

June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information Regarding the Bureau's Inherited Regulations and Rulemaking Authorities -- **Regulation Z (TILA), X (RESPA) and FTC mortgage rules**

Dear Acting Director Mulvaney,

The undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Request for Information ("RFI") issued by the Consumer Financial Protection Bureau ("CFPB") regarding its inherited regulations and rulemaking authorities.

These comments focus on the aspects of the following regulations that the CFPB has inherited and has not changed: Regulation Z (Truth in Lending Act), Regulation X (Real Estate Settlement Procedures Act), Regulation N (FTC rules on mortgage acts and practices), and Regulation O (FTC rules on mortgage assistance relief services). Many of our organizations have also joined comments on other inherited regulations, including comments governing electronic payments, credit reporting, fair lending, Property Assessed Clean Energy (PACE) loans, and other topics.

In general, we support these regulations and urge the CFPB not to weaken them. While there can always be improvements to any rules, these rules are working well overall. In light of the other work presently before the CFPB, updating these regulations is not a current priority and we urge the CFPB to spend its limited resources on other topics at this time.

If the CFPB chooses to revisit the open-end credit provisions of Regulation Z, we urge it to ban deferred interest credit cards, close loopholes that omit fees from the finance charge and APR, and protect consumers from unauthorized use of convenience checks. If it chooses to reopen Regulation Z's closed-end credit provisions, we urge it to implement an all-in finance charge definition, prevent evasion of disclosure requirements by improperly treating extensions of credit as open-end, and improve protections for reverse mortgages.

If the CFPB opens the settlement services provisions of Regulation X for amendments, it should clarify the application to manufactured homes and should tighten the restrictions on affiliated business agreements. If it opens Regulation X's servicing provisions, it should: 1) remove an exception from the requirement to give the borrower an annual escrow statement; 2) ensure that the error resolution process protects borrowers from foreclosure when the error relates to the alleged default or grounds for foreclosure; 3) require the transfer of servicing notice to inform borrowers of their dispute rights and give them more information about the status of the account; and 4) repeal exemptions for home equity lines of credit and reverse mortgages.

1. Objections to the CFPB’s Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB’s numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

The CFPB has ignored our request for an extension of time to respond to this particularly burdensome RFI and the one on adopted regulations. These two RFIs require us to comment on dozens of regulations on many different subjects running many hundreds if not thousands of pages in length. Doing so less than a week after responding to the RFI on the CFPB’s adopted regulations, many of which are of great importance to consumers, has been especially difficult.

These problems have prevented us from responding in more detail, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take the limited number of comments from the public as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.

2. Regulation Z (Truth in Lending Act): Inherited Rules

2.1. Credit Cards

2.1.1. Introduction: The Credit CARD Act and its implementing regulations demonstrate that consumer protection benefits everyone.

The Credit CARD Act and its implementing provisions in Regulation Z have resulted in enormous benefits for consumers. The Act and its corresponding Regulation Z provisions are a compelling example of how strong consumer protections benefit ordinary Americans and industry alike. After the passage of the Credit CARD Act in 2009 and the adoption of implementing Regulation Z provisions in 2010, consumers saw numerous benefits from the Act: interest rate hikes were dramatically curtailed, late fees were substantially reduced, and over-the-limit fees virtually disappeared.¹ Consumers saved \$16 billion in late and over-the-limit fees from 2011 to 2014.² They also saved \$2.1 billion in interest rate reductions in the first few years after the Act’s passage.³

¹ Jennifer Faulkner, Office of the Comptroller of Currency, *The CARD Act—One Year Later: Impact on Pricing and Fees* (Feb. 22, 2011).

² See Consumer Financial Protection Bureau, *Consumer Credit Card Market Report 10* (Dec. 3, 2015), available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf (hereinafter “CFPB 2015 CARD Act Report”).

³ Consumer Fin. Prot. Bureau, *CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market 72* (Oct. 1, 2013), available at https://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf (hereinafter “CFPB 2013 CARD Act Report”).

The CFPB has estimated that, for cardholders who carry a balance, the total cost of credit fell 150 basis points from the end of 2008 to the end of 2012, due in large part to the reductions in fees caused by the Credit CARD Act.⁴ By 2015, the total cost of credit card had fallen another 40 basis points.⁵ The Act has resulted in the APR becoming a more useful indicator of what consumers can expect to pay to own and use a credit card.⁶ In general, the Act created a market “in which the costs incurred by consumers are driven more by APR and annual fees and less by back-end penalty fees and APR repricing.”⁷

Prior to the Credit CARD Act, the card industry defended its questionable practices by arguing that lack of regulation benefited consumers because it resulted in fewer annual fees, lower interest rates, and rich reward programs.⁸ The industry predicted that re-regulating rates and fees would raise costs and limit credit for the majority of consumers in order to help financially distressed borrowers.⁹

These arguments proved to be hollow. After the passage of the Credit CARD Act, lenders raised annual fees by only a modest amount,¹⁰ and credit card solicitations were no less favorable¹¹ or abundant than before the Credit CARD Act.¹² In general, the Credit CARD Act did not result in any reduction in access to credit.¹³ Americans had access to nearly \$3.5 trillion in credit card lines as of early 2015, a 10% increase since 2012.¹⁴ Both the interest rates disclosed to consumers and the rates they actually paid dropped after the effective date of the Credit CARD Act.¹⁵

⁴ *Id.* at 33.

⁵ CFPB 2015 CARD Act Report at 77.

⁶ CFPB 2013 CARD Act Report at 70.

⁷ *Id.* at 37.

⁸ Jonathan Orszag & Susan Manning, COMPASS, An Economic Assessment of Regulating Credit Card Fees and Interest Rates 14–15 (Sept. 2007). This report was commissioned by the American Bankers Association.

⁹ *Id.* at 5.

¹⁰ CFPB 2013 CARD Act Report at 23 (annual fees increased by less than \$2 and increased in incidence by a modest 0.75%); Nick Bourke & Ardie Hollifield, Pew Health Group, Two Steps Forward: After the Credit CARD Act, Credit Cards are Safer and More Transparent—But Challenges Remain (July 2010), available at www.pewtrusts.org. See also CFPB 2015 CARD Act Report at 70 (percentage of accounts assessed an annual fee was below pre-CARD Act levels in 2015).

¹¹ Andrea McKenna, Increased Competition, Less Fallout from CARD Act Than Expected, Mintel Says, PaymentsSource.com (Aug. 4, 2010), available at www.paymentsource.com.

¹² Josh Frank, Center for Responsible Lending, Credit Card Clarity: CARD Act Reform Works (Feb. 16, 2011), available at www.responsiblelending.org.

¹³ CFPB 2015 CARD Act Report at 10 (account volume has grown every year since implementation of the Credit CARD Act). See also Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, Regulating Consumer Financial Products: Evidence from Credit Cards, 130 *The Quarterly Journal of Economics* 1, 15 (2015) (“we estimate that the CARD Act had a precise zero effect on credit limits and ADB [average daily balances]. We also estimate a zero effect on the number of new accounts.”).

¹⁴ CFPB 2015 CARD Act Report at 108. Even deep subprime consumers had a 4% increase in their available credit since 2012. *Id.*

¹⁵ Josh Frank, Center for Responsible Lending, Credit Card Clarity: CARD Act Reform Works (Feb. 16, 2011), available at www.responsiblelending.org. See also Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, Regulating Consumer Financial Products: Evidence from Credit Cards, 130 *The Quarterly Journal of Economics* 1, 15 (2015) (“we find no evidence of an anticipatory increase in interest charges prior to the CARD Act, and no evidence of a sharp or gradual increase following the CARD Act implementation periods”).

The Credit CARD Act also proved popular with American consumers. The majority of consumers familiar with the Act have reported that it has been good for them, and 60% of consumers in general believe that their monthly statements have been clearer and easier to read.¹⁶ And last but not least, the benefits of the Act have *not* resulted a corresponding huge hit to the revenues of credit card companies, which remained highly profitable after the Credit CARD Act.¹⁷

Moreover, informal conversations with industry players reflect a near universal acknowledgement that the Credit CARD Act and implementing regulations have been positive for the credit card industry. The rules create a level playing field, rewarding responsible companies and stopping a race to the bottom with back-end fees. Companies receive fewer complaints and have a better overall relationship with their customers. While problems remain in the credit card industry, the Credit CARD Act and regulations have had an overwhelmingly positive impact on both consumers and the industry.

2.1.2. The CFPB should ban deferred interest promotions.

Deferred interest promotions are one of the biggest credit card abuses that remains after the enactment of the Credit CARD Act. We urge the CFPB, as we have many times before, to ban this deceptive and costly practice. Deferred interest promotions entice consumers with promises of “no interest for 12 months,” but there is a significant condition that can trap unwary consumers. Unlike true “0% APR” deals, interest is actually accruing during the promotional period for deferred interest products, and will be waived only if the consumer completely repays the entire balance by the end of the promotional period. Consumers who fail to do so will be assessed a large lump sum interest charge going back to the date that they bought the item, even on amounts that have been paid off. For example, if a consumer buys a \$2,500 stereo system on June 1, 2018 using a one-year 24% deferred interest plan, then pays off all but \$100 by June 1, 2019, the lender will add to the next bill nearly \$400 in interest on the entire \$2,500 dating back one year.

