information for borrowers seeking loss mitigation.

Borrowers have benefited significantly from the loss mitigation communications that servicers are required to send pursuant to Regulation X, and any suggestion from the servicing industry that the required letters are redundant or confusing should be viewed with skepticism. The early intervention letters and written notices regarding loss mitigation options (§1024.39) serve an important function in informing struggling borrowers that options may be available and prompt action is important.[9] Borrowers who apply for loss mitigation need clear communication regarding the documents necessary to make an application complete (§1024.41(b)(2)) and confirmation when all such documentation has been received (§1024.41(c)(3)). They need written denial letters, when a denial is made, that state the specific reason for the denial (§1024.41(d)).

Servicers have suggested that the five-business-day timeframe for sending a notice under 1024.41(b)(2) is not sufficient for servicers to review the loss mitigation application and identify any additional information that is needed. Consumer advocates confirm that quite often the (b)(2) notices sent by servicers are incomplete, and lead to additional piecemeal requests for documents that could have been requested at the outset. If the CFPB considers lengthening the timeframe for sending the (b)(2) notice to, at most, ten business days, then the CFPB should demand strict compliance with the requirement in (b)(2) that the servicer identify ***all*** information and documents needed to complete the application. There would be no reason to fail to identify necessary documentation if a servicer is allowed ten business days to comply; and the end goal of keeping the total loss mitigation review period tight in order to avoid unnecessary foreclosures must be preserved.

1.2.2.3. Regulation X provisions related to Requests for Information and Notices of Error appropriately balance the needs of borrowers and burden on servicers.

The improved standards and procedures for handling Requests for Information (RFIs) and Notices of Error (NOEs) have enabled many borrowers to correct problems with the servicing of their mortgage loans before such problems jeopardize the retention of their homes. Borrowers have obtained information about the application of payments, escrow calculations, loss mitigation reviews, and countless other issues with greater success than was possible before the 2013 changes to Regulation X. In NCLC's 2017 survey of consumer advocates, sixty-five

[9] However, once a borrower has submitted a loss mitigation application and the servicer has sent the response required by § 1024.41(b)(2), indicating that the application has been received and informing the borrower whether or not it is complete, the servicer should cease sending automated solicitations to apply for loss mitigation. It is confusing, and creates a host of problems, when a borrower receives a letter inviting him or her to fill out and return "the enclosed application for loss mitigation" while a pending application is already under review.

percent of respondents said that borrowers have been more able to obtain servicing information and correct servicing errors due to the RESPA rule.[10]

Some in the servicing industry have attempted to argue that the NOE and RFI rules allow for broad and burdensome requests, but this concern has already been adequately addressed. The CFPB has already thoughtfully considered this issue and exempted servicers from responding to requests that are overbroad or duplicative.[11] The fact that servicers sometimes fail to correct errors or respond to requests properly the first time does not make a subsequent communication duplicative or unduly burdensome. Moreover, the timelines for response are extremely reasonable and allow servicers to extend the time when necessary. If the servicer seeks an extension, the standard six-week (thirty business days) response window is extended to a full nine weeks (forty-five business days). The requests that require a faster response than the standard timeframe, such as a Request for Information seeking the identity of the owner of loan are reasonable because the information sought should be readily available.

1.2.2.4. The dual tracking restrictions in Regulation X are essential to preventing unnecessary foreclosures, and must be preserved.

The practice of dual tracking--initiating or conducting a foreclosure despite a pending loss mitigation application--extracts a severe toll on borrowers, investors, and communities. The CFPB has put in place reasonable rules limiting this practice when a complete application is received before the first legal filing is made to commence foreclosure (limiting the initiation of foreclosure) or more than thirty-seven days before a foreclosure sale (limiting the conduct of the sale).

Some industry commenters have suggested that the rules are difficult for servicers to comply with because time is needed to evaluate whether an application is, in fact, complete at any point and they may feel compelled to halt foreclosure activity when a borrower’s application is not yet complete. In the context of a judicial foreclosure that has been initiated prior to the receipt of a complete application, the framework of the rules is logical and fair. A servicer is not required to immediately dismiss the foreclosure lawsuit or to refrain from litigating the case.[12] The only actions that are prohibited (if an application becomes complete more than thirty-seven days before foreclosure) are moving for judgment of sale or actually conducting a sale.[13] Servicers can communicate with their foreclosure counsel to ensure that they do not violate the 1024.41(g) prohibition without undue difficulty.

Contrary to some comments, the dual tracking provisions do not come into play with properties that are vacant or abandoned. Borrowers do not expend the time and effort necessary to arrive at a complete application for a property they have abandoned.

[10] See detailed discussion of survey, Comments of the National Consumer Law Center in Response to the Notice of Assessment of 2013 RESPA Servicing Rule and Request for Public Comment (Docket No. CFPB-2017-0012), July 10, 2017.

[11] 12 C.F.R. §§ 1024.35(g)(1)(i) and (ii); 1024.36(f)(1)(iv).

[12] Official Interpretation 1024.41(g)-2.

[13] 12 C.F.R. 1024.41(g)

The impact of the dual tracking rule is significant. In NCLC's 2017 survey of consumer advocates, nearly 70% of respondents believed that the rules have allowed more homeowners to save their homes from avoidable foreclosures.

There is no magic number or percent of homeowners who would need to obtain a foreclosure avoidance option because of the rule in order to consider the rule a success. Indeed, the percent who do receive approval for loss mitigation after getting a dual-tracking hold is likely still artificially low due to wrongful denials by servicers and the fact that many borrowers lack representation. The dual tracking rule is as narrowly tailored as possible to prevent foreclosure sales from being carried out when homeowners are still under review for, and are in fact eligible for, home-saving alternatives.

1.2.2.5. The successor in interest rule should be preserved in its final form.

The CFPB's rule protecting successors in interest, which took effect April 19, 2018, gives homeowners recovering from the death of a family member or a divorce a much better chance of being able to preserve their homes. Historically, homeowners who are on title to the property but not on the loan have faced challenges obtaining information about the loan and gaining access to loss mitigation options. The new protections are crucial both for successors who obtained their ownership interest through the death of the borrower as well as those who obtained their interest through a divorce. Even when the original borrower is still living, the successor who is the grantee of the home has a need for information and access to loss mitigation. The CFPB has already provided that required notices and statements need not be sent twice; sending such notices to a successor in interest and not also to the borrower would be sufficient to comply with the rule. NCLC is contacted nearly every week by advocates representing successors who became the owner of the home through a divorce or separation agreement and have struggled to obtain loss mitigation or information about the mortgage secured by their home, who have a much better fighting chance of saving their home now that the rule is in effect.

1.2.3. The CFPB does not have authority to promulgate a regulation or interpretation allowing RESPA rules to preempt state laws that afford greater protections to consumers.

1.2.3.1. 12 C.F.R. §1024.5(c) and its Official Interpretation define the appropriate balance between RESPA and state consumer protection laws.

State laws define the rights and obligations of mortgage lenders and borrowers. Not surprisingly, many state statutes and other local laws apply to servicers who regularly enforce the terms of mortgages. This is particularly true when the servicers use state laws to foreclose. Under its RESPA authority, the CFPB has also adopted rules that apply to certain activities of mortgage servicers. 12 C.F.R. §§1024.30 – 1024.41 (Regulation X, Subpart C).

Some commenters have asked the CFPB to revisit, and potentially annul, the rules and interpretations that define the relationship between the CFPB's adopted mortgage servicing rules and state laws. This relationship is defined by statute, rule, and an Official Interpretation of the rule, all of which provide that the RESPA mortgage servicing rules must not be construed in any way that preempts state laws that provide greater protections to consumers.[14] By law, the CFPB does not have the discretion to revisit this standard, and it should be retained.

The CFPB lacks statutory authority to promulgate a rule or interpretation allowing a RESPA rule to preempt state laws that gives *greater* protection to consumers. Such a rule or interpretation would be contrary to a federal statute, 12 U.S.C. § 5551. The attempt to promulgate such a rule would be an invalid agency action subject to being stricken by the courts under the Administrative Procedure Act.[15]

The statute now codified at 12 U.S.C. § 5551 was enacted as part of the Dodd-Frank Act. As section 1041 of the Act, it was contained in Subchapter D, a Subchapter captioned "Preservation of State Law." The section addresses the relationship between the CFPB's authority and state law. The statute provides:

> **(2) Greater protection under State law.** For purposes of this subsection, a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title. A determination regarding whether a statute, regulation, order, or interpretation in effect in any State is inconsistent with the provision of this title may be made by the Bureau on its own motion or in response to a nonfrivolous petition initiated by any interested person. 12 U.S.C. § 5551(a)(2).

This mandate for deference to state laws that provide greater protections for consumers carried forward the similar provision that had been part of RESPA since 1974, when the statute applied to a more limited range of mortgage settlement issues.[16]

The related rule, 12 C.F.R. § 1024.5(c), states that the CFPB has the authority to determine whether a state law is preempted as in conflict with a RESPA rule. However, the rule goes on to state, "The Bureau may not determine that a State law or regulation is inconsistent with any provision of RESPA or this part, if the Bureau determines that such law or regulation gives greater protection to the consumer." 12 C.F.R. §1024.5(c)(2)(i). The CFPB's mortgage servicing rules are thus a floor, and the states are free to do more to protect homeowners in the areas where the RESPA rules apply. The CFPB's Official Interpretation of § 1025.5(c) says essentially the same thing.[17]

Notably, the Official Interpretation expressly states that the adopted RESPA rules should not be construed "to preempt the entire field of regulation" of servicer practices covered by the rules. This interpretation is unavoidable given the statute and the regulation's express limitation of

[14] 12 U.S.C. § 5551(a)(2), 12 C.F.R. §1024.5(c), and Official Interpretation 1024.5(c)(1).

[15] 5 U.S.C. § 706(2)(A),(C).

[16] 12 U.S.C. §2616. *See* Washington Mutual Bank FA v. Superior Court, 75 Cal. App. 4th 773, 781-84 (1999); Perkins v. Johnson, 551 F. Supp. 2d 1246, 1255 (D. Colo. 2008).

[17] "Coverage of RESPA; Relation to State laws. *Paragraph 5(c)(1).* 1. State laws that are inconsistent with the requirements of RESPA or Regulation X may be preempted by RESPA or Regulation X. State laws that give greater protection to consumers are not inconsistent with and are not preempted by RESPA or Regulation X. In addition, nothing in RESPA or Regulation X should be construed to preempt the entire field of regulation of the practices covered by RESPA or Regulation X, including the regulations in Subpart C with respect to mortgage servicers or mortgage servicing."

conflict preemption to cases where the RESPA rule conflicts with a state law that affords *less* protection to consumers.

1.2.3.2 RESPA's deference to state laws is grounded in sound and necessary policy considerations.

A mortgage is a creature of state law. State contract law determines the existence and enforceability of a mortgage. Under the laws of most states, a mortgage also conveys an interest in real property. Any federal regulation that affects foreclosures of mortgages must recognize the primacy of state contract and property law.[18]

RESPA's long-standing deference to state laws is appropriate, and it is typical of other federal laws that affect the state foreclosure process. For example, the Bankruptcy Code, like RESPA, may preempt state property and contract law in certain circumstances. However, the Bankruptcy Code's preemption of state mortgage laws has always been construed narrowly, requiring an express Congressional directive. The well-settled rule is that even in bankruptcy the rights of mortgagors and mortgagees are determined by state law.[19]

The major federal programs that insure or guarantee most of the residential mortgages in the United States similarly defer to state foreclosure laws. Congress could have authorized loans insured under the National Housing Act to be foreclosed under federal standards, in derogation of state foreclosure laws. However, Congress and federal agencies have consistently chosen not to do so. For example, the statute that authorizes foreclosures of mortgages directly granted by the UDSA Rural Housing Service requires that in foreclosing the Government "shall follow the foreclosure procedures of the State in which the property involved is located to the extent such procedures are more favorable to the borrower than the foreclosure procedures that would otherwise be followed by the Secretary."[20] HUD's guidelines for foreclosures of FHA-insured mortgages state that "HUD expects Mortgagees to comply with all federal, state and local laws when proceeding with a foreclosure and pursuing a possessory action."[21] For GSE loans, the enterprises have similar requirements.[22]

Disruption of state foreclosure laws by federal regulations could have serious unintended consequences. Federal interference could unsettle titles to properties conveyed through foreclosure sales. States with non-judicial foreclosures systems that rely on compliance with

[18] BFP v. Resolution Trust Corp., 511 U.S. 531, 541-42 (1994).

