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NAFCU | Your Direct Connection to Advocacy, Education & Compliance

October 18, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

RE: Amendments to Federal Mortgage Disclosure Requirements Under the Truth in Lending Act (Regulation Z) (RIN 3170-AA61)

Dear Ms. Jackson:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally insured credit unions, I am writing to you regarding the proposal by the Consumer Financial Protection Bureau (CFPB) making various amendments to the *Truth in Lending Act* (TILA) and *Real Estate Settlement Procedures Act* (RESPA) Integrated Disclosure (TRID) rule that are implemented in Regulation Z. *See* 81 FR 54317 (August 15, 2016). TRID compliance remains a top concern for our members and remains one of the most common reasons credit unions seek compliance assistance from NAFCU. While NAFCU welcomes many of the Bureau's amendments as a step in the right direction, we continue to believe the CFPB needs to do more to streamline compliance, fill-in gaps, and mitigate the total regulatory burden of this highly complex rule.

To assist the Bureau as it works to amend the TRID rules, NAFCU provides the following additional suggestions drawn directly from concerns we have received from our member credit unions.

TRID Amendments' Effective Date

NAFCU remains concerned that the proposal does not offer a period of time sufficient to update systems with post-consummation disclosures. NAFCU's member credit unions have already worked extensively with their staff and vendors to implement the complex and voluminous TRID rules, and know from experience that a 120 day implementation period is an overly optimistic target. Specifically, revisions to comments 19(e)(3)(ii)—2 would require software providers to develop entirely new database functionality to determine whether aggregate increases in charges exceed 10 percent when an individual charge is omitted from loan estimates entirely and then imposed at consummation. Additionally, comment 19(e)(3)(iv)(D)—2 would require credit unions to develop new notification systems to provide customers with revised Closing Disclosures if the original disclosure is inaccurate after the rate lock. These are just two examples of complex changes that credit unions would need to develop, test and refine during the 120 day implementation period.

NAFCU strongly urges the Bureau to extend the implementation period in its proposal. Specifically, a period of at least nine to twelve months would give credit unions and their vendors the necessary time to test their systems in a real-world setting prior to the effective date of these amendments, thereby reducing the risk of process errors and consumer confusion. However, since there are a number of positive aspects of the rule that credit unions may want to implement on an earlier timeline, the Bureau should allow for early compliance but not require these changes to be implemented in a manner that would tax credit union regulatory compliance divisions and vendors.

Good-Faith Efforts

NAFCU and our members also recommend that the Bureau further extend its consideration of credit unions' "good faith efforts toward substantial compliance" with TRID after the implementation of these proposed amendments. The CFPB, along with the National Credit Union Administration, adopted this approach during the roll-out of TRID, and other rules, as it examined credit unions' initial compliance. NAFCU believes this approach results in a smoother transition for changes in regulatory requirements, and we ask that the CFPB implement it once again for these amended integrated mortgage disclosure forms.

Cure Provisions and Error Corrections

Under Section 1026.19(f)(2)(iv), the only errors that can be corrected if discovered post-consummation are "non-numeric clerical errors." While the CFPB specifically stated in the preamble to the TRID rules that it did not "intend to affect statutory liability provisions for other types of errors" and therefore did not define "numeric errors" or address how they may be cured, the use of the term "non-numeric clerical errors" in the regulation could lead some courts or supervisory examiners to interpret this provision as prohibiting creditors from curing numerical errors.[1] This could mean that credit unions are prohibited from correcting an incorrect number in the credit union's file number, the email address of the seller's real estate broker, phone number of the borrower's real estate broker, or the year of pro-rated taxes being paid at closing, even though those errors do not substantively impact the overall transaction and their correction would be beneficial to the borrower.