Deferred interest plans make money by taking advantage of consumers who are unaware of how the plans work or who meet with an unexpected difficulty in repaying the balance in full. They are inherently deceptive, and many consumers have trouble understanding their complex structure. Other consumers miscalculate the end of the promotional period, or expect to be able to pay the balance in full but for a variety of reasons find that they cannot. In any of these circumstances, the consumer is hit with an enormous, retroactive application of interest that causes significant injury, is unexpected and unavoidable, and is not outweighed by the creditors’ desire to profit from these tricks and traps.

Indeed, the only reason that creditors make deferred interest offers instead of a true 0% promotional rate offer (without retroactively imposed interest) is to trap a certain percentage of consumers. At one point, the Federal Reserve Board actually banned these plans, noting

¹⁶ CFPB 2013 CARD Act Report at 21–28; Synovate, Consumer Perceptions and Reactions to the CARD Act (Feb. 22, 2011), available at www.consumerfinance.gov.

¹⁷ CFPB 2015 CARD Act Report at 19 (“the credit card business continues to be the most profitable bank lending business, with returns more than four times higher than the average return on assets”).

“disclosure may not provide an effective means for consumers to avoid the harm caused by these plans.”¹⁸

In both its 2015 and 2013 Credit CARD Act studies, the CFPB conducted extensive analyses of deferred interest promotions, documenting the host of problems presented by these products. The CFPB found that deferred interest plans were especially harmful to vulnerable subprime consumers, 40% of whom were unable to pay off their balances in time to avoid deferred interest, and thus were socked with a lump sum retroactive charge.¹⁹ NCLC has also issued its own report on deferred interest promotions, which describes their numerous problems,²⁰ including:

- **Inherent deception.** Many consumers do not understand the complicated and confusing nature of these promotions. The CFPB has observed that “there are significant indications that the lack of transparency in this market contributes to avoidable consumer costs.”²¹
- **Minimum payments don’t pay off the balance.** Consumers who make only the minimum payment – often thinking they are doing what they need to do to avoid interest – will inevitably be hit with retroactively assessed interest.
- **“Life Happens.”** Even consumers who understand deferred interest promotions are at risk. They may expect to be able to pay off the balance by the end of the promotional period, but a job loss or other financial emergency could intervene – imposing a huge lump sum of retroactive interest when families can least afford it.
- **High APRs.** Deferred interest credit cards typically carry very high interest rates, with an average of 24% and as high as 29.99%, compared to a typical APR of 14% for mainstream credit cards.
- **Impact on the most vulnerable.** The CFPB found that more than 40% of subprime consumers were unable to pay off their balances in time to avoid deferred interest, and thus were socked with a lump sum retroactive charge. In contrast, nearly 90% of superprime consumers avoid getting hit with deferred interest. Thus, better-off consumers get the benefit of interest-free financing, while credit card lenders profit disproportionately from financially constrained consumers.
- **Difficulty avoiding retroactive interest when consumers make other purchases.** If a consumer uses the card to make another purchase, problems can arise with applying the consumer’s payments to the different balances. Payment allocation is extremely complex and fraught with pitfalls, and it can be nearly impossible to pay off a deferred interest balance while minimizing interest charges.

¹⁸ 74 Fed. Reg. 5498, 5528 (Jan. 9, 2009).

¹⁹ CFPB 2015 CARD Act Report at 167.

²⁰ Chi Chi Wu, National Consumer Law Center, Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards, Dec. 2015, at <https://www.nclc.org/issues/deceptive-bargain.html>.

²¹ CFPB 2015 CARD Act Report at 10.

Deferred interest promotions are widespread. According to a survey by WalletHub, about one-third (23 out of 75) of the largest retailers offered deferred interest plans.²² Yet even members of industry have recognized the problems with deferred interest products. In March 2017, Walmart announced it was ending its use of deferred interest plans, and instead offering truly 0% promotional APRs. Walmart stated it was doing so in order to “save our customers money and help remove unnecessary hassle or burden.”²³ Credit card issuers have also stayed out of the deferred interest business. For example, Capital One sold off the Best Buy card portfolio that it acquired from HSBC and does not offer deferred interest cards.²⁴

It is well past time for the CFPB to take action on deferred interest. There is plenty of evidence that deferred interest is unfair, deceptive, and abusive. Furthermore, the CFPB has clear authority under the Truth in Lending Act to eliminate the Regulation Z exceptions that permit deferred interest. Specifically, the CFPB should eliminate the exceptions for deferred interest plans in the Official Commentary §§ 1026.55(b)(1)-3.i and 1026.54(a)(1)-2.i.

These exceptions were established by the Federal Reserve Board in its regulations implementing the Credit CARD Act. Without these exceptions, deferred interest would violate the Truth in Lending Act itself, specifically the prohibition against double cycle billing in Section 127(j), 15 U.S.C. § 1637(j). This section provides that a finance charge cannot be assessed as a result of the loss of any time period within which the consumer may repay a balance without incurring a finance charge based on any balances from prior billing cycles. This language specifically prohibits deferred retroactive interest plans, which impose a finance charge based on balances from prior billing cycles if the consumer does not repay the entire balance within the specified time period. For further discussion on the regulatory history and legal issues involving deferred interest promotions, see our report *Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards*.²⁵

2.1.3. The CFPB should restore a fee-inclusive APR price tag for credit cards and other forms of open-end credit.

The CFPB has noted in its semi-annual regulatory agenda that it expects to modernize or streamline the open-end credit provisions of TILA. As part of that process, the CFPB should mandate an APR disclosure that includes the impact of fees on the cost of credit.

²² Alina Comoreanu, 2016 Deferred Interest Study: The Retailers with the Sneakiest Financing Offers, Nov. 1, 2016, available at <https://wallethub.com/edu/deferred-interest-study/25707/>.

²³ Daniel Eckert, Walmart, Blog Post - We're Taking a New Approach to Our Credit Card – Here's Why, May 4, 2017, available at <http://blog.walmart.com/business/20170504/were-taking-a-new-approach-to-our-credit-card-heres-why>.

²⁴ See Danielle Douglas, Washington Post, “Capital One sells Best Buy credit card portfolio to Citigroup” (Feb. 19, 2013) (quoting analyst as saying, “From what we’ve heard from Capital One, strategically it seems the two parties had a difference of opinion and felt it was best to terminate the contractual obligation.”), available at https://www.washingtonpost.com/business/economy/capital-one-sells-best-buy-credit-card-portfolio-to-citigroup/2013/02/19/9b4ba18a-7ab6-11e2-a044-676856536b40_story.html?utm_term=.cd9c67aa746f.

²⁵ Chi Chi Wu, National Consumer Law Center, *Deceptive Bargain: The Hidden Time Bomb of Deferred Interest Credit Cards*, Dec. 2015, at <https://www.nclc.org/issues/deceptive-bargain.html>.

Currently, the only APR disclosure required for credit cards and other open-end credit under Regulation Z is an APR consisting solely of periodic interest. 12 C.F.R. § 1026.14(b). This APR does not include the impact of any fees, whether they be finance charges or not, on the cost of credit for a credit card. This is despite the fact that TILA requires disclosure of a fee-inclusive or “effective” APR.²⁶

The requirement to disclose the effective APR was eliminated by the Federal Reserve Board in 2010. Eliminating the effective APR disclosure abandoned a core principle of the Truth in Lending Act. It was contrary to one of the fundamental reasons that Congress enacted TILA, *i.e.*, to create a standard disclosure of the cost of credit that would promote informed shopping. The effective APR was the only disclosure in open-end credit that reflected the price imposed by fees and non-periodic interest finance charges. Its existence and calculation are specifically mandated by TILA for open-end credit. By eliminating it, the FRB contravened the explicit requirements of TILA.

The FRB eliminated the effective APR because its focus group testing found that consumers were confused by it and did not understand it. But if consumers were confused by the effective APR, the proper response would have been to improve the disclosure, not eliminate it.²⁷ The solution should have been to improve the price tag, not tear it off. Indeed, in the October 2013 study, the CFPB developed a measure somewhat similar to the effective APR for its own research purposes, a “Total Cost of Credit.”²⁸ This measure attempts to capture an “all-in cost of credit.” A similar measure could be developed for credit card and other open-end credit disclosures.

For example, the CFPB could require an effective APR for periodic statements that consists of a rolling 12-month average of the calculation in 15 U.S.C. § 1606(a)(2). A rolling average would address the phenomenon of a high effective APR in the month that a fee is imposed, which is what sometimes led to consumer confusion. For an account that has been opened for less than 12 months, this rolling effective APR could be pro-rated.

The CFPB should also require a fee-inclusive APR for applications and solicitations. Restoring the effective APR would make TILA disclosures more meaningful and truthful. Here are examples of deceptive or nonexistent APR disclosures:

- First Premier Bank charges 36% periodic interest and discloses a 36% APR. But a fee-inclusive APR should include the \$95 pre-account opening fee charged by First Premier

²⁶ 15 U.S.C. § 1606.

²⁷ Indeed, it is no wonder that consumers were confused by the effective APR – in its comments to the Board’s 2005 Advanced Notice of Proposed Rulemaking, the Center for Responsible Lending noted the confusion generated by inconsistent terminology around both the rate-only APR (the “corresponding” or “nominal APR” or “corresponding nominal APR”) and the fee-inclusive APR, which could also be labeled with different adjectives, such as “effective APR” or “historic APR” or “actual APR.”