[19] Butner v. U.S., 440 U.S. 48, 54 (1979). *See also e.g.* 11 U.S.C. § 1322(c)(1) (a chapter 13 bankruptcy debtor may cure a mortgage default on a residence "until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy [*i.e.* state] law").

[20] 42 U.S.C. § 1475(b).

[21] HUD Handbook 4000.1, III.A.2.r (Rev. Dec. 30, 2016) (pp. 679-80). The FHA foreclosure guidelines in Handbook 4000.1, Part III.A.2 include extensive guidance as to how servicers of FHA-insured loans can comply with both the RESPA servicing guidelines, state laws (including foreclosure mediation), and FHA's own loss mitigation requirements.

[22] *See e.g.* Freddie Mac Single Family Servicing Guide § 9301.2 (Mar. 2, 2016) (when foreclosing servicers must comply with, *inter alia*, "[a]pplicable federal, State and local laws and customs."

state statutes and the terms of mortgages to assure conveyance of valid title through foreclosure sales would be most vulnerable.[23]

State courts interpreting state laws routinely decide whether a foreclosure sale conveyed valid title to property.[24] In certain states, a servicer's failure to serve a particular notice, whether required by a state statute or by the underlying loan documents, can lead to invalidation of a foreclosure sale.[25] Under several states' laws, the failure to engage in loss mitigation may be treated as a breach of contract and be the basis for invalidating a foreclosure sale.[26] Exercise of a broad federal preemptive power under RESPA would undercut, or at a minimum make uncertain, the basic elements of state foreclosure laws. These laws have historically served as guideposts to assure that good title is conveyed through foreclosure sales.[27] The likely consequence of substantial RESPA preemption of state foreclosure laws would be decades of confusion about whether non-judicial foreclosure sales conveyed valid title to purchasers. Such clarity is important for all stakeholders.

As matters stand now, when servicers need to conduct a foreclosure, they hire local attorneys who are familiar with each state's foreclosure laws. These attorneys can ensure that foreclosure sales convey good title. At the same time, states can regulate mortgage servicers, and do so in ways that are innovative and more protective of their consumers than the minimal RESPA requirements. States can ensure that their innovative laws function consistently with the requirements of state property law. One federal agency cannot perform this task for fifty different states.

1.2.3.3 State laws offer key consumer protections and do not conflict with the federal RESPA requirements.

During the foreclosure crisis, a number of states and localities created innovative laws and programs to assist homeowners and reduce foreclosures. These new laws cut back on unnecessary foreclosures in demonstrable ways and set examples for best practices that should be retained for the future. For example, since the foreclosure crisis began, foreclosure mediation programs went into effect in almost half of the states. Studies of these programs indicate that they produced positive results for a substantial number of consumers.[28] The Connecticut

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[23] Elizabeth Renuart, Property Title Trouble in Non-Judicial Foreclosure States: The Ibanez Time Bomb?, 4 William & Mary Bus. L. Rev. 111 (2013) (discussing vulnerability of non-judicial foreclosures to defects related to failure to comply with state laws affecting transfer of loan documents).

[24] *See, e.g.*, Bevilacqua v. Rodriguez, 955 N.E. 2d 884 (Mass. 2011).

[25] *See, e.g.*, Pinti v. Emigrant Mortg. Co., Inc., 33 N.E. 3d 1213 (Mass. 2015).

[26] *See, e.g.*, Fonteno v. Wells Fargo Bank, N.A., 228 Cal. App. 4th 1358, 1371 (2014).

[27] Preemption of state foreclosure laws was carefully limited under the 2013 RESPA mortgage servicing rules. The only significant preemption occurs in the provision requiring a delay of 120 days from default before the commencement of foreclosure proceedings. 12 C.F.R. § 1024.41(f). Notably, this preemption of contrary state laws applies *before* any actual foreclosure proceedings begin, minimizing interference with core foreclosure requirements under state law. In addition, consistent with the RESPA statute, the provision does not preempt a state law that is more protective of the consumer.

[28] National Consumer Law Center, *Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation* (Feb. 2012), *available at* www.nclc.org; Federal Reserve Bank of Boston, *State Foreclosure Prevention Efforts in New England: Mediation and Assistance* (Fed. Reserve Bank of Boston Research Report 11-3,

mediation program, as one example, has consistently seen high borrower participation rates and produced well-documented successful outcomes.[29] Data provided by the Connecticut courts covering the period from July 2008 through December 31, 2016 showed that of 25,969 completed mediations, seventy percent resulted in settlements in which the borrowers stayed in their homes.[30] Significantly, eighty-five percent of the cases that settled with an agreement for the borrower to stay in the home involved a loan modification. A study of the Philadelphia settlement conference program also showed that high numbers of borrowers avoided foreclosures and the program operated within existing foreclosure time frames without delaying foreclosures.[31]

Foreclosure mediation programs set their own time frames for review of loss mitigation options. The RESPA rules provide timelines for servicers to process loss mitigation applications only in limited instances, namely for a borrower's first complete loss mitigation application to a servicer. The RESPA rules are not inconsistent with the more general procedures that apply in the mediation programs. When applicable, the RESPA rules trigger enforceable legal rights for borrowers. They promote effective loss mitigation reviews because they set minimal procedural standards when no other rules apply. The mediation systems build upon and supplement the procedural requirements and enforceable standards set by the RESPA rules.

The mediation programs also supplement RESPA by directing borrowers to counselors and other trained advocates who facilitate efficient communication between homeowners and servicers. This is consistent with the objectives of the RESPA loss mitigation rules. Attorneys who have worked with thousands of homeowners over many years in connection with the foreclosure mediation programs report that the existence of both the RESPA and the mediation program rules has not confused homeowners. For example, in Philadelphia, a steering committee made up representatives from the courts, the City, homeowners' attorneys, and lenders' counsel meets regularly to review problems and issues arising in the mediation program. A problem of conflicts or confusion involving the RESPA rules and the mediation program rules has never come up. Any suggestions to the contrary appear to be the product of unfounded conjecture.

To the extent that state statutes, such as the California Homeowners' Bill of Rights ("HBOR") provide greater procedural rights for homeowners seeking loss mitigation help, this does not interfere with the functioning of the RESPA rules. California is a non-judicial foreclosure state where foreclosures proceed relatively quickly and without any court oversight. A state law that allows consumers more time to apply for loss mitigation or appeal a servicer's decision that is required by the RESPA floor helps prevent avoidable foreclosures is appropriate here.

Sept. 2011), *available at* www.bos.frb.org; Center for American Progress, *Walk the Talk, Best Practices on the Road to Automatic Foreclosure Mediation* (Nov. 2010), *available at* www.americanprogress.org.

[29] Extensive analysis of Connecticut mediation case data can be found in the program's annual reports. See Office of the Chief Court Administrator, *Report to the General Assembly, Connecticut Foreclosure Mediation Program* (March 1, 2017).

[30] Office of the Chief Court Administrator, *Report to the General Assembly, Connecticut Foreclosure Mediation Program*, App. E, p. 54 (March 1, 2017).

[31] The Philadelphia Reinvestment Fund, *Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report and Findings* (June 2011), *available at* www.trfund.com;

The CFPB should reject any proposal to modify or annul the preemption limitations that are essential parts of the RESPA statute, regulations, and Official Interpretation. Decisions regarding this important issue must not be based on hypothetical scenarios that lack factual support.

1.2.4. New technologies and electronic communications are allowed in some circumstances under the rule, and this need not be adjusted.

The CFPB has drawn the appropriate line between mandating certain disclosures by mail and allowing others to be sent by electronic communication. For example, good faith efforts to establish live contact may include sending an electronic communication encouraging the borrower to establish live contact with the servicer, and promptly informing borrowers of loss mitigation options may also be done through electronic communications. On the other hand, the written notice regarding loss mitigation must be sent by mail once in a 180 day period. This balance is appropriate because sending a notice by mail is still the most reliable way to ensure the borrower sees it, and it is helpful to have loss mitigation information in hard copy.

1.3. The rule should be preserved as-is, but if changes are considered, there are ongoing problems with servicing transfers, the complete application rule, and the duplicative application carve-out that should be addressed.

If any changes are considered to the servicing rule, the following areas require attention to strengthen the rule consistent with the consumer protection purposes of RESPA.

1.3.1. Servicing Transfers.

We 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 servicers' inability to communicate with each other adequately and reconcile account records. While the issuance of 12 U.S.C. § 1024.41(k) as part of the 2016 Mortgage Servicing Final Rule was a step in the right direction, regulations affecting systemic transfer problems have not been adopted:

- The adopted regulations do not go far enough in helping borrowers avoid unwarranted or unnecessary costs from getting the runaround when loss mitigation is pending at the time of servicing transfer. The CFPB should explicitly prohibit servicers from making duplicative and burdensome requests for information and documents that have been previously provided to a transferor servicer.

- The adopted regulations do not require that borrowers be given essential information at the time of transfer, such as whether the transferee servicer is aware of a pending loss mitigation application and will continue with the evaluation process. Transferee servicers should be required to send borrowers written notice about the status of their loss mitigation application following a transfer of servicing.

- The adopted regulations do not go far enough to protect borrowers when a transferee servicer fails to honor loss mitigation offers that have already been accepted by the borrower before the servicing transfer. Transferee servicers should be required to accept and honor all loss mitigation offers that have been accepted by the borrower and to promptly convert trial loan modification agreements to permanent agreements.

- The CFPB's supervisory and enforcement proceedings have highlighted serious problems in the boarding of loans from one servicer to another, based in part on the incompatibility of servicer systems of record. This has caused borrowers to be charged improper fees, have their payments misapplied, be improperly denied loss mitigation options, and be subjected to wrongful foreclosure proceedings. The CFPB should define industry-wide standards and protocols to ensure the compatibility of transferred data as between servicers.

1.3.2. 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.[32] Reliance on submission of a complete application confounds attempts to address dual-tracking and wrongful foreclosures due to the lack of an objective standard for when an application is complete and inconsistent implementation by servicers. Moreover, it creates exactly 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. We have repeatedly requested that the CFPB abandon this flawed 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. We have also pointed out that the CFPB's continued reliance on a complete application to trigger essential borrower protections risks making the CFPB's loss mitigation rules obsolete under new loss mitigation protocols, such as Fannie Mae and Freddie Mac's "Flex Modification" program, in which borrowers often do not submit applications.

1.3.3. Duplicative Request Rule.

As we have stated in prior comments, the most significant limitation on the borrower's procedural rights under the loss mitigation rule is that a servicer is not required to comply with section 1024.41 if a borrower has been evaluated previously by that servicer for loss mitigation options for the borrower's mortgage loan account.[33] 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 evaluate the prior application properly. 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. The CFPB's amendment made in the 2016 Servicing Rule, to allow a loss mitigation

[32] Reg. X, 12 C.F.R. § 1024.41(b)(1).