²⁸ Consumer Financial Protection Bureau, CARD Act Report: A review of the impact of the CARD Act on the consumer credit card market, Oct. 1, 2013, at 19, 32-33, *available at* http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

and other fees, which results in a 416% APR as calculated under 15 U.S.C. § 1606(a)(2) based on full use of the \$300 credit line.²⁹

- Elevate does not disclose any APR on its Elastic line of credit, and the sample payment schedule even obscures the number of payments. Its website displays a 10% monthly cash advance fee (or 5% bimonthly), but the full APR with all charges is closer to 100%.³⁰
- Bank payday loans (“deposit advance products”) often disclosed no APR or if they did, calculated a sample one assuming a 30-day repayment period, when in fact most loans were repaid in fewer than 14 days upon the next paycheck deposit. Thus, the sample APR was less than half what it should have been.³¹

Restoring the effective APR would also remove incentives for payday lenders and other high cost lenders to convert their predatory loan products into open-end credit. It would require a more meaningful and truthful APR disclosure for products such as the line of credit offered by CashNetUSA.com. In Utah, CashNetUSA discloses an APR of 299%.³² However, this does not include the 15% “Transaction Fee” imposed each time a borrower obtains a cash advance. Combining the Transaction Fee with the periodic interest translates into an effective APR of 480%.

The CFPB has several options for fee-inclusive APR disclosures in applications and solicitations. It could require disclosure of a “typical APR” that consists of an average of historical effective APRs for a certain time period in a certain credit portfolio. Or it could develop an “Energy Star” type rating that is similarly based on the average of historical effective APRs. The CFPB could also limit the requirement for a “typical APR” to certain categories of credit, such as those that have fee income that is more than a small percentage of the revenue from periodic interest.

2.1.4. The CFPB should protect consumers from unauthorized use of credit card convenience checks.

The CFPB should eliminate the exception for convenience checks from the unauthorized use protections of the Truth in Lending Act. This exception was established by the Federal Reserve Board in 2008 in the Official Commentary § 1026.12(b)-4.

The Board justified this decision based on its belief that “it was unnecessary to extend the unauthorized use protections to convenience checks because convenience check transactions are generally subject to the Uniform Commercial Code (UCC) provisions governing checks, and thus a consumer generally would not have any liability for a forged check ...”³³ However, the UCC permits banks to hold consumers partially liable for unauthorized use under a comparative

²⁹ It would be even higher if the effective APR included the \$75 annual fee, which is currently not considered a finance charge under Regulation Z. If the \$75 were to be included, the effective APR for the month in which the account was opened would be 955%.

³⁰ <https://www.elastic.com/what-it-costs/>.

³¹ As noted in another section of these comments, single payment loans should be treated as closed-end credit, not open-end credit.

³² <https://www.cashnetusa.com/rates-and-terms.html>.

³³ 72 Fed. Reg. 32,948, 32,959 (June 14, 2007).

negligence standard.³⁴ TILA's unauthorized use protections provide far stronger protections for consumers than does the UCC.

Furthermore, the convenience check is merely a mechanism for initiating a credit card transaction, like a telephone or computer. Even though neither a telephone nor a computer is a credit card, purchases made by telephone or Internet are both covered by the unauthorized use protections. It seems anomalous that if a thief uses only the credit card number, without more, the unauthorized use protection applies, but the simple fact that the number is on a check takes the transaction outside this protection.

A complaint received by NCLC demonstrates why convenience checks should be regulated as credit cards under TILA. Ms. X, a victim of domestic violence, fled the marital home on September 9, 2011 and obtained a protective order. Subsequently, her abusive husband intercepted two convenience checks and used them to charge \$7,000 to two of Ms. X's individual credit card accounts. The card issuers, Chase and Bank of America, refused to treat this theft as unauthorized use, despite the fact that Ms. X even had a protective order against Mr. X on the date of the charge showing that Ms. X was not in the marital home at the time.

Unfortunately, Chase and Bank of America were not required to treat this theft as unauthorized use because of the exception for convenience checks. This legal loophole was confusing to even an attorney representing Ms. X; thus, an average consumer would be even less likely to understand that a convenience check is exempted from the unauthorized use protections of TILA. To prevent consumer confusion and ensure uniform protections for all devices accessing a credit card account, the CFPB should eliminate this exception.

2.2. General Regulation Z Requirements for Closed-End Credit

2.2.1. Regulation Z has been amended to address industry concerns and should not be weakened.

The Truth in Lending Act (TILA), under which Regulation Z was promulgated, was enacted in 1968.³⁵ In its current form it includes requirements regarding all forms of consumer credit, unless specifically exempted. This section addresses general Regulation Z requirements regarding closed-end credit. Installment loans and automobile financing are examples of closed-end credit to which these requirements apply. Many also apply to closed-end mortgage credit, but there are some variations for mortgage transactions (for example, in the rules about disclosure of variable rates and about the fees that must be included in the calculation of the finance charge). In addition, as discussed in a later section of these comments, disclosure requirements for most mortgage transactions are different from those for non-mortgage transactions, and a number of additional disclosures that are required for those transactions.

Regulation Z was first adopted in 1969, effective July 1, 1969.³⁶ It was extensively revised in 1981 to simplify it, ease creditor compliance burdens, and conform it to statutory amendments.³⁷

³⁴ U.C.C. § 3-406.

³⁵ Pub. L. No. 90-321, 82 Stat. 146 (May 29, 1968).

³⁶ 34 Fed. Reg. 2002 (Feb. 11, 1969).

TILA and Regulation Z contain several provisions designed to grant creditors numerical leeway when disclosing the most important cost of credit numbers—the APR and the finance charge.³⁸ Moreover, TILA provides for statutory defenses to liability for creditors, including good faith conformity with rulings and official interpretations, use of model forms, bona fide errors, and correction of errors.³⁹ Regulation Z adds a faulty calculation tool defense to this list.⁴⁰

While every regulation can be improved, and we have our own suggestions if the CFPB chooses to revisit Regulation Z’s closed-end provisions, they are working well overall and are a lower priority for revisions than other work before the CFPB. We especially oppose any effort to weaken Regulation Z, add exemptions, or otherwise undercut the protections that it offers.

The TILA provisions that apply generally to closed-end credit focus on disclosure of the credit terms. The rules require that those terms be disclosed to consumers in a uniform, consistent format so that consumers can compare credit terms and shop for credit. The theory behind the disclosure requirements is that by comparing credit terms and shopping for credit, consumers will create market pressure for creditors to offer more attractive terms.⁴¹

In general, a reliance on disclosures alone is a weak approach to protecting consumers. Substantive rules to limit unaffordable credit and to prevent abuses are much more effective. Nonetheless, the TILA disclosure rules do provide an important function and should be strengthened, not weakened.

Prior to the enactment of TILA, consumers had no easy way to compare credit terms or determine how much credit would really cost. Creditors could disclose their interest rates—if they disclosed them at all—in deceptively non-uniform ways. For example, if a lender disclosed an 8% interest rate calculated by the add-on method on a \$1000 one-year loan, it would actually amount to an APR of 14.45%--even if the lender did not add any fixed-charge fees on top of the interest rate.⁴² Regulation Z’s disclosure requirements are essential to prevent a return to this chaotic and opaque market.

Regulation Z’s general disclosure provisions for closed-end credit are not lengthy or complex. In the statute, they appear in only four sections—1631, 1632, 1634, and 1638. In Regulation Z, they appear in sections 1026.4 and 1026.17-1026.22. These rules are not burdensome on creditors. Indeed, the credit markets have been applying the 1981 simplified regime for thirty-seven years.

On the other hand, uniform and consistent disclosure of the cost of credit is essential to consumers. The math behind the numbers is daunting for most consumers and credit terms are

³⁷ 46 Fed. Reg. 20848 (Apr. 7, 1981), *implementing* the Truth in Lending Simplification and Reform Act (Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221).

³⁸ 15 U.S.C. § 1606(c); Reg. Z §§ 1026.18(d), 1026.22(a).

³⁹ 15 U.S.C. §§ 1604(b), 1640(b), (c), (d).

⁴⁰ Reg. Z § 1026.22(a)(2).

⁴¹ 15 U.S.C. § 1602(a) (purposes of TILA).

⁴² *See* National Consumer Law Center, Consumer Credit Regulation § 5.3.2.1 (2d ed. 2015), *updated at* www.nclc.org/library.

not easily understandable. The greater the uniformity of disclosures—not just in the calculation rules but also in language, prominence, and order of presentation—the more likely consumers are to understand them and be able to compare the terms offered by creditors. Carefully crafted requirements are essential to the goal of achieving this uniformity.

Precise rules are also helpful for industry, so that companies know exactly what is required of them and each company that offers consumer credit does not have to draft language, devise disclosure forms, or obtain legal advice to resolve ambiguities. From 1968 until 2011 when the Federal Reserve Board had responsibility for Regulation Z, on many occasions industry representatives on the FRB's Consumer Advisory Committee commented that they prefer as much clarity and specificity as possible to enhance compliance and limit potential liability.

The CFPB should approach the question of revising Regulation Z with caution. Regulation Z's requirements are interdependent, so every change made has the potential of causing a chain of other consequences.

Any revisions to disclosure requirements must also build in systematic consumer testing. The FRB pioneered consumer testing as part of its reworking of the disclosure requirements for open-end credit pursuant to the Credit Card Accountability, Responsibility, and Disclosure Act of 2009,⁴³ and the CFPB put its combined TILA and RESPA mortgage loan disclosures through several rounds of consumer testing before finalizing the rule.⁴⁴ Consumer testing has often revealed widespread and serious misunderstanding of newly-drafted disclosures that regulators thought would be clear.