[33] Reg. X, 12 C.F.R. § 1024.41(i).

request to be covered by the rules if the borrower has at some point cured the default since the prior request, is inadequate and fails to address the significant problems with the exclusion we have identified on numerous occasions.

1.4. Certain additional issues should be addressed in the mortgage servicing rule.

The following are additional areas in which the mortgage servicing rule could be strengthened and streamlined.

1.4.1 Successors in Interest.

The CFPB has taken an important step forward by amending the servicing rules to address problems faced by successors in interest trying to preserve their homes. However, the amendments made in the 2016 Servicing Rule deprive successors of any enforcement rights until the servicer has "confirmed" the successor's status, a process that is fully controlled by the servicer. Successors must be able to enforce their rights once they have provided documentation establishing their identity and ownership interest in the home. Our prior comments have urged the CFPB to prevent abuse and delay by giving successors certain limited enforcement rights during the confirmation process.

1.4.2 Force-Placed Insurance.

In responding to force-placed insurance abuses, one of the provisions 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-place insurance.[34] We strongly supported the adoption of this rule, but also pointed out that many homeowners who have force-placed insurance imposed do not have escrow accounts. We urged the CFPB to expand the rule to cover borrowers without escrow accounts. We have also requested that the CFPB amend the rule dealing with the cost of force-placed insurance to ban all forms of kickbacks and non-monetary compensation.

1.4.3 Error Resolution Rights.

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. We believe the CFPB missed an opportunity in the 2013 rule to implement two provisions of RESPA that are intended to assist borrowers avoid foreclosure: the error resolution procedure under § 2605(e) and the prohibition in § 2605(k)(1)(C) preventing a servicer 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

[34] Reg. X. 12 C.F.R. § 1024.17(k)(5)(i).

time as the servicer has conducted a reasonable investigation of the notice of error and provided a response in accordance with § 1024.35(e).

1.4.4. HELOC Exemption.

We have on numerous occasions requested that the CFPB reconsider its decision to exempt home equity lines of credit (HELOCs) from coverage of the 2013 Servicing Rule. The scope of the Subpart C provisions of Regulation X (§§ 1024.30 through 1024.41) apply to "mortgage loans,"[35] and that term is defined as federally related mortgage loans, but does "not include open-end lines of credit (home equity plans)."[36] Thus, a servicer does not need to comply with the Subpart C requirements if the mortgage loan is a HELOC, even if the HELOC is a first lien (and the borrower's only mortgage) on the property.

Servicers have ample experience regarding loss mitigation on HELOCs since HELOCs in first lien position were eligible for HAMP review. The exemption was retained based on the erroneous assumption that TILA's protections for open-end credit under the Fair Credit Billing Act (FCBA) provide equivalent protections to those under RESPA. Unlike a credit card transaction, however, borrowers put their homes at risk in a HELOC. A default on a credit card debt, by comparison, which may generally be discharged in a bankruptcy, does not put the home in immediate jeopardy.

Moreover, the FCBA was not designed to address a mortgage loan product that is secured by a lien on the borrower's residence. Rather, it is primarily intended to deal with billing errors related to the use of an open-end credit account to finance retail purchases of goods and services. Only two of the billing errors that can be asserted under the FCBA involve issues that are similar to the errors listed under Regulation X, § 1024.35(b). Thus, most of the listed errors under § 1024.35(b), such as disputes about escrow account disbursements or the accuracy of payoff statements, cannot be asserted under the FCBA. In addition, RESPA applies not only to billing error inquiries but to any request for information relating to the servicing of a federally related mortgage loan, whereas the while the FCBA billing error notice provision applies only to billing errors.

1.4.5. 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 affiliate) is the creditor or assignee.[37] As noted in section 1.2.1 above, 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.

[35] Reg. X. 12 C.F.R. § 1024.30(a).

[36] Reg. X. 12 C.F.R. § 1024.31 (definition of "mortgage loan").

[37] 12 C.F.R. § 1026.41(e)(4)(ii)(A).

Public notice about small servicers would also reduce the number of complaints to the CFPB and other parties.

1.4.6. Reverse Mortgage Exemption.

Reverse mortgages are currently exempt 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 from servicing abuses. Reverse mortgage servicers typically evaluate borrowers for loss mitigation after a default on property charges. There is no logical reason to exclude reverse mortgage servicers from the rules governing loss mitigation, continuity of contact, and early intervention.

1.4.7. Borrowers with Limited English Proficiency.

The lack of protections for borrowers with limited English proficiency (LEP) in the servicing (and origination) markets raises significant fair lending concerns. We have urged the CFPB to consider additional rulemaking and other steps it can take to require servicers and other market participants to effectively meet the needs of LEP borrowers. We have noted that the CFPB should assess the extent to which borrowers with limited English proficiency (LEP) are able to access the market. Collection, tracking, and transfer of language preference are essential both to assessing and providing access.[38]

1.4.8. Mandate Affordable Loan Modifications.

At all times during the CFPB's consideration of mortgage servicing rules, we have urged the CFPB to mandate affordable loan modifications 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. A loan modification mandate could require outcomes that an overall benefit to the investor as well (NPV positive) at either the loan or portfolio level. It should require terms that are more affordable (for example, by reducing payments) and more sustainable (where there is a reasonable basis to believe the change in terms will improve long-term performance).

2. Ability-to-Repay and Qualified Mortgage Rule

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. When Congress passed the Dodd-Frank Act, it created a requirement that mortgage

[38] 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.

lenders reasonably evaluate the borrower's repayment ability, with a special category of "qualified mortgages" that were presumed to meet the ability to repay test because they are deemed free of unsafe features.[39] The Act directed the CFPB to prescribe rules to implement the exception for qualified mortgages.[40] The CFPB published the final Ability to Repay rule in January 2013.[41] These rules have restored sense to the market by ensuring that lenders have an incentive to make loans that homeowners can afford and that are safe for the market. In its regulatory implementation, the CFPB has balanced the need for robust affordability requirements with flexibility for smaller institutions. The agency should not further revise the rule at this time beyond a narrow implementation of the expansion of the small creditor portfolio exemption in Public Law No. 115-174.

2.1 The Ability-to-Repay and Qualified Mortgage rule protects consumers and the market and is consistent with the purposes of both Dodd-Frank and the Truth in Lending Act.

As the CFPB noted in its publication of the final rule, Dodd-Frank's mortgage protections were a response to "an unprecedented cycle of expansion and contraction . . . ."[42] The mortgage market is the largest consumer financial services market in the country, and this activity triggered the most severe recession since the Great Depression. Fueled by a "steady deterioration of credit standards in mortgage lending," trends included loans based solely on collateral, loans to borrowers with no documentation of income, and higher cost loans to borrowers who would have qualified for prime loans.[43] After a long period of housing price appreciation, housing prices began to decline at the same time unemployment rose precipitously and the effects of these lending patterns emerged more openly. The abuses wreaked havoc on families, communities, investors and the market. They disproportionately undermined wealth accumulation in communities of color.[44] The rates of serious delinquencies for subprime and Alt-A mortgage products climbed from 10 percent in 2006, to 20 percent in 2007, to more than 40 percent in 2010.[45] In 2012, the Federal Reserve estimated that the resulting fall in housing prices resulted in approximately $7 trillion in household wealth losses.[46]

Dodd-Frank's requirement that creditors reasonably evaluate a borrower's ability to repay a mortgage loan aligns the interests of creditors, investors, and borrowers, serving as a bulwark against future mortgage market instability. The CFPB's implementation of that rule strikes the right balance between protecting consumers and allowing for a robust market. It satisfies the purposes of Dodd-Frank and the Truth in Lending Act.

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[39] 15 U.S.C. § 1639c.

[40] 15 U.S.C. § 1639c(b)(3).

[41] 78 Fed. Reg. 6408 (Jan. 30, 2013).

[42] *Id.* at 6410.

[43] *Id.*

[44] *See, e.g.,* James H. Carr et al., *The Foreclosure Crisis and its Impact on Communities of Color: Research and Solutions,* National Community Reinvestment Coalition (Sept. 2011), *available at* https://schar.gmu.edu/sites/default/files/faculty-staff/cv/ncrc_foreclosurewhitepaper_2011.pdf.

[45] 78 Fed. Reg. 6408, 6411 (Jan. 30, 2013)(citing CoreLogic data).

[46] *Id.*

The Truth in Lending Act, passed in 1968, was enacted by Congress to promote the informed use of credit to enhance economic stability and competition. Congress amended it over time to address abusive mortgage lending practices. In 1994, Congress amended TILA and established substantive protections against mortgage lending abuses in the high-cost loan market through the Home Ownership and Equity Protection Act. (HOEPA).[47] The Federal Reserve Board then issued implementing regulations, including HOEPA's ability to repay requirement.[48] In 2001, the Board made significant additional changes to the HOEPA regulation to cover more loans and further limit abuses.[49] After a series of hearings, in 2008 the Board again expanded HOEPA's protections.[50] Dodd Frank's goals echoed and expanded upon these purposes, emphasizing access to fair, transparent and competitive markets.

The CFPB's Ability-to-Repay and Qualified Mortgage regulations not only implement Congressional intent but also animate TILA and Dodd-Frank's purposes, by providing clear safe lending rules while allowing flexibility for smaller institutions. The CFPB has balanced the need for robust affordability requirements with flexibility for smaller institutions and should not make revisions to the rule at this time.

2.2 The CFPB should craft the exemption mandated by Public Law No. 115-174 narrowly and should not expand any other exemptions to the rule.

The protections put in place by Dodd-Frank rule are of great importance to consumers and the economy as a whole. A number of lenders are already exempt from key provisions of these rules. Watering the protections down by exempting additional parts of the mortgage origination market would invite a return to the unsustainable lending practices that led to the market crash described in the preceding section.

The history of the CFPB's rulemaking shows that it has already taken sufficient account of any need for exemptions from the rule. The CFPB issued its initial rule implementing these Dodd-Frank requirements on January 10, 2013.[51] At the same time, it proposed a number of exemptions to the rule.[52] On June 12, 2013, the CFPB published a final rule creating a series of new exemptions, all generally supported by industry comments.[53] 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) who 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

[47] Public Law 103-325, 108 Stat. 2160.

[48] 60 Fed. Reg. 15463 (Mar. 24, 1995).

[49] 66 Fed. Reg. 65604 (Dec. 20, 2001).

[50] 73 Fed. Reg. 44527 (July 3, 2008).

[51] 78 Fed. Reg. 6407 (Jan. 30, 2013)

[52] 78 Fed. Reg. 6621 (Jan. 30, 2013).

[53] 78 Fed. Reg. 35,430 (June 12, 2013).

creditors, even if they do not operate predominantly in rural or underserved areas. These loans are not subject to a specific debt-to-income ratio as they would be under the general qualified mortgage definition.

On October 2, 2015, the CFPB returned to the question of exemptions, publishing a final rule that again revised the definitions of small creditor, and rural and underserved areas.[54] 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 2000 originations of covered transactions secured by a first lien. In addition, it excluded originated loans held in portfolio by the creditor and its affiliates from that limit. The final rule also established a grace period from calendar year to calendar year to allow a creditor that exceeded 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 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 that are not in an urban area as defined by the U.S. Census CFPB (Census CFPB) to 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.

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.[55]

On May 24, 2018, Congress passed Public Law No. 115-174, which, among other things, amended the Ability-to-Repay standard to provide a broader small creditor portfolio exemption from certain aspects of the Qualified Mortgage rule for institutions with assets up to $10 billion. We recommend that the CFPB include affiliates in the asset threshold and that it draw the new regulation as narrowly as possible to ensure that larger institutions are not inadvertently covered by the new exemption. We also urge the CFPB to craft the exemptions required by the Public Law from Dodd-Frank's appraisal and escrow requirements as narrowly as possible. Rollbacks in these requirements will inadvertently run afoul of the goals of the Ability-to-Repay standard by reducing requirements that allow consumers to have an accurate estimate of the value of the home they are financing compared to the loan amount and by undermining their ability to stay current on taxes and insurance.