Finally, any revisions of Regulation Z that would affect auto finance—and most of the closed-end non-mortgage disclosure rules do affect auto finance—should be a joint rulemaking with the Federal Reserve Board (FRB), which retains jurisdiction over Regulation Z as it applies to a major segment of the auto finance market. It would enormously increase the complexity of the disclosure rules, and decrease their usefulness to consumers, if different rules applied to auto finance based on whether the consumer was dealing with an auto finance company or a buy-here-pay-here (BHPH) dealer, both of which are governed by the CFPB version of Regulation Z, as opposed to a non-BHPH auto dealer that is governed by the FRB's version.⁴⁵ So far, the FRB version and the CFPB version of these rules have stayed in sync, and the CFPB should not take any steps that would undermine that coordination.

2.2.2. The CFPB should implement an all-in finance charge definition and fully fee-inclusive APR.

If the CFPB chooses to revisit Regulation Z, we have a number of suggestions for ways it can be improved. We discuss two of those suggestions here. First, if the CFPB reopens the general closed-end credit disclosure requirements, we urge it to implement an all-in finance charge

⁴³ See 74 Fed. Reg. 5244, 5246-5250 (Jan. 29, 2009) (describing the testing methods and other research conducted before and during the rulemaking process).

⁴⁴ See 78 Fed. Reg. 79,730, 79,741-44 (Dec. 31, 2013) (describing the testing methods and other research conducted before and during the rulemaking process).

⁴⁵ 12 U.S.C. § 5519.

definition and a fully fee-inclusive APR. While the closed-end APR disclosure is far better than the one for open-end credit, it nonetheless has loopholes that are exploited by some lenders and that undermine TILA's primary goals of capturing the full cost of credit in the APR that is disclosed to consumers.

To achieve this goal, the APR should include *all* of the costs of credit. Otherwise, it is not an accurate representation of the true cost of credit, and does not allow the consumer to make apples-to-apples comparisons between credit offers. The current rules allow a swiss-cheese approach, that is, some fees are in and some are not.

The failure to mandate an all-in finance charge has been a longstanding concern of Congress and the Federal Reserve Board (FRB) dating back to at least 1995. At that time, Congress directed the FRB to study the issue.⁴⁶ The resulting FRB report suggested further debate. A 1998 joint HUD/FRB report again discussed the pros and cons of an all-in approach and recommended a hybrid methodology—the “required cost of credit test.” Under this test, the finance charge would include the costs the consumer is required to pay to get the credit. This issue lay dormant until 2009. At that time, the FRB published a proposal to replace the current rule with a more inclusive approach based on several significant rationales discussed below. The FRB did not finalize this proposal prior to the transfer of its TILA rulemaking authority to the CFPB.⁴⁷ The CFPB revived this issue in 2012. After receiving comments, it decided in 2013 to postpone further consideration for at least five years and pending further data collection.⁴⁸ It is now five years later.

Allowing creditors to exclude significant components of the cost of credit from the calculation of the APR undermines the goals of the APR disclosure for several reasons, including those articulated by the FRB: 1) excluding certain fees undermines the effectiveness of the APR as a measure of the cost of credit; 2) the numerous exclusions from the finance charge encourage lenders to shift the cost of credit to the excluded fees or hide them in the cash price of goods or services; and 3) complexity of rules increases regulatory burden and litigation risk for lenders.⁴⁹

Areas in which we see particular problems regarding APR disclosures include:

- *Disproportionately large application fees.* For example, Kinecta Federal Credit Union discloses a 15% APR on the payday loans it offers through Nix, but the \$37.95 application fee on a 14-day \$400 loan results in a true APR of over 260%.
- *Credit insurance and other add-on products.* Regulation Z only requires credit insurance to be included in the APR if it is mandatory. But some lenders steer virtually all borrowers into believing that credit insurance and other add-on products are required. In addition, most credit insurance products primarily benefit the creditor, both because the creditor receives substantial commissions and other compensation from selling the product and because, if the borrower makes a claim, the insurance proceeds go to pay off the debt.

⁴⁶ See 78 Fed. Reg. 79,730, 79,774 (Dec. 31, 2013) (describing this history).

⁴⁷ 78 Fed. Reg. at 79,774.

⁴⁸ 78 Fed. Reg. at 79,778-80.

⁴⁹ 78 Fed. Reg. at 79,774.

2.2.3. The CFPB should prevent evasions of TILA disclosure requirements through the open-end credit loophole.

As discussed above under open-end credit, Regulation Z's disclosure rules for open-end credit have big gaps that often prevent the APR from accurately reflecting the cost of credit. In addition to closing those loopholes so that the APRs for open- and closed-end credit are more uniform, the CFPB should prevent evasions through spurious open-end credit. For example, any credit that is required to be repaid in one or two payments should be deemed closed end credit. Advances that are repaid on a fixed schedule with fixed payments should also be disclosed in a way that is consistent with closed-end loan disclosures.

Preventing spurious use of open-end credit or disparities between open- and closed-end rules would simplify disclosures, make them more meaningful, and enhance comparison shopping. Creditor compliance would be simplified, litigation burdens reduced, and manipulations designed to avoid consumer protections would be avoided.

2.3. Regulation Z Requirements for Closed-End Mortgage Credit⁵⁰

2.3.1. History of FRB and CFPB rulemaking for closed-end mortgages.

When Congress enacted TILA in 1968, it applied broadly to both mortgage and non-mortgage credit, subject to statutory exemptions. The FRB finalized Regulation Z in 1969.⁵¹ At that time, Regulation Z contained two sections that specified the disclosure rules for all closed-end credit, sections 226.6 and sections 226.8. These sections were the ancestors of the current sections 1026.17 and 1026.18. The right of rescission that applies to some mortgage loans was housed in section 226.9 and now appears in sections 1026.15 (open-end) and 1026.23 (closed-end).

After its original enactment of TILA, Congress responded to particular concerns that arose regarding mortgage lending in 1994 (high cost loan abuses and reverse mortgages), 2008 (early disclosures for credit secured by a dwelling), 2009 (notification of transfer of ownership of the note; the identity of and contact information for the assignee; duty of servicers of securitized mortgage loan), and 2010 (the Dodd-Frank Act).

The FRB was busy during the same period until the transfer of its jurisdiction to the CFPB in 2011. The FRB both implemented Congressional amendments and mandated additional disclosures and protections for slices of the mortgage market, such as variable rate mortgages in 1987⁵² and higher-priced mortgage loans in 2008.⁵³ This collection of regulations, both general and specific, makes up the "inherited" closed-end mortgage loan disclosure requirements.

⁵⁰ This section does not discuss the TILA/RESPA integrated disclosure rules, which cover a large segment of the mortgage lending market, because they are rules adopted, not inherited by the CFPB.

⁵¹ 34 Fed. Reg. 2002 (Feb. 11, 1969).

⁵² 52 Fed. Reg. 48,665 (Dec. 24, 1987).

⁵³ 73 Fed. Reg. 44,522 (July 30, 2008).

As discussed in the next subsection, the inherited closed-end mortgage loan disclosure requirements have now been largely displaced by the TILA/RESPA integrated disclosure rules that the CFPB crafted after the Dodd-Frank Act was enacted. However, the inherited disclosure rules still apply to some categories of mortgage loans. In addition, as discussed below, Regulation Z's rescission rules for mortgage loans continue to apply generally, regardless of which set of disclosure rules applies to a particular loan.

2.3.2. The CFPB should not weaken the inherited disclosure rules for mortgage loans.

As noted in the preceding section, disclosure requirements for most mortgage transactions are found in regulations adopted since 2010, primarily the TILA/RESPA integrated disclosure rules. Those rules were addressed in our comments on the CFPB's adopted regulations. However, a few categories of closed-end mortgage transactions are subject to older, inherited disclosure rules (many of which also apply to non-mortgage credit).

Reverse mortgages make up the main category of mortgages covered by the inherited disclosure rules,⁵⁴ including some rules that were crafted specially for reverse mortgages.⁵⁵ Another section of these comments discusses Regulation Z's reverse mortgage provisions.

A second category of mortgage credit that is not subject to the new TILA/RESPA integrated disclosure rules is qualifying mortgage loans provided through housing assistance loan programs for low- and moderate-income households.⁵⁶ In addition, the TILA/RESPA integrated disclosure rules do not apply to manufactured-home financing unless it is secured by a manufactured home that is a dwelling and is also secured by real property.⁵⁷

As discussed in more detail in section 2.2.1 of these comments, the CFPB should approach revisions to its inherited disclosure rules with caution. Those provisions are interlocking, so changes that appear small have the potential of causing a chain of other consequences. In addition, the FRB retains rulemaking authority over Regulation Z as applied to major segments of the auto financing industry, so a joint rulemaking would be necessary in order to coordinate the two versions of the inherited disclosure requirements. Moreover, the CFPB should not proceed without consumer testing. For all of these reasons, the CFPB should not revisit the inherited disclosure rules for mortgages at this time.

2.3.3. The CFPB should not weaken the inherited rules regarding the right to rescind a mortgage transaction.

The inherited parts of Regulation Z covering mortgages include the right to cancel. Consumers have an absolute right to cancel a mortgage during a three-day cooling-off period.⁵⁸ Thereafter,

⁵⁴ See prefatory clause of 12 C.F.R. § 1026.18 (stating that the requirements of this section do not apply to mortgage transactions that are subject to § 1026.19(e) and (f)).

⁵⁵ See 15 U.S.C. § 1648(a); Reg. Z § 1026.33(b).

⁵⁶ Reg. Z § 1026.3(h) (providing that these loans are not subject to § 1026.19(e) and (f); as a result, they are not excluded from the disclosure requirements of § 1026.18 by that section's prefatory clause).

⁵⁷ Official Interpretations § 1026.18-3; 78 Fed. Reg. 79,730, 79,795-96 (Dec. 31, 2013).

⁵⁸ 15 U.S.C. § 1635.

a consumer may rescind the loan for up to three years only if the lender has failed to properly and accurately provide certain material disclosures.

The extended right to rescind when material disclosures are faulty is important for encouraging compliance with the Act's material disclosure requirements.⁵⁹ The rescission rights are also important to enforcing Congress's ban on dangerous terms and preventing consumers from being locked into high-cost loans.

In closed-end transactions, there is a short list of material disclosures that trigger the extended right to rescind. These disclosures have been deemed critical to the consumer: the primary cost of credit disclosures (the APR and the finance charge), the amount financed, the total of payments, and the payment schedule. Discrepancies between the creditor's disclosure of this numerical information and the accurate numbers, however, do not trigger rescission if they do not exceed generous tolerances.⁶⁰ In the context of a high-cost mortgage transaction, the information contained in the HOEPA notice is also considered "material," as is the presence of any of the contract terms prohibited by HOEPA. In the context of a higher-priced mortgage transaction, a prepayment penalty clause also triggers the extended right of rescission.⁶¹

TILA's rescission remedy is available only in consumer credit transactions that are secured by the consumer's principal dwelling and that do not finance the purchase of the home. Cash-out, refinance, and home improvement financing loans are examples of covered transactions. Congress made significant changes to the rescission rules in 1995 when the tolerances for errors in the finance charge disclosures were expanded.

The TILA rescission provisions reflect Congress's desire to keep homeowners from placing their homes in jeopardy without a clear understanding of the risks and benefits of the transaction.⁶² The rescission right is statutory and cannot be taken away by regulation. Moreover, the lending industry has functioned in this environment for decades. There is no need for the CFPB to reopen the rescission provisions of Regulation Z.

2.3.4. If the CFPB revisits the inherited closed-end mortgage credit rules, we suggest changes to the special rules governing reverse mortgages.

Reverse mortgages allow older borrowers to convert a portion of their home equity into cash without the immediate need for repayment of the loan. In 1994, Congress recognized that disclosures tailored to reverse mortgage products should be mandated and added section 1648 to TILA.⁶³ The additional information required for reverse mortgages includes a pre-closing notice

⁵⁹ See *WMC Mortgage L.L.C. v. Baker*, 2012 WL 628003, at *14 n.22 (E.D. Pa. Feb. 28, 2012) (comparing the purpose of the three-day right with that of the extended right to rescind).

⁶⁰ Reg. Z §§ 1026.22(a); 1026.18(d)(1)(i); 1026.23(g); 1026.23(h)(2) (finance charge tolerance when lender has initiated foreclosure is smaller--\$35).

⁶¹ Reg. Z § 1026.23(a)(3)(ii).

⁶² U.S. Rep. No. 368, 96th Cong., 2d Sess. 28, reprinted in 1980 U.S.C.C.A.N. 236, 264 ("This provision was enacted to give the consumer the opportunity to reconsider any transaction which would have the serious consequence of encumbering the title to his home.").

⁶³ Pub. L. No. 90-

containing a good faith projection of closing cost, itemization of loan terms, an explanatory table, and a statement that the borrower is not obligated to complete the transaction.⁶⁴

Currently, almost all reverse mortgages are federally-insured Home Equity Conversion Mortgages (HECMs), overseen by the U.S. Department of Housing and Urban Development (HUD). The agency issued final rules on January 19, 2017, that updated the regulations governing the HECM program.⁶⁵ Aside from HUD's regulations, all reverse mortgages are subject to RESPA and fair lending laws, as well as to TILA.

If the CFPB undertakes revisions of Regulation Z, we urge it to further strengthen the rules and add substantive protections for older homeowners, especially for those who may take out non-HECM proprietary loans in the future. Disclosures are inadequate to protect vulnerable older adults from the well-documented abuses associated with reverse mortgages. Moreover, providing safe harbors for reckless industry practices would encourage abusive lending.

The CFPB should use its authority to identify and ban unfair, deceptive and abusive practices and add protections to prevent the eviction of non-borrowing spouses after the death of the borrower-spouse; prohibit cross-selling of other financial products; require independent counseling provided by individuals employed by HUD-approved counseling organizations; require new and earlier disclosures tailored to reverse mortgages; and ban deceptive marketing and solicitation.

3. Regulation X (Real Estate Settlement Procedures Act)

3.1. Mortgage settlement provisions of Regulation X

3.1.1. The ban on kickbacks and referral fees is effective and should not be weakened.

RESPA, as implemented by Regulation X, is the primary federal law directly addressing residential mortgage settlements.⁶⁶ RESPA was enacted as the result of a congressionally mandated investigation into settlement costs.⁶⁷ In 1972 HUD and the VA jointly released a report showing that settlement costs were more than 10% of the average purchase money mortgage.⁶⁸ The report also found that settlement charges often were based on factors unrelated to the cost of providing the service.⁶⁹ RESPA and Regulation X are intended to ensure that consumers in real estate transactions receive timely information about the nature and cost of the

⁶⁴ Reg. Z § 1026.33.

⁶⁵ See 82 Fed. Reg. 7094 (Jan. 19, 2017).

⁶⁶ For RESPA purposes, "settlement means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan." Reg. X, 12 C.F.R. § 1024.2(b) (emphasis in original). Settlement is also called "closing" and "escrow" in some parts of the country. Reg. X, 12 C.F.R. § 1024.2(b). See generally Office of the Comptroller of the Currency, Comptroller's Handbook, Real Estate Settlement Procedures Act (Apr. 2015), available at <http://occ.gov> (handbook summarizing RESPA for bank examiners).

⁶⁷ Elizabeth Renuart & Jen Douglas, The Limits of RESPA: An Empirical Analysis of the Effects of Mortgage Cost Disclosures, 21 Hous. Pol'y Debate 481, 483–486 (Sept. 2011), available at <http://papers.ssrn.com>.

⁶⁸ *Id.*

⁶⁹ *Id.*

settlement process and to protect consumers “from unnecessarily high settlement charges caused by certain abusive practices.”⁷⁰

RESPA and Regulation X accomplish these purposes through a combination of disclosure requirements and substantive restrictions. The key substantive restrictions are prohibitions of kickbacks, referral fees, and splitting of fees except for services actually performed.⁷¹ These prohibitions are vital to RESPA’s original purpose. Kickbacks, fee splitting, and referral fees are almost impossible for consumers to detect, so comparison shopping will not be enough for self-protection—especially where these practices were once widespread.

The statute and regulation were carefully crafted to make exceptions for practices that the drafters deemed reasonable accommodations to the realities of the mortgage settlement industry. In particular, the statute and the rule provide for referrals between affiliated businesses⁷² and specify the payments that such businesses can exchange without violating the statute.⁷³ To fall within this exception, service providers must meet certain disclosure requirements and, generally, allow the consumer to choose another provider.

There has been some criticism of the CFPB’s investigations into whether some companies’ marketing services agreements (MSAs) violate the ban on referral fees.⁷⁴ Regulation X does not prohibit MSAs *per se*. As explained by a California district court, the question is “whether marketing and promotion are just euphemisms for prohibited referrals.”⁷⁵ Any claim that Regulation X needs to be reopened in order to allow legitimate MSAs that are not covers for illegal referrals is unfounded.

After more than 40 years, the mortgage industry has long been accustomed to Regulation X compliance, and the rule continues to meet the needs of mortgage borrowers. With the exception of the TILA/RESPA integrated disclosures (discussed in our adopted regulations comments), there have been few changes to Regulation X’s origination provisions in recent years. And we see no need for any other changes. The rule remains relevant and effective as it currently stands.

3.1.2. If the CFPB opens Regulation X for amendments, it should clarify the application to manufactured homes and should tighten the restrictions on affiliated business agreements.

While we do not recommend opening Regulation X for amendments, if the CFPB does so, it should consider two changes.

First, the CFPB should clarify that Regulation X applies to all manufactured homes titled as real property—something the Act already does, but which the regulation muddies. RESPA’s definition of “federally related mortgage loan” includes loans secured by manufactured homes

⁷⁰ Pub. L. No. 93-533, § 2(a), 88 Stat. 1724 (1974) (codified at 12 U.S.C. § 2601(a)).

⁷¹ 12 U.S.C. § 2607; 12 C.F.R. § 1024.14.

⁷² See 12 U.S.C. § 2602(7) (defining “affiliated business arrangement”).

⁷³ 12 U.S.C. § 2607(c); 12 C.F.R. § 1024.15.

⁷⁴ See Kate Berry, *CFPB Takes Aim at Referral Fees*, Am. Banker, Mar. 19, 2015, available at www.americanbanker.com.

⁷⁵ *Henson v. Fid. Nat’l Fin., Inc.*, 18 F. Supp. 3d 1006, 1014 (C.D. Cal. 2014).

that are titled as real property, without regard to whether the loan is secured by land. Regulation X, however, modifies the definition to require a lien on land. When the regulation was adopted there was no explanation for this addition and there is no rational basis for it. For many reasons, the buyer of a manufactured home may choose to encumber just the home, without also encumbering the land on which it sits. Moreover, manufactured homes can be titled as real estate in a number of states even when they are on land that the homeowner does not own, in which case a lien on the land is not even possible. The CFPB should abandon this distinction and clarify that the regulation applies to all manufactured homes titled as real property.