2.3 The rule has not interfered with access to credit.

The CFPB's QM rule and Ability-to-Repay rule sets out common sense standards that protect the market and consumers from high-risk, unsustainable loans by ensuring borrowers have an ability to repay the loans they receive. In the run-up to the foreclosure crisis, irresponsible mortgage lending that ignored borrowers' ability to repay their loans resulted in a foreclosure tsunami that

[54] 80 Fed. Reg. 59944 (Oct 2, 2015). *See also* 80 Fed. Reg. 7770 (Feb. 11, 2015) (proposing these changes and calling for comments).

[55] 81 Fed. Reg. 11099 (Mar 3, 2016).

disproportionately impacted communities of color—eviscerating a generation of wealth building and nearly destroying the economy. The data show that the QM rule has not had a negative impact on the market and there has been a modest but steady increase in lending.[56]

Financial institutions, including small banks, are continuing to recover from the worst financial downturn since the Great Depression. Mortgage lending, in particular, continues to steadily improve. Small banks are playing an important and growing role in the recovery. Contrary to theories that the Dodd-Frank Act has stifled growth, the financial sector has had record profits. In 2016 U.S. financial institutions had total annual profits of $171.3 billion, the highest level since 2013.[57] Financial institutions continue to soar and enjoyed record high profitability in the first quarter of 2018.[58]

The profitability of community banks has also rebounded strongly and meets pre-recession levels. In 2010, less than 78 percent of community banks were profitable. By the end of 2015, over 95 percent of community banks were profitable.[59] The most recent FDIC report from the first quarter of 2018 notes that the percentage of unprofitable institutions sank to 4.6 percent, which is the "lowest percentage since the first quarter of 1996."[60] This FDIC report also notes that net income of community banks jumped 17.7 percent from the first quarter of 2017.[61] To the extent there may be concerns about smaller lenders, many have noted that the recent statutory roll back of Dodd-Frank is likely to result to a significant acceleration in mergers and acquisitions of smaller institutions, regardless of the Ability to Repay requirements.

Credit unions have also continued to grow while recovering from the financial crisis. Credit union membership has been steadily growing in recent years. In 2016, credit unions added 4.7 million new members, which amounted to "the biggest annual increase in credit union history and four times the pace set a decade earlier."[62] In a recent report using data from February 2018, membership rose 4.6 percent from the previous year.[63] Operating costs for credit unions have

[56] CRL Analysis, HMDA 2016 data, *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-2016hmda-policy-brief-sep2017.pdf.

[57] Wall Street Journal, U.S. Banking Industry Annual Profit Hit Record in 2016 (Feb 28, 2017), *available at*: https://www.wsj.com/articles/u-s-banking-industry-annual-profit-hit-record-in-2016-1488295836.

[58] Federal Deposit Insurance Corporation, FDIC-Insured Institutions Report 56 Billion in Net Income in First Quarter of 2018 (2018), *available at* https://www.fdic.gov/news/news/press/2018/pr18030.html. See also CNN Money, American Banks just had their most Profitable Quarter Ever (2018), *available at* http://money.cnn.com/2018/05/22/investing/banks-record-profits-fdic-deregulation-bill/index.html.

[59] Federal Deposit Insurance Corporation, Core Profitability of Community Banks 1985-2015 1 (2016), *available at* https://www.fdic.gov/bank/analytical/quarterly/2016_vol10_4/article1.pdf.

[60] Federal Deposit Insurance Corporation, Quarterly Banking Profile: First Quarter 2018, *available at* https://www.fdic.gov/bank/analytical/quarterly/2018-vol12-2/fdic-v12n2-1q2018.pdf.

[61] Id. At 19.

[62] CUNA Mutual Group, Credit Union Trends Report (2017), *available at* https://www.cunamutual.com/resource-library/publications/credit-union-trends-report.

[63] CUNA Mutual Group, Credit Union Trends Report (April 2018), *available at* https://www.cunamutual.com/-/media/cunamutual/about-us/credit-union-trends/public/apr_2018_cu_trends_report.pdf.

also fallen in the period since Dodd-Frank was passed and were down to 3.08 percent in 2018 from a high of 3.59 percent in 2008.[64]

While the number of small lenders, including community banks and credit unions, has decreased over the years, this cannot be reasonably attributed to Dodd-Frank or CFPB regulations. The number of community banks has declined every single year since 1984.[65] FDIC research concludes that community bank profitability since 2008 has overwhelmingly been driven by macroeconomic conditions, not regulations.[66] The FDIC study first takes a wide look at regulations that include Dodd-Frank, but also Basel III capital standards. The study states that "regulation is just one among many noneconomic factors that may contribute to structural change in community bank profitability," but concludes that 80 percent of variation in profitability is due to macroeconomic factors, and the other 20 percent includes not just changing regulations, but also "the rise of nonbank lending, competition from larger banks, and changes in loan portfolios and other business practices."[67]

Smaller lenders play an important role in extending access to credit, and it is noteworthy that lending has also rebounded from the depths of the crisis. After falling from June 2008 to November 2010, outstanding consumer loans have steadily increased at $3.7 trillion in December 2016, which well exceeds pre-crisis levels.[68] Small banks have posted increases in commercial lending in all but one quarter compared to levels at the time of passage of Dodd-Frank in 2010.[69] Furthermore, the FDIC's quarterly community bank performance data for the fourth quarter of 2016 shows that community banks hold 43 percent of all small loans to businesses and that they increased lending by $6.4 billion (2.2 percent) compared to 2015, twice the rate of other banks.[70]

Finally, mortgage lending has also steadily recovered since the crisis. Community banks and small lenders play an important and growing role in the mortgage market in particular. In 2015, mortgage lenders originated 850,085 more loans[71] than they did in 2012, a 37 percent increase. Loans originated by smaller lenders with assets under $1 billion saw the biggest increase during this period (48 percent) while the largest institutions, those with assets over $10 billion, saw a 1

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[64] National Credit Union Administration, NCUA Chart Pack (2016), *available at* https://www.ncua.gov/analysis/Pages/industry/fact-sheets.aspx. See also National Credit Union Administration, NCUA Chart Pack (March 2018), *available at* https://www.ncua.gov/analysis/Pages/call-report-data/reports/chart-pack/chart-pack-2018-q1.pdf.

[65] Federal Deposit Insurance Corporation, Community Banking Study 1 (2012), *available at* https://www.fdic.gov/regulations/resources/cbi/report/cbi-full.pdf.

[66] FDIC, Core Profitability of Community Banks *supra* note 4.

[67] Id at 42.

[68] Federal Reserve, Total Consumer Credit Owned and Securitized, Outstanding *available at* https://fred.stlouisfed.org/series/TOTALSL.

[69] Federal Reserve, Total Value of Loans for All Commercial and Industry Loans, Small Domestic Banks *available at* https://fred.stlouisfed.org.

[70] Federal Deposit Insurance Corporation, Quarterly Banking Profile, Community Bank Performance, Fourth Quarter (2016), *available at* https://www.fdic.gov/bank/analytical/qbp/2016dec/qbpcb.html.

[71] CRL Analysis of HMDA Data 2012-2015. Loan analysis limited to: home purchase, owner-occupied, 1-4 family units, 1st lien loans, *available at* http://www.responsiblelending.org/media/new-hmda-data-shows-mortgage-market-continues-exclude-consumers-color-and-low-wealth-families. See also CRL 2016 HMDA analysis, *supra* note 2.

percent decline. Credit unions alone originated $41.7 billion in first-lien mortgage loans in the third quarter of 2016, an increase of 22 percent over the same period in the previous year.[72]

Small lenders also saw their market share in mortgage lending increase over this time period. The market share of the smallest lenders with assets under $1 billion increased from 54 percent in 2012 to 58 percent in 2015. In contrast, the market share of the largest lenders with assets over $10 billion, decreased from 31 percent in 2012 to 22 percent in 2015.[73]

2.4 The rule should not be re-opened at this time, and any future changes should limit exemptions while ensuring that protections are maintained for riskier products.

The CFPB should not re-open the rule at this time, but instead should monitor implementation and further collect data on its impact, including on the increasingly expanding market of non-QM lending. If the CFPB does re-open the rule, however, the Qualified Mortgage rule should maintain its limited approach to institutional exemptions but carve out riskier products, such as high-cost mortgages and land installment contracts. Moreover, the CFPB should actively study how to incorporate predictive residual income measures into the ability to repay analysis.

- *Riskier products should be carved out of the Qualified Mortgage presumption.* Under Dodd-Frank, the Qualified Mortgage receives a presumption of affordability exactly because it is considered to be a safer product. However, some products are inherently unsafe and should not be granted such a presumption. High-cost mortgages have warranted additional protections for over two decades. Congress confirmed the need for such protections when it affirmed these protections and lowered the thresholds in Dodd-Frank. High-cost mortgages should be excluded from the Qualified Mortgage presumption. Moreover, land installment contracts, which constitute credit under TILA, are inherently abusive, denying homeowners the opportunity to fairly build equity while requiring them to bear all the risk. Land installment contracts do not warrant the Qualified Mortgage presumption.

- *Institutional exemptions must remain narrow.* As noted above, the statute and the CFPB's existing rules already provide a number of accommodations for smaller institutions, allowing them to originate Qualified Mortgage loans on a more flexible basis. Moreover, Congress has passed Public Law No. 115-174, which includes an expansion of the small creditor portfolio exemption. This and any future exemptions should be narrowly drawn to ensure that market incentives promote origination of affordable mortgages even as the market returns to a period of expansion and innovation.

Residual income measures should be incorporated into the ability to repay analysis alongside debt-to-income ratios. While Dodd-Frank itself identifies residual income along with debt-to-income ratio as a measure for affordability, the regulation does not yet incorporate this crucial concept. Increasingly, researchers are examining a means to update this measure, to ensure it can be predictive of affordability in the contemporary market. While a debt-to-income ratio standard

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[72] CUNA Mutual Group, Credit Union Trends Report (2016), *available at* https://www.cunamutual.com/resource-library/publications/credit-union-trends-report.

[73] CRL Analysis *supra* note 76.

offers some level of surety, it is weak in identifying affordability problems in lower-income borrowers who simply have limited cash on hand. We urge the CFPB's researchers to work with outside analysts to develop a residual income measure that can be incorporated into the rule.

3. Truth in Lending and Real Estate Integrated Disclosures

3.1 History behind Congressional directive to the CFPB to combine disclosures under these two statutes

In 2010, Congress directed the Consumer Financial Protection Bureau (CFPB) to create "a single, integrated disclosure" form combining the existing HUD-1 settlement statement and TILA disclosure form.[74] But the overlap between RESPA's required settlement cost disclosures and TILA's cost of credit disclosures was recognized as confusing long before then.[75] Earlier efforts to combine the forms formally started in 1996 when Congress directed HUD and the FRB to simplify and improve these disclosures and combine them into a single format.[76] The agencies submitted a report to Congress in which they recommended that Congress amend these statutes in specific ways.[77] Congress took no action to implement the suggested changes. In 2009, the FRB took matters into its own hands and proposed significant changes to the TILA disclosures and stated that it would work with HUD "towards" integrating the two disclosure regimes.[78]

Before the FRB could finalize this proposal, Congress passed the Dodd-Frank Act in 2010. In that Act, Congress amended both TILA and RESPA[79] and directed the CFPB to create "a single, integrated disclosure" form combining the existing HUD-1 settlement statement and TILA disclosure form.[80] Congress did not mandate the nature or form of the changes other than to state that: "Such forms shall conspicuously and clearly itemize all charges imposed on the borrower and all charges imposed on the seller in the connection with the settlement and shall indicate whether any title insurance premiums included in the borrower's such charges covers or insures the lender's interest in the property, the borrower's interest, or both."[81]

In 2011, the CFPB embarked on an extensive project to fulfill this Congressional mandate. The process included consumer testing in the form of a qualitative study[82] that led to the publication

[74] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1098, 124 Stat. 1376 (July 21, 2010), *codified at* 15 U.S.C. § 1604(b).

[75] 78 Fed. Reg. 79,730, 79, 79,738 (Dec. 31, 2013) (describing this history).

[76] Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208 (1996).

[77] Bd. Of Governors of the Fed. Reserve Sys. & U.S. Dep't of Hous. and Urban Dev., *Joint Report to the Congress Concerning Reform to the Truth in Lending Act and the Real Estate Settlement* (1998). *See* 78 Fed. Reg. at 79,739 (summarizing this Report).

[78] 78 Fed. Reg. at 79,739.

[79] 15 U.S.C. § 1604(a); 12 U.S.C. § 2603.

[80] 15 U.S.C. § 1604(a).

[81] 12 U.S.C. § 2603(a).

82 Kleimann Commc'n Grp., Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures (2012), available at www.consumerfinance.gov. *See* NCLC Comments on 77 Fed. Reg. 51,116 (Aug. 23, 2012) (critiquing Kleimann study), available at of proposed forms followed by a quantitative study to validate the effectiveness of its proposal.[83] In addition, the agency utilized a web-based initiative known as "Know Before You Owe" to directly solicit input on the forms from the general public.[84]

Two years later, on December 31, 2013, the CFPB finalized the forms and the accompanying regulations.[85] According to the CFPB, the primary purpose of the integrated early disclosures "is to inform consumers of the cost of credit when they have bargaining power to negotiate for better terms and time to compare to other financing options.".[86] The new regime commenced on October 3, 2015, for applications received on or after that date.[87]

3.2 The CFPB should not re-open the Integrated Disclosure rules

As discussed in more detail in the Comments filed by NCLC and other consumer groups to the Request for Information Regarding the Bureau Rulemaking Processes (Docket No. CFPB-2018-0009), the CFPB put an extensive amount of time and effort developing the proposed TILA-RESPA Integrated Disclosure rules (hereinafter "Integrated Disclosure" or "TRID" rules), including conducting consumer testing and focus groups to get direct feedback from consumers on whether the disclosure was accessible and useful. The CFPB also solicited input from the public, including consumer advocates and industry participants. The agency did not favor consumer concerns more than those of industry members, but properly focused on the question of whether consumers could understand disclosures intended to convey key information.

Use of the Integrated Disclosures is no more burdensome than the prior disclosure regime. Most of the information required was previously required on the old disclosure forms. And the mortgage industry has by now adapted to the new forms. Similarly, HousingWire stated in April 2016, "it appears that, despite the initial hiccups and headaches, lenders now have this whole TRID thing figured out, as the time to close a loan fell to a 12-month low in March."[88]

MBA's mortgage credit availability index is at its highest level since June 2011, when it began tracking data.[89] The Urban Institute similarly finds that mortgage credit is more available today than it was before the integrated disclosures became mandatory.[90] "Mortgage credit availability in the GSE channel—Fannie Mae and Freddie Mac—has been at the highest level since its low

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https://www.nclc.org/images/pdf/foreclosure_mortgage/predatory_mortgage_lending/comments-to-cfpb-tila-respa-integration.pdf.

[83] Kleinman Commc'n Grp., Know Before You Owe: Quantitative Study of the Current and Integrated TILA-RESPA Disclosures (Nov. 20, 2013), available at www.consumerfinance.gov; 77 Fed. Reg. 51116 (Aug 23, 2012).

[84] *See generally* CFPB Know Before You Owe website, available at https://www.consumerfinance.gov/know-before-you-owe/.

[85] 78 Fed. Reg. 80,225 (Dec. 31, 2013).

[86] *Id.*

[87] *Id*.

[88] https://www.housingwire.com/articles/36851-is-trid-hysteria-over-time-to-close-drops-to-12-month-low.

[89] Index hit 180.6 in May 2018 https://www.mba.org/news-research-and-resources/research-and-economics/single-family-research/mortgage-credit-availability-index; historical chart: https://www.housingwire.com/articles/40919-mba-mortgage-credit-loosens-as-conventional-programs-become-more-available

[90] https://www.urban.org/policy-centers/housing-finance-policy-center/projects/housing-credit-availability-index

in 2011."[91] Closing costs have declined since 2013,[92] and a survey by the American Land Title Association shows that "a significantly larger portion of homebuyers are actually reviewing their mortgage documents prior to closing than they were before TRID's implementation . . . ."[93]

While there were difficulties during the transition period, defects related to the new disclosures have declined dramatically. In the first quarter of 2016, one financial compliance company reported that "legal/regulatory/compliance" defects had jumped from 25.9% of critical defects before the integrated disclosure rule to 50% of all critical defects.[94] But the most recent data shows that number as having dropped to 9.96%[95]-- even lower than before the integrated disclosures were required.

Small creditors are already exempt from the integrated disclosure rules. Anyone who made five or fewer non-HOEPA[96] mortgages in the previous year is not required to provide the integrated disclosures or any other TILA disclosures.[97] Many transactions secured by manufactured homes are also not subject to the integrated disclosure requirements because they are legally considered personal property.[98] The CFPB has also granted a partial exemption for certain mortgage loans provided through housing assistance loan programs for low- and moderate-income households from the TILA/RESPA integrated disclosure requirements.[99] There is no further need to create exemptions from the integrated disclosure requirements.

Congress's recent enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act on May 24, 2018, is yet another reason why the agency should not reopen the Integrated Disclosure rule.[100] In that Act, Congress amended TILA in several ways but did not amend the statute regarding the TILA/RESPA integrated disclosure.[101] Congress, did, however, express the "sense of Congress" and stated that the CFPB should:

> endeavor to provide clearer, authoritative guidance on—

[91] Id.

[92] Bankrate.com National Survey of Closing Costs 2013-2017.

[93] Ben Lane, HousingWire, TRID works: More homebuyers actually review mortgage documents (May 16, 2016), available at https://www.housingwire.com/articles/37040-trid-works-more-homebuyers-actually-review-mortgage-documents.

[94] ARMCO Releases Inaugural Mortgage QC Industry Trends Report, ARMCO press release (Sept. 6, 2016), available at http://www.armco.us/about-us/news/press-release/ARMCO-Releases-Inaugural-Mortgage-QC-Industry-Trends-Report. The company attributed this increase to the new disclosure requirements, but the legal/regulatory/compliance defect category includes far more than just the disclosures.

[95] ARMCO Q3 2017 ARMCO Mortgage QC Industry Trends, available at https://www.armco.us/knowledge/mortgage-qc-industry-report-2017-q3.

[96] High-cost loans subject to the Home Ownership Equity Protection Act.

[97] *See* National Consumer Law Center, Truth in Lending § 2.3.3 (9th ed. 2015), *updated at* www.nclc.org/library

[98] National Consumer Law Center, Truth in Lending § 5.11.2.1a (9th ed. 2015), *updated at* www.nclc.org/library (integrated disclosures do not apply to "[c]onsumer credit that is secured by personal property that is a dwelling but that is not also secured by real property.").

[99] Reg. Z § 1026.3(h); Official Interpretations § 1026.3(h).

[100] Pub. L. No. 115-174 (2018).

[101] Pub. L. No. 115-174, §§ 101-103, 107, 108, 109, 307.

> (1) the applicability of the Integrated Disclosure Rule to mortgage assumption transactions;
>
> (2) the applicability of the Integrated Disclosure Rule to construction-to-permanent home loans, and the conditions under which those loans can be properly originated; and
>
> (3) the extent to which lenders can rely on model disclosures published by the Bureau of Consumer Financial Protection without liability if recent changes to regulations are not reflected in the sample Integrated Disclosure Rule forms published by the Bureau of Consumer Financial Protection.[102]

Congress took this opportunity to revisit TILA and directed the CFPB to "endeavor" to provide clearer guidance on three specific topics related to the Integrated Disclosure rules. The CFPB should not stray beyond this "sense of Congress" and engage in further rulemaking to amend the Integrated Disclosure rules. Congress could have chosen to amend the statute itself or instruct the CFPB to issue regulations if it had so desired.

If, however, the CFPB decides to re-open the existing Integrated Disclosure rules, we strongly urge the agency to make four changes: 1) move the APR to the first page of both the loan estimate and closing disclosure and make the interest rate less conspicuous; 2) eliminate exceptions to the finance charge definition; 3) eliminate the use of "informational" loan estimates; and 4) prohibit creditors from providing a closing disclosure earlier than four days before the original closing.[103]

4. Loan Originator Compensation Rule

4.1. The Loan Originator Compensation Rule has played a key role in protecting consumers and the mortgage market.

The limits on loan originator compensation contained in the Dodd-Frank Act and in the CFPB's rule are important consumer protections that fundamentally improved the mortgage market and reduced the incentives that mortgage originators had to benefit themselves financially by placing borrowers in more expensive loans.

According to the CFPB, prior to the mortgage crisis, training and qualification standards for loan originators varied widely.[104] Borrowers often paid brokers an upfront fee and were under the impression that the broker would obtain the best possible loan for the borrower. Yet, the borrower was unaware that the lender was paying a commission – or a yield spread premium – to the originator. The premium increased with the interest rate or other loan terms. These deceptive practices grossly inflated the cost of a mortgage, even when borrowers qualified for a better deal.

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[102] Pub. L. No. 115-174, § 109(b)

[103] These concerns are described in more detail in the Comments filed by NCLC and other consumer groups to the Request for Information Regarding the Bureau Rulemaking Processes (Docket No. CFPB-2018-0009).

[104] Final Rule, Loan Originator Compensation Requirements under the Truth in Lending Act, 78 Fed. Reg. 11279, 11280 (Feb. 15, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-02-15/pdf/2013-01503.pdf.

Yield spread premiums caused families to be steered into loans that cost more than was appropriate and that they could not afford over the long run. Leading up to the crisis, yield spread premiums were a major culprit in the number of borrowers of color that were steered into high-priced subprime mortgages.[105] Not only did these borrowers end up paying more, the high-cost terms of the mortgages often ultimately resulted in loss of the home to foreclosure. When a borrower loses a home to foreclosure, society pays the price in the drop in surrounding property values and lost tax revenue.[106]

The CFPB's rule regulates how compensation is paid to a loan originator in most closed-end mortgage transactions. Most importantly, it does not permit a loan originator to be compensated based on the terms of a mortgage loan or a proxy for the terms of the loan (other than compensation based on a fixed percentage of the loan amount). The rule also imposes qualification standards on loan originators. Loan originators must be licensed and registered if required under the SAFE Act or other state or federal law. Furthermore, loan originators who are not required to be licensed must be trained on the state and federal legal requirements that apply to their loan origination activities.

The rule also implements other key provisions of the Dodd-Frank Act, including prohibiting mandatory arbitration clauses in contracts, prohibiting contracts from being interpreted to waive federal statutory causes of action, and prohibiting financing of lump-sum credit insurance premiums or fees.

4.2. The CFPB should not erode the rule.

The Dodd-Frank Act and the CFPB's final rule have made the mortgage marketplace safer and more transparent. The rule has helped eliminate predatory compensation practices and should remain fully intact. Indeed, if the rule had been in place prior to the housing crisis, borrowers in the subprime market would have received fairer and more affordable, sustainable loans. Any attempt to erode the rule would have costly and disastrous consequences for consumers and the overall market.