Second, the affiliated business rule is a gaping loophole in RESPA's otherwise strong ban on referral fees and kickbacks. The statute clearly allows affiliated business arrangements, but Regulation X should more strictly regulate them. Service providers know that consumers have difficulty shopping for settlement services and must accept whatever the provider offers. As a result, merely disclosing the arrangement is not enough. The CFPB should ensure that the arrangement is legitimate and not merely a cover for illegal conduct.

3.2. Inherited Servicing Provisions of Regulation X

3.2.1. The inherited mortgage servicing rules provide important protections for consumers.

As originally enacted in 1974, the Real Estate Settlement Procedures Act (RESPA) focused primarily on giving consumers in real estate transactions timely information on the nature and costs of the settlement process. Only one aspect of mortgage servicing, the management of escrow accounts, was addressed in the 1974 Act. It requires servicers to properly calculate the amount required to be deposited in escrow accounts and provide annual statements to borrowers.⁷⁶

The Cranston-Gonzalez National Affordable Housing Act of 1990 expanded the scope of RESPA by more broadly addressing mortgage servicer practices.⁷⁷ These amendments to RESPA came in response to numerous reports of consumer complaints about mortgage servicing problems, particularly those related to the transfer of servicing.⁷⁸ The amendments generally require servicers to respond to borrower inquiries and correct account errors, disclose information relating to the transfer of servicing operations, and make timely payments out of escrow accounts.

The Department of Housing and Urban Development (HUD) was the agency originally designated to issue regulations under RESPA. The initial rules issued by HUD, found in Regulation X, were inherited by the CFPB when rulemaking authority for RESPA was transferred. For the most part, these inherited rules properly implemented the pre-Dodd-Frank Act statutory servicing provisions and have been effective in curbing some of the worst servicer

⁷⁶ 12 U.S.C. § 2609.

⁷⁷ Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990) (codified at 12 U.S.C. § 2605).

⁷⁸ U.S. Gen. Accounting Office, Report, Home Ownership—Mortgage Servicing Transfers Are Increasing and Causing Borrower Concern (1989); Wanger v. EMC Mortg. Corp., 127 Cal. Rptr. 2d 685 (Cal. Ct. App. 2002).

abuses, establishing minimum standards in the servicing industry, and making servicers more responsible to consumers.

The CFPB made some minor revisions and improvements to the inherited servicing rules as part of the 2013 RESPA and TILA Servicing Rule.⁷⁹ Some further improvements to the rules should be made, including the removal of several exemptions from coverage that had been adopted by HUD, as discussed below. However, the consumer protections in the inherited servicing rules should not be eroded.

3.2.2. The inherited rules should be preserved, but if changes are considered, certain provisions should be strengthened consistent with the consumer protection purposes of RESPA.

Most of the inherited Regulation X servicing rules are consistent with the provisions of RESPA. In fact, HUD's approach was often to repeat the statutory language, almost verbatim, in Regulation X. While this was unnecessary, there is no reason for the CFPB to reconsider most of the inherited rules and they should be preserved.

If changes are considered by the CFPB, we urge the CFPB to strengthen the following rules consistent with the consumer protection purposes of RESPA. If the CFPB does consider reopening the rule, we would be happy to provide more detail about the need for these improvements and their legal basis.

3.2.2.1. The CFPB should remove exemptions for escrow account requirements based on borrower default or bankruptcy.

The annual escrow account statement required by RESPA section 2609 gives the borrower a summary of all of the account deposits and disbursements made during the prior year. It also notifies the borrower of any surpluses, shortages, and deficiencies that exist and the action the servicer intends to take in response. Despite the mandatory language found in RESPA and the lack of any statutory exemption, HUD provided in Regulation X that a servicer is exempt from providing a borrower with an annual escrow statement if the borrower is more than thirty days overdue in payments at the time the servicer conducts the escrow analysis.⁸⁰ This exemption also applies when the mortgage account is in foreclosure or when the borrower is in a bankruptcy proceeding.⁸¹

This exemption is inconsistent with both the purpose behind RESPA's escrow disclosure provision and the policy of promoting homeownership through loss mitigation efforts aimed at avoiding foreclosure. For borrowers who are experiencing temporary financial difficulties and barely more than a month behind in payments, the exemption deprives them of critical information about their accounts, such as the new monthly payment amount, which may ultimately cause them to fall further behind. The exemption for borrowers in default should be

⁷⁹ The inherited provisions are now found in Subpart C of Regulation X.

⁸⁰ Reg. X, 12 C.F.R. § 1024.17(i)(2).

⁸¹ *Id.*

eliminated, or, if amended, should not apply to borrowers who are less than six months in arrears or are seeking a loss mitigation option.

The current exemption is even less rational in the bankruptcy setting, in which HUD failed to distinguish between borrowers who are current with their mortgage payments at the time of the bankruptcy filing and intend to remain current, with those who are in default.⁸² Nor does the rule treat differently borrowers who are curing a mortgage default in a Chapter 13 bankruptcy. The CFPB should eliminate the bankruptcy exemption entirely or replace it with an exemption similar to that recently adopted by the CFPB with respect to bankruptcy periodic mortgage statements.⁸³

Another exemption created by HUD deals with the duty of servicers to make timely payments out of escrow. RESPA section 2605(g) requires a servicer to make payments from an escrow account for taxes, insurance, and other charges in a timely manner as such payments become due. This provision requires timely disbursements out of escrow in order to protect borrowers from being charged interest and penalty fees for late tax and insurance payments, and to ensure that borrowers' insurance coverage does not lapse. When HUD issued regulations to implement the timely escrow payment requirement, it again created an exemption from the statutory mandate. Regulation X provides that the obligation does not apply when the borrower's mortgage payment is more than 30 days overdue--even if there are sufficient funds in the escrow account to cover the payment from escrow.⁸⁴

The exemption was partially overridden by the CFPB as part the 2013 Servicing Rule, in implementing the force-placed insurance requirements under the Dodd-Frank Act. Servicers have a duty to disburse funds in a timely manner to pay the borrower's hazard insurance premium charges unless the servicer is unable to disburse funds from the borrower's escrow account.⁸⁵ However, the change does not apply to disbursements for property taxes, homeowner association fees and other payments from escrow that are not for hazard insurance. Because the exemption is triggered when a borrower is barely more than a month behind on payments, often the servicer has enough borrower funds in the escrow account to pay the taxes and other charges when they come due. At a minimum, the exemption should not apply when there are sufficient funds in the borrower's escrow account to make the payment.

3.2.2.2. The CFPB should ensure that the error resolution process protects borrowers from foreclosure when the error relates to the alleged default or grounds for foreclosure.

As part of 1990 amendments to RESPA, Congress created a robust procedure for borrowers to dispute account errors made by servicers, by sending a qualified written request. If the error relates to a payment dispute, Congress made clear that the borrower should not suffer any

⁸² As evidence that the bankruptcy exemption was not well-reasoned, it is worth noting that former § 3500.17(i)(2) did not include any discussion of bankruptcy when first promulgated under the notice and comment rulemaking procedure. Prior to the regulation's effective date, however, HUD added the bankruptcy exemption as a "technical correction" to the rule language without soliciting comment. *See* 60 Fed. Reg. 8812 (Feb. 15, 1995).

⁸³ Reg. Z, 12 C.F.R. § 1026.41(e)(5)(i).

⁸⁴ Reg. X, 12 C.F.R. §§ 1024.17(k)(1), 1024.17(k)(2).

⁸⁵ Reg. X, 12 C.F.R. § 1024.17(k)(5)(i).

adverse consequences while the dispute is being resolved. During the sixty-day period beginning upon receipt by a servicer of a qualified written request or notice of error relating to a payment dispute, the servicer cannot give any adverse information to a credit reporting agency concerning the payments subject to the request.⁸⁶

However, HUD undermined this protection by providing in Regulation X that a servicer's receipt of a notice of error does not prevent it from taking the more drastic step of pursuing collection remedies during the sixty-day period—including foreclosure on the borrower's home.⁸⁷ This inherited provision of Regulation X was retained by the CFPB in the reissuance of regulations dealing with error resolution in the 2013 RESPA Servicing Rule, except with respect to a notice of error based on the servicer's noncompliance with the loss mitigation dual tracking protections under sections 1024.41(f), 1024.41(g), or 1024.41(j).⁸⁸

HUD based its ill-conceived provision on a misinterpretation of RESPA section 2615, which states the uncontroversial proposition that nothing in RESPA affects the “validity or enforceability” of loan agreements or mortgages in connection with federally related mortgage loans. But section 2615 cannot possibly mean that mortgage contract provisions that squarely conflict with RESPA are nevertheless enforceable. The more logical construction of section 2615 in the context of the entire statutory scheme is that it is intended to serve the same function as a severability clause in a contract. In other words, if a mortgage contract contains a provision that RESPA makes illegal, the contract as a whole nevertheless remains valid and enforceable even though the individual provisions that violate RESPA are not enforceable. Congress could not possibly have intended that a servicer would be permitted to foreclose on a borrower before responding to a borrower's notice of error that asserts that the loan is not in default or that the servicer has no grounds under the mortgage or applicable state law to foreclose.

3.2.2.3. The transfer of servicing notice should inform borrowers of their dispute rights, and provide additional information about account loan status.

If the servicing of a mortgage is transferred after the mortgage loan is made, RESPA requires that the transferor and transferee servicers give the borrower a written notice containing important information about the transfer.⁸⁹ Much of the information in the notice is required by RESPA, though HUD added some additional information when implementing the requirement in Regulation X. Unfortunately, the CFPB removed a critical disclosure from the transfer notice when revising this inherited rule.

Mortgage servicing errors, particularly those relating to payment application, generally are more likely to occur at the time of servicing transfer. In fact, evidence of borrower complaints about servicing transfers was what originally prompted Congress to add the first servicing requirements

⁸⁶ 12 U.S.C. § 2605(e)(3); Reg. X, 12 C.F.R. § 1024.35(i).

⁸⁷ Reg. X, 12 C.F.R. § 1024.21(e)(4)(ii) (vacated and replaced by 12 C.F.R. § 1024.35(i)(2), effective Jan. 10, 2014).

⁸⁸ Reg. X, 12 C.F.R. § 1024.35(i)(2) (“Except as set forth in this section with respect to an assertion of error under paragraph (b)(9) or (10) of this section, nothing in this section shall limit or restrict a lender or servicer from pursuing any remedy it has under applicable law, including initiating foreclosure or proceeding with a foreclosure sale.”).

⁸⁹ 12 U.S.C. § 2605(b)(3).

to RESPA in 1990.⁹⁰ Because of this potential for errors, there is perhaps no better time to inform borrowers of the right under RESPA section 2605(e) to dispute account errors and obtain account information than at the time of servicing transfer. Thus, it is not surprising that HUD had initially required in Regulation X that the servicing transfer notice include a statement of the borrower's rights in connection with error resolution, including any exclusive address for sending qualified written requests.⁹¹

However, the CFPB removed this requirement from Regulation X as part of the 2013 RESPA Servicing Rule. The CFPB stated that “detailed information about the error resolution and information request process may not always be optimally located in the transfer notice” and that borrowers should be informed of this process “through mechanisms that do not necessarily depend on the transfer of servicing.”⁹² The CFPB suggested that servicers should develop policies and procedures to inform borrowers, noting the adoption of section 1024.38(b)(5). However, the CFPB did not mandate any process or method that servicers must use to inform borrowers of dispute or information rights. Significantly, neither the periodic billing statement (§ 1026.41) or the early intervention notice (§ 1024.39) rule requires the servicer to inform the borrower of the right to dispute errors or obtain account information. In fact, none of the mandatory contacts with borrowers require disclosure of these rights.

The CFPB should not assume that consumers are aware of their RESPA rights or that they will exercise these rights if they are merely provided servicer contact information on a monthly statement that they can use if they have “questions.” If they rely upon this contact information, borrowers may incorrectly assume that an inquiry or dispute may be made orally by calling the servicer, or that a letter sent to one of the many servicer addresses on various notices, rather than the servicer's exclusive address, will be valid.

The reasons given by the CFPB for this deletion were not compelling at the time, and have proven to be even less convincing in light of continuing problems with servicing transfers. The decision to delete this information from the transfer notice should be reconsidered by the CFPB. In addition, since it is so common for errors in crediting of payments to arise when servicing is transferred, the CFPB should require transfer notices to provide specific information that will enable errors to be identified and corrected, including a statement as to whether the transferee servicer deems the borrower to be current with payments as of the effective date of the transfer.

3.2.2.4. The exemptions for reverse mortgages and HELOCs should be repealed or revised.

Despite unambiguous statutory language, HUD construed the 1990 RESPA amendments as not applying to home equity lines of credit (HELOCs) covered by TILA and Regulation Z.⁹³ Several

⁹⁰ U.S. Gen. Accounting Office, Report, Home Ownership—Mortgage Servicing Transfers Are Increasing and Causing Borrower Concern (1989).

⁹¹ Reg. X, former 12 C.F.R. § 1024.21(d)(3)(vii) (vacated and replaced by § 1024.33(b)(4), effective Jan. 10, 2014).

⁹² 78 Fed. Reg. 10730 (Feb. 14, 2013).

⁹³ Regulation X stated that it did not apply to “subordinate lien loans or open-end lines of credit (home equity plans) covered by the Truth in Lending Act and Regulation Z, including open-end lines of credit secured by a first lien.” Former Reg. X, 12 C.F.R. § 1024.21(a) (removed effective January 10, 2014).

courts had held that this exemption in the regulation was not entitled to deference because it clearly conflicts with the RESPA.⁹⁴

With the transfer of rulemaking authority from HUD to the CFPB, the CFPB had an opportunity to repeal this exemption. However, the CFPB elected to retain an exemption for HELOCs.⁹⁵ Our comments to the adopted servicing regulations discuss why this exemption should be repealed. We again urge the CFPB to reconsider the retention of the HELOC exemption in Regulation X for the reasons stated in our comments for the adopted regulations.

The definition of “federally related mortgage loan” in Regulation X includes reverse mortgages or home equity conversion mortgages.⁹⁶ Thus, reverse mortgages are generally subject to the RESPA requirements. However, Regulation X exempts the servicer of a reverse mortgage from the requirements relating to (1) general servicing policies, procedures, and requirements,⁹⁷ and (2) early intervention contacts with borrowers about loss mitigation, continuity of contact with borrowers, and evaluation of applications for loss mitigation options.⁹⁸

The exemption leaves reverse mortgage borrowers with few protections from servicing abuses in several critical areas, including loss mitigation. While reverse mortgage servicers typically evaluate borrowers for loss mitigation after a default on property charges, they are not required to comply with the procedural requirements of the loss mitigation rule. The exemption also prevents reverse mortgage borrowers from seeking redress for violations of the CFPB’s procedural requirements for evaluation of loss mitigation applications. There is no logical reason to exclude reverse mortgage servicers from the rules governing loss mitigation, continuity of contact, and early intervention, and the exemption should be repealed.

4. Mortgage Assistance Relief Services Rule (Regulation O, 12 C.F.R. Part 1015)

4.1. The MARS Rule Provides Vital Protection to Distressed Homeowners.

The Mortgage Assistance Relief Services (MARS) rule prohibits various forms of misconduct associated with for-profit services that claim to help homeowners avoid foreclosure. The Federal Trade Commission adopted the Mortgage Assistance Relief Services (MARS) rule nearly a decade ago. Since then, rulemaking authority has passed to the CFPB, but the FTC retains shared enforcement authority. The MARS rule has proven extremely valuable for protecting desperate homeowners from charlatans trying to bilk them of their last dollar.

The MARS rule was adopted near the peak of the last foreclosure crisis as a new breed of

⁹⁴ *Hawkins-El v. First Am. Funding, L.L.C.*, 891 F. Supp. 2d 402, 408 (E.D.N.Y. 2012) (HELOC is subject to RESPA qualified written request provisions despite contrary Regulation X exemption), *aff’d*, 529 Fed. Appx. 45 (2d Cir. 2013); *Cortez v. Keystone Bank*, 2000 WL 536666, at *11 (E.D. Pa. May 2, 2000). *See also* *MorEquity, Inc. v. Naeem*, 118 F. Supp. 2d 885, 901 n. 7 (N.D. Ill. 2000) (noting in dicta that regulation conflicts with RESPA).

⁹⁵ Reg. X, 12 C.F.R. § 1024.31 (defining “mortgage loan” for purposes of Subpart C of Regulation X not to include “open-end lines of credit (home equity plans”).

⁹⁶ Reg. X, 12 C.F.R. § 1024.2 (subsection 1(ii)(F) of definition of “federally related mortgage loan”).

⁹⁷ Reg. X, 12 C.F.R. §§ 1024.30(b)(2), 1024.38.

⁹⁸ Reg. X, 12 C.F.R. §§ 1024.30(b)(2), 1024.39 through 1024.41.

scammer took advantage of desperate homeowners. At that time thousands of homeowners sought loan modifications from their mortgage servicers in hopes of avoiding foreclosure. Servicers, however, were overwhelmed and understaffed, frequently botching their response to modification requests and often dragging their feet for months. Scammers—and some well-meaning but unqualified individuals—stepped in, claiming that they could act as intermediaries between the homeowner and servicer for a hefty fee. They claimed that they had special skills or contacts that would enable them to arrange a loan modification for the homeowner. But, far more often than not, they did nothing but take the homeowner’s money without delivering the promised assistance.

4.2. The MARS Rule Should Remain Intact.

Even though the foreclosure crisis has abated, the MARS rule remains necessary. Foreclosure rescue scams were problematic before the crisis and continue to be so. Legal advocates inform us that they regularly hear from consumers who have been bilked by these scams. The FTC’s website shows a steady flow of enforcement actions under the MARS rule.⁹⁹

The rule has not been a burden on law-abiding businesses. In 2011 the FTC announced that it would not enforce the rule’s disclosure requirements and advance-fee ban against law-abiding real estate agents.¹⁰⁰ The CFPB has continued that policy.¹⁰¹ Furthermore, as far as we can determine, nobody has responded or objected to either agency’s request for renewed Paperwork Reduction Act clearance for the MARS rule’s information collection requirements.¹⁰² Therefore we believe that there is no need to limit the scope of the rule or any of its requirements.

4.3. The CFPB Should Increase MARS Enforcement.

While the FTC has actively enforced the MARS rule since it became effective, the CFPB has been more lax. This is a problem for the public because the FTC has inadequate resources to properly police the market.