Furthermore, in implementing the rule, the CFPB carefully balanced industry and consumer concerns. 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), the final rule permits loan originators to reduce their compensation to defray certain unexpected increases in estimated settlement costs. This exception was adopted over the objections of many consumer advocates. Additionally, the final rule generally prohibits loan originator compensation based upon the profitability of a transaction or a pool of transactions. However, over objections

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[105] *See* Debbie Gruenstein Bocian, Keith S. Ernst, and Wei Li, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, Center for Responsible Lending (May 31, 2006), *available at* https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/rr011-Unfair_Lending-0506.pdf.

[106] *See* 2013 Update: The Spillover Effects of Foreclosures, Center for Responsible Lending (Aug. 19, 2014), *available at* https://www.responsiblelending.org/mortgage-lending/research-analysis/2013-crl-research-update-foreclosure-spillover-effects-final-aug-19-docx.pdf; Daniel Hartley, The Impact of Foreclosures on the Housing Market, Federal Reserve Bank of Cleveland (Oct. 27, 2010), *available at* https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/economic-commentary-archives/2010-economic-commentaries/ec-201015-the-impact-of-foreclosures-on-the-housing-market.aspx.

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.

Section 107 of Public Law No. 115-174 establishes an exemption for most manufactured home dealers from the definition of a "mortgage originator," meaning dealers do not have to comply with the loan originator compensation provisions. Although the new law also requires that dealers disclose their affiliation with a lender and not directly negotiate loan terms, this provision significantly weakens consumer protections due to the interrelationship between manufactured home dealers and financers. We urge the CFPB not to weaken these protections any further.

5. Higher-Priced Escrow Rule

5.1. The escrow rule has played a key role in protecting consumers in higher-priced loans.

Escrow accounts protect consumers by ensuring that they have funds for recurring homeownership-related expenses, such as property taxes and insurance premiums. This is especially critical with high-cost and higher-risk loans. Prior to passage of the Dodd-Frank Act, creditors were required to set up and administer escrow accounts for higher-priced mortgage loans for a minimum of one year. The Dodd-Frank Act expanded the applicable time period from one year to five years, and the CFPB's escrow rule implements this requirement. Additionally, the rule clarified that one does not have to escrow insurance payments for homeowners in common interest communities where the governing body is required to purchase master insurance policies.

5.2. The CFPB should not erode the rule.

Both the Dodd-Frank Act and the CFPB's escrow rule took industry concerns into account and exempted certain types of transactions from the escrow requirement. The rule creates an exemption from the escrow requirement for small creditors that operate in rural or underserved areas.[107] The rural-or-underserved test extends 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.

Section 108 of Public Law No. 115-174 creates new exemptions from the escrow requirement for higher-priced mortgage loans. The new Act requires the CFPB to exempt by regulation from this requirement any insured depository institution or credit union with assets of $10 billion or less, that has extended fewer than 1,000 first mortgages on a principal residence, and that meets three additional requirements, including having made at least one mortgage loan in a rural area.

[107] 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.

Unexpected costs and mortgage defaults happen all too often where escrow protections are weakened. Weakening escrow protections is risky for both prospective homebuyers and the general taxpayer. It is also a direct threat to sustainable homeownership. We urge the CFPB to draw the exemption required by the new Act as narrowly as possible to protect homebuyers and taxpayers.

6. Higher-Priced Loan Appraisal Rule

6.1. The appraisal rule has played a key role in protecting consumers and lenders from the perils of inflated mortgage loans.

An accurate appraisal helps to ensure that mortgage loans are properly and accurately collateralized. This protects both lenders, through adequate collateral for their loans, and borrowers, by preventing them from borrowing more than their homes are worth. The lack of adequate regulation in the appraisal market was a significant factor causing the housing market crash.[108] In fact, between 2000-2007, a coalition of appraisal organizations produced a petition, signed by 11,000 appraisers that stated lenders were pressuring them to artificially inflate home prices, and would only give business to appraisers that complied.[109]

As required by the Dodd-Frank Act, the CFPB and five other federal regulatory agencies adopted the Higher-Priced Mortgage Loans (HPML) Appraisal Rule in 2013.[110] Mortgage loans are HPML if they are secured by a borrower's principal dwelling and have interest rates above certain thresholds. Lenders that originate covered loans must abide by important rules, including using a licensed or certified appraiser who certifies that the appraisal complies with the Uniform Standards of Professional Appraisal Practice and the Financial Institutions Reform, Recovery and Enforcement Act; having the appraiser physically visit the property and view the interior and produce a written appraisal report; obtaining an additional appraisal at the originator's own expense if the property's seller acquired the dwelling within the past 180 days and is reselling it for a price that exceeds certain thresholds; providing a disclosure within three business days of application that explains the consumer's appraisal rights; and giving consumers free copies of the appraisal reports at least three days before the transaction consummates.

The agencies exempted from the rule's requirements reverse mortgages, bridge loans for 12 months or less, loans for initial construction of a dwelling (not limited to loans of 12 months or less), and qualified mortgage (QM) loans meeting the CFPB's definition in 12 C.F.R. 1026.43(e).[111]

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[108] Financial Crisis Inquiry Report, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States. Submitted by The Financial Crisis Inquiry Commission Pursuant to Public Law 111-21, January 2011, 17-19.

[109] *Id.* at 18.

[110] *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.

[111] Lenders must assess the borrower's ability to repay for nearly all closed-end residential mortgage loans. One way a lender can follow the ability-to-repay rule is by making a qualified mortgage. All QM loans must have points and fees less than or equal to 3% of the loan amount, no risky features, and a maximum loan term less than or equal to 30 years.

6.2. The CFPB should not erode the rule.

In 2014, the agencies adopted additional exemptions to the rule.[112] These apply to extensions of credit of $25,000 or less, indexed every year for inflation; certain types of refinancing products commonly referred to as streamlined refinances; and certain covered HPMLs secured by manufactured housing. In addition, the agencies broadened the exemption from the appraisal rule for qualified mortgages beyond the CFPB's QM definition to include any transaction that falls under the statutory QM criteria.[113] These expanded exemptions provide evidence that the regulators already have endeavored to accommodate industry demands.

Section 103 of Public Law No. 115-174 amends Title XI of the Financial Institutions, Reform, Recovery and Enforcement Act (FIRREA) and exempts certain mortgages from the requirement that there be an appraisal of the real estate collateral. The new exemption applies to mortgages in a rural area where no appraiser is reasonably available, and where certain other conditions are met. The exclusion does not apply to high-cost loans, and there are limits on the sale of mortgages covered by the exclusion. We urge the CFPB to bear in mind the predatory appraisal practices leading up to the financial crisis, and not take any actions to weaken the appraisal rule beyond the exemptions explicitly required by the Public Law.

7. Home Ownership and Equity Protection Act

7.1. Significance of HOEPA and its expansion by Congress in the Dodd-Frank Act.

The Home Ownership and Equity Protection Act (HOEPA) was enacted in 1994 as an amendment to TILA to address abusive practices in refinancing and home equity mortgage loans with high interest rates or high fees. Loans that meet the Act's high-cost coverage tests are governed by special disclosure requirements and restrictions on loan terms. In addition, specific acts or practices are restricted or banned.[114] Congress also invested the Federal Reserve Board with the specific authority to issue regulations banning additional acts or practices that it finds to be unfair, deceptive, designed to evade the Act's protections, or are abusive lending practices arising in the refinancing context.[115]

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[112] *See* Supplemental Final Rule, Appraisals for Higher-Priced Mortgage Loans, 78 Fed. Reg. 78519 (Dec. 26, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30108.pdf (effective date of Jan. 18, 2014).

[113] For example, this exemption includes transactions that are covered by the CFPB's Ability-to-Repay Rule and are QMs defined under any final rule that the CFPB, HUD, or other federal agencies may adopt under authority at 15 U.S.C. 1639c. In addition, transactions that are not covered by the CFPB's Ability-to-Repay Rule may still be eligible for the exemption if they are insured, guaranteed, or administered by HUD, VA, or USDA and meet the QM criteria under rules issued by the corresponding agency. *See* TILA Higher-Priced Mortgage Loans (HPML) Appraisal Rule, Small Entity Compliance Guide, at 7, *available at* https://files.consumerfinance.gov/f/201401_cfpb_tila-hpml_appraisal-rule-guide.pdf.

[114] 15 U.S.C. § 1639.

[115] 15 U.S.C. § 1639(p) (formerly § 1639(l)).

Starting as early as 2003, "Federal Reserve staff began to 'observe deterioration of credit standards' in the origination of non-traditional mortgages. Yet, the Federal Reserve Board failed to meet its responsibilities under HOEPA, despite persistent calls for action."[116] Signs of a looming foreclosure catastrophe in the subprime mortgage market began to emerge in the beginning of 2007. Well-documented causes include the collapse of the housing bubble fueled by low interest rates, easy credit, negligible regulation, and toxic mortgages.[117] Based on these reports and testimony from extensive hearings, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in part to address "the spectacular failure of the prudential regulators to protect average American homeowners from risky, unaffordable, 'exploding' adjustable rate mortgages, interest only mortgages, and negative amortization mortgages."[118] This Act expanded the coverage of HOEPA to regulate more loans and restricted or banned additional acts or practices, such as balloon payments, modification and deferral fees, prepayment penalties, late fees, acceleration clauses, and the financing of points and fees.[119]

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[116] S. Rep. No. 111-176, at 15 (2010) (Report regarding The Restoring American Financial Stability Act of 2010) (quoting from Banking Committee document, ''Mortgage Market Turmoil: A Chronology of Regulatory Neglect" prepared by the staff of the Banking Committee, March 22, 2007.).

[117] Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, xvi (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf. More specifically, the Commission found: widespread failures in financial regulation and supervision by key federal agencies; failures of corporate governance and heightened risk-taking; excessively leveraged financial institutions and high consumer debt-loads; deterioration of mortgage-lending standards; loosening of due diligence standards applied in the securitization process; the re-packaging and sale of questionable mortgage-backed securities into collateralized debt obligations and the sale of credit default swaps to hedge against the collapse of the securities; failures of the credit rating agencies; and an unprepared government that responded inconsistently to the crisis. *Id.* at xviii-xxvii (summary). See also *FDIC Oversight: **Examining and Evaluating the Role of the Regulator during the Financial Crisis and Today: Hearing before the Subcommittee on Financial Institutions and Consumer Credit** of the House Fin. Servs. Comm.* May 26, 2011, 5-12 (testimony of Sheila C. Bair) (identifying the roots of the financial crisis—excessive reliance on debt and financial leverage, misaligned incentives in financial markets, failures and gaps in financial regulation, and erosion of market discipline due to "too big to fail"), *available at* http://financialservices.house.gov/UploadedFiles/052611bair.pdf (last visited June 14, 2018).

[118] S. Rep. No. 111-176, at 15 (2010) (Report regarding The Restoring American Financial Stability Act of 2010).

[119] 15 U.S.C. § 1602(bb)(1) (general definition of "high-cost" mortgage, accounting for introductory rate, and treatment of mortgage insurance), 2(B) (limits on agency changes to APR trigger) (4)(B) (compensation to mortgage originator counted as point and fee), 4(D)-(F) (insurance premiums, debt cancellation/suspension fees, and prepayment fees and penalties as points and fees), (5) (calculation of points and fees for open-end consumer credit plans); 15 U.S.C. § 1639 (addressing content and timing of disclosures; prepayment penalties; limitations after default; balloon payments; negative amortization; prepaid payments; ability to repay; payments under home improvement contracts; recommended default; late fees; acceleration of debt; financing points and fees; consequence of failure to comply; discretionary authority of the Bureau; evasions and structuring of transactions; modification and deferral fees; payoff statements; pre-loan counseling; and corrections of unintentional violations.