In particular, we recommend focusing enforcement efforts on MARS providers that claim to be legal service providers. A review of the FTC’s list of enforcement actions and of the consumer complaints we have received indicates that many of the MARS scams falsely advertise that they are affiliated with an attorney or otherwise provide legal assistance. We are not referring to

⁹⁹ See <https://www.ftc.gov/news-events/media-resources/consumer-finance/mortgage-relief-scams>.

¹⁰⁰ Enforcement Policy Statement on Real Estate Professionals and the Mortgage Assistance Relief Services (MARS) Rule (July 14, 2011), available at <https://www.ftc.gov/public-statements/2011/07/enforcement-policy-statement-real-estate-professionals-mortgage-assistance>.

¹⁰¹ Bureau of Consumer Financial Protection, Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43569, 43570 (July 21, 2011) (stating that the CFPB will abide by the “official commentary, guidance, and policy statements” of the transferring agency for all rules that are being transferred to CFPB’s jurisdiction; list includes FTC’s MARS rule).

¹⁰² See 82 Fed. Reg. 8425 (Jan. 25, 2017) (two comments filed but not publicly posted to [regulations.gov](https://www.regulations.gov); stating "On November 17, 2016, the FTC sought public comment on the information collection requirements associated with Regulation O. 81 FR 81140. No germane comments were received."); 80 Fed. Reg. 43762 (July 23, 2015) (no comments filed); 80 Fed. Reg. 25282 (May 4, 2015) (one comment filed but not publicly posted to [regulations.gov](https://www.regulations.gov)); 77 Fed. Reg. 25439 (Apr. 30, 2012) (no comments filed); 77 Fed. Reg. 2685 (Jan. 19, 2012) (only one nongermane comment filed).

ordinary law firms or nonprofit legal services providers that act in the ordinary course of an attorney-client relationship. Instead, we see advertisements for organizations that either have no attorney on staff or that have a ratio of hundreds to thousands of clients per attorney. Such organizations use any attorney staff as a fig leaf even though the attorneys are not assisting their customers, not providing legal assistance, and not adequately supervising the nonattorney staff. This usually results in blatant violations of the MARS rule's ban on taking payment before delivering the promised relief. We urge the CFPB to take more aggressive action against this type of MARS provider.

5. The FTC Mortgage Advertising Rule

5.1 History of the adoption of the mortgage advertising rule

The Mortgage Advertising Rule, currently found at 12 C.F.R. Part 1014, was originally adopted pursuant to Section 626 of the Omnibus Appropriations Act of 2009.¹⁰³ As amended in 2010 by the Credit CARD Act,¹⁰⁴ the statute mandated the FTC to initiate a rulemaking proceeding “relat[ing] to unfair or deceptive acts or practices regarding mortgage loans.”¹⁰⁵

The FTC issued two rules pursuant to this authority: the Mortgage Assistance Relief Services rule discussed in the preceding section, and the Mortgage Advertising Rule discussed here.

The FTC published an advance notice of proposed rulemaking and a call for comments on the Mortgage Advertising Rule in 2009¹⁰⁶ and a notice of proposed rulemaking in 2010.¹⁰⁷ It issued the final rule in 2011,¹⁰⁸ numbering it as 16 C.F.R. § 321.3.

The statutory authority for the FTC to adopt this rule was identified as one of the enumerated statutes that was transferred to the CFPB by the Dodd-Frank Act.¹⁰⁹ On December 16, 2001, the

¹⁰³ Pub. L. 111-8, Sec. 626(a), March 11, 2009, 123 Stat 524 (“Within 90 days after the date of enactment of this Act, the Federal Trade Commission shall initiate a rulemaking proceeding with respect to mortgage loans in accordance with section 553 of title 5, United States Code. Any violation of a rule prescribed under this subsection shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices.”).

¹⁰⁴ Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act of 2009), PL 111-24, § 511(a) May 22, 2009, 123 Stat 1734. This is an uncodified provision that appears as a note to 15 U.S.C. 1638.

¹⁰⁵ The provision reads:

(1) Within 90 days after the date of enactment of this Act, the Federal Trade Commission shall initiate a rulemaking proceeding with respect to mortgage loans in accordance with section 553 of title 5, United States Code. Any violation of a rule prescribed under this subsection shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices. Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services.

(2) Paragraph (1) shall not be construed to authorize the Federal Trade Commission to promulgate a rule with respect to an entity that is not subject to enforcement of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) by the Commission.

¹⁰⁶ 74 Fed. Reg. 26118 (June 1, 2009).

¹⁰⁷ 75 Fed. Reg. 60352 (Sept. 30, 2010).

¹⁰⁸ 76 Fed. Reg. 43826 (July 22, 2011).

¹⁰⁹ 12 U.S.C. § 5481(12)(Q).

CFPB published the rule without substantive change as an interim final rule, renumbering it as 12 C.F.R. Part 1014.¹¹⁰ This rule, along with a number of other inherited rules, was published without change as a final rule in 2016.¹¹¹

5.2. The CFPB should not reopen the mortgage advertising rule.

The mortgage advertising rule begins with a general prohibition of “any material misrepresentation, expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product.”¹¹² It then lists 19 examples of topics on which misrepresentations are forbidden.¹¹³ It also prohibits waiver of its requirements.¹¹⁴ There is no private cause of action to enforce this rule, so it is enforced solely by federal and state governmental agencies. Since deceptive practices have been prohibited by the FTC Act for decades,¹¹⁵ the primary function of the rule is to provide more specificity to law-abiding businesses about the types of misstatements they should avoid, and to guide and enhance enforcement.

Mortgage lending has, of course, changed since the adoption of this rule in 2011, but those changes do not show a need to amend the rule. First, the list of examples in the rule is quite thorough, so changes in mortgage lending are unlikely to lead to misrepresentations that would not be encompassed by one of the examples. But amendments to the rule would be unnecessary in any event because the rule, with its general prohibition followed by examples, was drafted so that it could apply to newly-emerging misrepresentations without needing to be amended.

The FTC’s promulgation of the rule was not controversial, drawing only 22 comments. In adopting the rule, the FTC took a balanced approach. It declined to make certain changes proposed by industry commenters, but it also rejected a number of proposals from a group of

In addition, this rulemaking authority was repeated in a later section of the Dodd-Frank Act, 12 U.S.C. § 5538, which reads:

(a)(1) The Bureau of Consumer Financial Protection shall have authority to prescribe rules with respect to mortgage loans in accordance with section 553 of Title 5. Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services. Any violation of a rule prescribed under this paragraph shall be treated as a violation of a rule prohibiting unfair, deceptive, or abusive acts or practices under the Consumer Financial Protection Act of 2010 and a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices.

(2) The Bureau of Consumer Financial Protection shall enforce the rules issued under paragraph (1) in the same manner, by the same means, and with the same jurisdiction, powers, and duties, as though all applicable terms and provisions of the Consumer Financial Protection Act of 2010 were incorporated into and made part of this subsection.

(3) Subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission shall enforce the rules issued under paragraph (1), in the same manner, by the same means, and with the same jurisdiction, as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made part of this section.

¹¹⁰ 76 Fed. Reg. 78130 (Dec. 16, 2011).

¹¹¹ 81 Fed. Reg. 25323 (April 28, 2016).

¹¹² 12 C.F.R. § 1014.3.

¹¹³ 12 C.F.R. § 1014.3(a) through (s).

¹¹⁴ 12 C.F.R. § 1014.4.

¹¹⁵ 15 U.S.C. § 45(a).

state consumer credit regulators--the Conference of State Bank Supervisors, the American Council of State Savings Supervisors, and the National Association of Consumer Credit Administrators--to include stronger provisions in the rule. These regulators had asked the FTC to include disclosure requirements in the rule, to require mortgage brokers to disclose that they are not lenders, to provide in the rule that providing substantial or support to those engaged in deceptive mortgage advertising is a violation, to require disclosures and the loan contract to be in a language other than English when a lender advertises in that other language, and to require that advertisers retain records for three to four years.¹¹⁶ The FTC did not adopt any of these suggestions.

While the rule could have been stronger if the FTC had adopted the suggestions of the state consumer credit regulators, it represents a balanced approach. Reopening this rulemaking proceeding should not be a priority of the CFPB at this time. Instead, we recommend that the CFPB focus on the higher-priority topics that we have highlighted in our other comments in response to the CFPB's series of RFIs. If the CFPB chooses to reopen the rule, however, we recommend that the CFPB give further consideration to adoption of the recommendations of the state regulators.

* * *

Thank you for considering these comments.

Yours very truly,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
CASH Campaign of Maryland
Center for NYC Neighborhoods
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Equal Justice Society
Florida Alliance for Consumer Protection
Heartland Alliance for Human Needs & Human Rights
Housing Options & Planning Enterprises, Inc.
Illinois People's Action
Main Street Alliance
Maryland Consumer Rights Coalition
Mississippi Center for Justice
National Association of Consumer Advocates
National Association of Social Workers
National Consumer Law Center (on behalf of its low income clients)

¹¹⁶ 76 Fed. Reg. 43826 (July 22, 2011).

National Fair Housing Alliance
National Housing Law Project
Neighborhood Housing Services of Baltimore
New Jersey Citizen Action
People's Action Institute
Public Counsel
Public Justice Center
Public Law Center
Texas Appleseed
U.S. PIRG
West Virginia Center on Budget and Policy