15 U.S.C. § 1602(dd) (treatment of discount points as points and fees).

15 U.S.C. § 1639(c) (changes to prepayment penalties prohibition), (e) (changes to balloon payment prohibition), (j) (prohibition against recommending or encouraging default), (k) (protections related to late fees), (l) (limitation on scope of acceleration clauses), (m) (restriction on financing of points and fees), (r) (prohibitions on evasions, restructuring of transactions, and reciprocal arrangements), (s) (ban on modification and deferral fees), (t) (provision of payoff statements), (u) (disclosures related to and provision of pre-loan counseling), (v) (creditor or assignee corrections and unintentional errors).

The major HOEPA rulemaking initiated by the CFPB addressed these Congressional amendments. The agency proposed to implement these amendments on August 15, 2012, and finalized the changes on January 31, 2013,[120] pursuant to its authority under TILA and the Dodd-Frank Act.[121]

For the most part, the CFPB faithfully followed the statutory language in the Dodd-Frank Act. The agency, however, used its exemption authority[122] to create two exemptions from HOEPA for initial construction loans and for loans originated by a Housing Finance Agency or by the U.S. Department of Agriculture's Rural Development Section 502 Direct Loan program.[123] In addition, the CFPB clarified inconsistencies in the statute and the existing regulations where supported by industry comments.[124]

The importance of HOEPA cannot be overstated. Due to the heightened regulation of loan terms and creditor practices in the high-cost market, the number of high-cost loans has declined. Creditors prefer to originate loans under the triggers to avoid the reputational stigma and liability risks associated with making these loans.[125] The data suggest that higher-risk borrowers who might otherwise have been given HOEPA loans are now receiving mortgage credit that is subject to the separate protections for "higher-priced" loans at a lower cost.[126]

Consumers are protected because they are not subjected to the practices that led to the original enactment of HOEPA--protections that were significantly expanded by the Dodd-Frank Act. Beyond the new prohibitions and expanded coverage, the Dodd-Frank counseling requirement should result in more consumers avoiding high-cost loans when offered by the small number of creditors that currently offer those products.[127]

7.2. Subsequent HOEPA regulatory changes.

The CFPB initiated three rulemaking processes to address a handful of substantive issues following the publication of the final rule implementing Dodd-Frank amendments on January 31, 2013. All of the resulting changes to the regulations and commentary were supported by the lending industry.

First, the CFPB issued a final rule on October 1, 2013, in response to industry requests for guidance regarding the treatment of third party paid charges and creditor-paid charges for

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[120] 77 Fed. Reg. (Aug. 15, 2012) (proposed); 78 Fed. Reg. 6856 (Jan. 31, 2013) (final).

[121] 12 U.S.C. §5481(12), (14); 15 U.S.C. § 1604(a).

[122] This authority is found in 15 U.S.C. § 1639(p).

[123] Reg. Z § 1026.32(a)(2).

[124] Examples include: when amounts must be payable to be included in the definition of points and fees, 78 Fed. Reg. at 6891-92; the operation of the 30- and 60-day periods listed in section 1639(v) in which consumers may select a remedy, 78 Fed. Reg. at 6869-70; or, calculating the total loan amount for purposes of the points and fees trigger by starting with the amount financed, rather than the principal amount of the loan as proposed and then deducting the financed points and fees, 78 Fed. Reg. at 6914-15.

[125] 78 Fed. Reg. at 6858, 6942, 6945.

[126] See also discussion below.

[127] 78 Fed. Reg. at 6943-44 (discussing the size of the HOEPA market).

purposes of the points and fees calculation.[128] Also, the agency extended the 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. This change was supported by trade associations, credit unions, and other industry advocates.[129]

Next, the CFPB announced an interim final rule on October 23, 2013 that fixed a gap in the January 31 regulations regarding when pre-origination counseling must occur for a certain subcategory of mortgage loans, primarily those secured by manufactured homes.[130] The CFPB's Federal Register notice did not mention whether this change originated from concerns raised by the manufactured housing industry, but it was clearly a response to a problem that would hamper lenders making these loans. The rule was issued as an interim final rule prior to the receipt of comments from the public, along with a request for comments.[131]

Finally, another interim final rule implemented a change Congress made in December 2015 that allowed the CFPB to expand the scope of the small rural lender exemptions from various provisions in Regulation Z.[132] Published on March 25, 2016, this change was clearly driven by industry criticism the CFPB received over time that also likely led to the Congressional amendment.[133]

7.3. Future revisions to the HOEPA regulations are unnecessary.

7.3.1. In 2018, Congress amended HOEPA and TILA where it considered necessary; the CFPB should refrain from changing what Congress chose to leave unchanged.

Congress enacted and the President signed the Economic Growth, Regulatory Relief and Consumer Protection Act on May 24, 2018.[134] In this Act, Congress took the opportunity to revisit HOEPA and the Dodd-Frank provisions related to TILA. The CFPB may need to implement the specific Congressional amendments, but it should refrain from amending what Congress chose to leave unchanged.

Relevant to HOEPA loans, the Act amends TILA's timing requirement for the special high-cost mortgage disclosure by providing that where the creditor makes a second offer of a mortgage loan that has a lower APR than the first offer, consummation of that second offer can take place immediately after the disclosures, rather than waiting at least three days.[135] Wisely, the Act also

[128] 78 Fed. Reg. 60,382, 60,408 (Oct. 1, 2013).

[129] 78 Fed. Reg. 60,414.

[130] 78 Fed. Reg. 62,993 (Oct. 23, 2013).

[131] The agency did seek comments to be filed following the publication date of the rule and before its effective date.

[132] 81 Fed. Reg. 16,074 (Mar. 25, 2016).

[133] 80 Fed. Reg. 7770, 7774 (Feb. 11, 2015) (Amendments Relating to Small Creditors and Rural or Underserved Areas Under the Truth in Lending Act (Regulation Z). The Bureau discussed comments from industry prior to this rulemaking and noted that the consumer comments did not support amendments proposed. *Id*. at 7778-81.

[134] Pub. L. No. 115-174 (2018).

[135] Pub. L. No. 115-174, § 109.

excludes HOEPA loans from a new exemption from appraisal requirements for mortgages in a rural area where no appraiser is available, and certain other conditions are met.[136]

Beyond these modifications, Congress enacted only a few changes to the Dodd-Frank Act that are quite limited in scope, underscoring its intent to retain the numerous protections it considered essential to protect consumers and the nation from the consequences of reckless lending practices.[137]

7.3.2. The Dodd-Frank HOEPA amendments have no restricted credit.

The data that is available shows that neither HOEPA itself nor the Dodd-Frank amendments to HOEPA have restricted access to credit by the consumers that HOEPA is intended to protect. Instead, those provisions have resulted in beneficial changes to the mortgage market, replacing the highest-cost loans to which HOEPA applies with above-prime but considerably less expensive loans that the CFPB's regulations categorize as "higher cost."

Well before the mortgage crisis, loans with such high APRs or such high points and fees that they were subject to HOEPA had declined from the peak of 35,980 loans in 2005 (a 53% increase from 2004)[138] to 11,269 in 2007.[139] Since the onset of the foreclosure crisis in 2009, HOEPA loan originations reached their lowest point in 2015 (1,194) but rose to 3,149 following the date in 2014 when the Dodd-Frank Act expanded coverage to include purchase loans. This change does not appear to have restricted credit to consumers.

Attorneys working with homeowners shortly after HOEPA was originally passed noted that loans that formerly had been above the HOEPA thresholds were replaced with loans clearly designed to fall below the triggers. The peak years of this "subprime" market occurred in 2004-2006.[140] When the mortgage meltdown hit, the dollar volume of subprime originations plummeted, as was true for prime mortgages.[141] In 2009, the Federal Reserve Board issued

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[136] Pub. L. No. 115-174, § 103(d).

[137] Specifically, Congress passed only targeted changes to the broader set of TILA protections. For example, it created a new safe harbor from the general ability-to-repay standards for certain mortgages held in portfolio by banks with less than $10 billion in assets. Pub. L. No. 115-174, § 101. It exempted manufactured housing retailers and their employees from consumer protections applicable to loan originators. § 107. The Act created exemptions from the escrow provisions for higher-priced mortgage loans by requiring the CFPB to exempt any insured depository institutions or credit union with assets of $10 billion or less, that has extended fewer than 1,000 first mortgages on a principle residence, and that meets three additional requirements, including having made at least one mortgage loan in a rural area. § 108. Finally, it exempts mortgages from appraisal requirements made in a rural area where no appraiser is available and certain other conditions are met. § 103.

[138] Federal Reserve Board Bulletin, *Higher-Priced Home Lending and the 2005 HMDA Data* A132-133, A 147 (2006) (Table 4) (total reported mortgage loans originated: 15,611,711), *available at* www.federalreserve.gov/publications/bulletin.htm. The 2006 HMDA data included 15,172 HOEPA loans out of 13,969,965. Federal Reserve Board Bulletin, *The 2006 HMDA Data* A132-133, A 147 (Dec. 2007) (Table 4), *available at* www.federalreserve.gov/publications/bulletin.htm. Note that lenders were not required to report HOEPA loans as a separate category until 2004.

[139] See Chart 1 at the end of this section.

[140] The dollar volume of subprime loans during this period was, in billions: 2004—$401.46; 2005--$507.65; and. 2006--$483.05. Mortgage Finance Publications, The 2008 Mortgage Market Statistical Annual, Vol. I, at 3 (2008).

[141] Subprime dollar volume dropped from $23 billion in 2008 to $4 billion in 2009 and remained at that level through 2014. Total origination volume dropped from $3.945 trillion in 2003 (the high) to $1.24 trillion in 2014. Mortgage Finance Publications, The 2015 Mortgage Market Statistical Annual, at 12 (2015).

regulations that layered lighter regulation on "higher-priced" mortgage loans than it did on HOEPA loans.[142] These rules govern much of the former "subprime" market. The number of higher-priced loans were dropping before this effective date, not surprising since the foreclosure crisis began in 2007 and was still virulent by 2010. Nonetheless, the number of higher-priced originations rose from the low of 221,613 in 2010 to 465,204 in 2017.[143] This data suggests that mortgage credit remains available both for prime and non-prime, without the need to resort to the highest-priced loans subject to HOEPA.

Loans to purchase, refinance, or improve manufactured homes require more explanation to understand the HMDA data regarding this segment of the market. The reliance on manufactured housing as primary residences increased significantly from 1991 to 1998.[144] Indeed, manufactured housing shipments as a percentage of all new site-built homes sold peaked in 1995 at 33.8%. The manufactured housing bubble burst following 1995, several years before the broader mortgage market meltdown, and has yet to return to the pre-1995 levels. Since 2007, for example, this percentage has ranged between 11% and 14.4%.[145] The causes of both the meltdown in the manufactured housing market and the later meltdown of the entire mortgage market included similar risky lending practices.[146]

By 2000, loan defaults and repossessions increased dramatically and inventory at dealerships stagnated.[147] The flood of repossessed homes that occurred between 1999 and 2002 accounted, at least in part, for the decreased sales and sale prices.[148] Many dealers went out of business. Secondary market players, including Fannie Mae and Freddie Mac, incurred huge losses and have been reluctant to re-enter this market.[149] As of 2014, most manufactured housing loans

[142] These rules were effective for most provisions on October 9, 2009 The escrow provisions did not take effect until April 1, 2010 for all higher-priced loans other than for manufactured home loan. The escrow rule was effective on October 1, 2010 for manufactured home loans.

[143] See Chart 2 at the end of this section.

[144] Ann. M. Burkhart, *Bringing Manufactured Housing into the Real Estate Financing System*, 37 Pepp. L. Rev. 427, 437 (2010).

[145] *Id*. at 437 (providing data up to 2008); U.S. Census Bureau, U.S. Shipments of New Manufactured Homes 2015-2018, *available*

at www.census.gov/data/tables/time-series/econ/mhs/latest-data.html; U.S. Census Bureau, Single-Family Site-Built Homes Sold By Region, *available at* www.census.gov/construction/nrs/historical_data/index.html (including data from 1963-2017).

[146] Ann. M. Burkhart, *Bringing Manufactured Housing into the Real Estate Financing System*, 37 Pepp. L. Rev. 427, 437-439 (2010) (describing these practices and the resulting decline in capital once sales began to stagnate and lenders saturated the market).

[147] *See also* Consumer Fin. Prot. Bureau, Manufactured-housing consumer finance in the United States 6-7 (Sept. 2014), *available at* files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf ("Poor manufactured-home loan quality drove high defaults. For example, in the year 2000 alone, more than 75,000 consumers had their manufactured homes repossessed, about 3.5 times the typical number during the 1990s. Between the beginning of 1999 and the end of 2002, repossessed inventory grew more than fourfold to $1.3 billion.").

[148] Ann. M. Burkhart, *Bringing Manufactured Housing into the Real Estate Financing System*, 37 Pepp. L. Rev. 427, 440 (2010).

[149] *Id*. at 441.

were not sold to the secondary market and were held in portfolio.[150] "Today, more than a decade after this collapse, production and sales remain at depressed levels, and the secondary market is extremely limited."[151]

Without a robust secondary market and in light of the slow recovery of this market, it is not surprising that manufactured home loans dipped from 2007 (214,030) to 2011 (93,091). Since the passage of the Dodd-Frank Act, the market has risen, with some fits and starts to 129,427 in 2017.[152] The higher-priced segment of this market exhibits a similar trend and accounts for a large percentage of the entire manufactured housing finance market.[153] Manufactured home HOEPA loans remain minuscule at 821 in 2017, compared with 71,423 higher-priced loans.[154]

This evidence shows that both the HOEPA and higher-priced mortgage regulations are doing their job. Consumers with credit issues are not plagued by the most expensive mortgage loans containing onerous terms. They can, however, access the less expensive higher-priced market and obtain loans with slightly higher interest rates than conventional loans and can rely on the protections contained in applicable ability-to-repay, escrow, and appraisal rules, as well as those protections governing the broader closed-end mortgage market. These developments are welcome in light of the increase in originations of more expensive mortgage loans.

In addition, since at least 2014, non-bank lenders and riskier mortgage loans have begun to return to the market. For example, non-bank mortgage lenders represented almost half of all mortgage originations in 2016, up from twenty percent in 2007, and made almost half of all loans sold to Fannie Mae and Freddie Mac.[155] Meanwhile, these lenders accounted for seventy-five percent of all FHA and VA insured loans in 2016.[156] These trends are not surprising since FHA, VA, RHS loans and loans sold to Fannie Mae and Freddie Mac can more easily meet the safe harbor protection for qualified mortgages, even if they are higher-priced loans.[157]

Some nonbank mortgage lenders also make loans that do not meet the strict qualified mortgage underwriting standards set forth in the Dodd-Frank Act.[158] Wall Street investors, such as private

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[150] Consumer Fin. Prot. Bureau, Manufactured-housing consumer finance in the United States 37 (Sept. 2014), *available at* files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf.

[151] *Id*. at 6-7.

[152] See Chart 3 at the end of this section.

[153] Id.

[154] Compare Chart 1 with Chart 3, below.

[155] You Suk Kim, et al., *Liquidity crisis in the mortgage market* 3 (Brookings Paper on Economic Activity 2018), *available at* www.brookings.edu/project/brookings-papers-on-economic-activity.

[156] *Id*. at 3-4.

[157] 15 U.S.C. § 1639c(b)(3)(B)(ii); Reg. Z § 1026.43(e)(4)(ii)(1), (iii).

[158] Brad Finkelstein, *Carrington to start offering subprime mortgages*, Nat'l Mortgage New (Apr. 3, 2018), www.nationalmortgagenews.com (describing Carrington Mortgage Services' decision to enter the subprime market; its subprime program is aimed at borrowers with credit scores as low as 500; Carrington is a servicer and a large FHA and VA lender); Alexis Leondis & Jody Shenn, *Western Asset Bespoke Mortgages Feeding Non-Agency Demand*, Bloomberg (June 9, 2014), www.bloomberg.com (identifying Caliber Home Loans, Inc. as one such lender). *Cf.* Rachel Witkowski, *Underwriting Standards Loosened to Precrisis Levels, OCC Warns*, Am. Banker, Dec. 9, 2015, *available at* www.americanbanker.com (noting OCC concerns about more lax underwriting standards in the indirect consumer loan (bank loans to finance the purchase of goods) and credit card contexts).

equity firms, hedge funds, and mutual fund companies, are buying subprime, Alt-A, and interest-only loans and placing those loans into private funds that are sold to institutional investors and wealthy clients, thus creating a demand for these products.[159] Several lenders reportedly are now offering higher loan-to-value loans and low-credit score programs to target borrowers who have been unable to purchase a home.[160] Other products, such as equity purchase contracts,[161] also are appearing.

7.4 The CFPB should not re-open the HOEPA rules.

As shown above and in the Comments filed by NCLC and other consumer groups to the Request for Information Regarding the Bureau Rulemaking Processes (Docket No. CFPB-2018-0009), the CFPB faithfully followed the statutory language amending HOEPA in the Dodd-Frank Act during the original rulemaking in 2012-13. As a rule, the CFPB adopted consumer comments only if the industry expressed similar concerns or the industry was silent. In the subsequent rulemakings addressing the HOEPA regulations, the agency implemented clarifications, provided guidance, or filled gaps that industry requested. In the most recent rulemaking, the industry wanted and got an easy-to-meet definition of rural lender for purposes of expanding access to exemptions from certain consumer protections despite consumer objections. Finally, Congress just amended HOEPA in May of this year in a very limited way. No further regulatory action is necessary other than to possibly address these limited changes.

If the CFPB decides to re-open the existing HOEPA rules, we strongly urge the agency to end the disparity between protections for open-end and closed-end mortgagors that have arisen because Congress extended the HOEPA coverage to include home equity lines of credit (HELOC). Congress did not, however, address the question of whether the HELOC APR should include finance charges, as does the closed-end mortgage loan APR trigger. 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. Creating an apples-to-apples comparison between the cost of HELOCs and closed-end mortgage loans would further the expressed purpose of TILA…" to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[162] The existing gap encourages 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. Thus, while the addition of

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[159] *See, e.g.*, Kirsten Grind, *Crisis-Era Mortgage Attempts a Comeback*, Wall St. J., Feb. 1, 2016 (discussing investor appetite for Alt A low-documentation loans); Arleen Jacobius, *Firms Resurrect Non-Agency RMBS Market*, Pensions & Investments, Sept. 19, 2016, *available at* www.pionline.com; Alexis Leondis & Jody Shenn, *Western Asset Bespoke Mortgages Feeding Non-Agency Demand*, Bloomberg, June 9, 2014, www.bloomberg.com (discussing investor appetite for interest-only loans with higher debt-to-income ratios).

[160] Aly J. Yale, *Borrower FICO Scores Hit 8-year Low*, MReports (May 25, 2017), *available at* www.themreport.com/daily-dose/05-25-2017/borrower-fico-scores-hit-8-year-low-fico-scores-lowest-non-bank-lenders (these lenders include Royal Pacific Funding, Opes Advisors, Sierra Pacific, Sun West, Flagstar Bank, Ditech Financial, and Castle Mortgage).

[161] Kevin Wack, *Startup Offers to Buy Home Equity, Instead of Lending Against It*, American Banker (Sept. 13, 2016) (describing the downside for homeowners).

[162] 15 U.S.C. § 1602(a).

open-end credit to HOEPA's purview was a constructive change, parity in APR treatment should be addressed.

Chart 1: Origination of HOEPA loans 2007-2017 (number of loans) (source: HMDA)[163]

YEAR	ALL HOEPA LOANS (other than manufactured housing loans)	MANUFACTURED HOME HOEPA LOANS	TOTAL
2017	2,328 (1,235) [164]	821 (273)	3,149
2016	1,584 (653)	253 (100)	1,837
2015	991 (616)	203 (104)	1,194
2014	921 (674)	306 (165)	1,227
2013	1,254[165]	557	1,811
2012	1,385	729	2,114
2011	1,546	791	2,337
2010	2,260	1,041	3,301
2009	4,337	1,985	6,322
2008	6,119	2,264	8,383
2007	9,275	1,994	11,269

[163] This chart reflects HMDA data available at the CBFP's website at www.consumerfinance.gov/data-research/hmda/explore. This search tool provides data from 2007 through 2017. The results are derived from applying the following filters for each of the years 2007 to and including 2017: year, all originated mortgages, property type—1 to 4 family but not including manufactured housing (middle column) or only manufactured home loans (right column); owner-occupied as principal dwelling; loan purpose—purchase (2014-2017 only), home improvement, refinancing (2007-2013); loan type—conventional, FHA, VA, FSA/RHS; lien status—first and subordinate; HOEPA—yes.

[164] The number in parentheses reflects the number of non-purchase loans included in the total. Note: HOEPA did not cover purchase loans before 2014.

[165] These numbers represent non-purchase loans as HOEPA did not cover purchase loans before 2014.

Chart 2: Origination of higher-priced mortgage loans 2007-2017 (number of loans) (source: HMDA) [166]

YEAR	ALL HIGHER-PRICED MORTGAGE LOANS (including manufactured home loans)
2017	465,204
2016	424,739
2015	395,488
2014	461,113
2013	350,821
2012	244,421
2011	231,865
2010	221,613
2009	443,610
2008	731,009
2007	1,678,071

[166] This chart reflects HMDA data available at the CFPB's website at www.consumerfinance.gov/data-research/hmda/explore. This search tool provides data from 2007 through 2017. The results are derived from applying the following filters for each of the years 2007 to and including 2017: year, property type—1 to 4 family including manufactured housing; owner-occupied as principal dwelling; loan purpose—purchase, home improvement, refinancing; loan type—conventional, FHA, VA, FSA/RHS; lien status—first and subordinate; HPML—yes.

Chart 3: Origination of higher-priced and all prime[167] manufactured home loans 2007-2017 (number of loans) (source: HMDA) [168]

YEAR	ALL HIGHER-PRICED MANUFACTURED HOME LOANS	ALL MANUFACTURED HOME LOANS
2017	71,423	129,427
2016	64,528	120,002
2015	60,987	111,915
2014	56,161	101,933
2013	50,209	114,516
2012	51,257	104,716
2011	46,353	93,091
2010	51,474	102,347
2009	61,219	128,148
2008	94,948	171,647
2007	105,099	214,030

[167] "Prime" refers to all mortgage loans, excluding higher-priced or high-cost mortgage loans.

[168] This chart reflects HMDA data available at the CFPB's website at www.consumerfinance.gov/data-research/hmda/explore. This search tool provides data from 2007 through 2017. The results are derived from applying the following filters for each of the years 2007 to and including 2017: year, all originated mortgage loans; property type—manufactured housing; owner-occupied as principal dwelling; loan purpose—purchase, home improvement, refinancing; loan type—conventional, FHA, VA, FSA/RHS; lien status—first and subordinate; HPML—yes (middle column); neither HPML or HOEPA checked (right column).