Because the regulation does not provide a method of correction or cure for numeric clerical errors, a credit union must consult either TILA or RESPA regarding its potential liability for a numeric clerical error depending on the specific line item in the Closing Disclosure where the error is located. This means that credit unions must consult with local counsel to determine their potential scope of liability under TILA, RESPA, or both before fixing even some of the most

[1] *See,* 78 FR 79882.

inadvertent errors, such as transposing numbers in a phone number. This issue is compounded by the fact that TILA affords statutory penalties that may be awarded without any showing of actual damages.[2]

Between the inability to cure the violation under the regulation and the potential liability for any violation under TILA, it is very difficult for credit unions to manage their liability in a risk-based manner. In comparison, before the implementation of TRID, credit unions were able to avoid violation of Regulation X, which implements RESPA, by correcting any "inadvertent or technical error."[3]

NAFCU recommends that the Bureau amend Section 1026.19(f)(2)(iv) to remove the descriptor "non-numeric" and allow for the curing of any clerical error. It can then define "clerical errors" in a manner that does not rely on whether the error involved a number, but rather, whether the error is substantive, affects the terms or charges of the transaction, and creates any actual risk of harm or confusion for the borrower. This approach would be more faithful to the text of TILA, which allows creditors to correct errors within 60 days after discovering the error provided that the borrower is not required to pay an amount in excess of the charge actually disclosed and creates an exemption for unintentional or bona fide errors.[4] While this would not necessarily eliminate the need for credit unions to consult with counsel on certain TRID issues or allow for the complete management of TRID risk, NAFCU believes that this would be an important first step to provide clarity to courts, examiners, and supervised institutions regarding the scope of potential liability under TRID.

Negative Owner's Title Insurance Premium

Under Section 1026.37(g)(4) and its associated commentary, credit unions are required to disclose the cost of owner's title insurance purchased simultaneously with lender's title insurance by "taking the full owner's title insurance premium, adding the simultaneous issuance premium for the lender's coverage, and then deducting the full premium for lender's coverage."[5] The Bureau's rationale for adopting this method was to account for the "incremental" cost of each insurance policy.[6] Often, however, because these policies are purchased together, the policies are heavily discounted. This leads, in many cases, to a negative number being disclosed in the "Other Costs" table on the Loan Estimate. Furthermore, the methodology adopted by the Bureau does not always represent the actual cost allocation, which can create confusion for consumers, since insurance companies may offer discounts on both the lender's title insurance and the owner's title insurance if purchased simultaneously.

NAFCU recommends incorporating guidance into the Bureau's Official Interpretations to Regulation Z that indicates that a negative number is permissible if that is what the formula provides. Insofar as this issue may also impact the "Cash to Close" table, which incorporates

[2] 15 U.S.C. § 1640(a)(2)(A)(i); *see also*, *Huff v. Stewart-Gwinn Furniture*, 713 F.2d 67 (4th Cir. 1983) (creditor liable for technical violation even though borrower suffered no damage or actual injury and was not misled as a result of the violations).
[3] *See*, 12 C.F.R. § 1024.8(c).
[4] *See*, 15 U.S.C. § 1640(b), (c).
[5] 12 C.F.R. pt. 1026, Supp. I, comment 1026.37(g)(4)-2.
[6] *See*, 78 FR 79964.

amounts disclosed under paragraph (f) and (g) of Section 1026.37, the Bureau should consider incorporating guidance on negative numbers in that commentary as well. NAFCU also recommends amending the calculation methodology discussed in comment 1026.37(g)(4)-2 to read "taking the simultaneous issuance premiums for the owner's coverage and the lender's coverage, and then deducting the full premium for lender's coverage." This clarification would accommodate discounts offered by insurers on either the premium for lender's insurance, which is passed on to the consumer as a service for which the consumer may not shop, or the premium for owner's insurance, which is an optional product that is purchased by the consumer.

Lender Credits

Lender paid closing costs are a critical tool for credit unions' marketing of loans and in making credit accessible to those lower- and middle-income borrowers who often do not have as much cash on hand to cover these costs. Despite how common and critical this loan feature is, the Bureau has provided insufficient guidance regarding it. The phrases "specific lender credit" and "general lender credit" appear nowhere in the text of Sections 1026.19, 37 or 38.

It is clear from a careful reading of the commentary and the preamble that the Bureau distinguishes between specific and general lender credits. It also indicates that they should be disclosed differently and treated differently for the purposes of a good faith determination. However, borrowers understand "cash towards closing" and "no cost" loans. It is difficult to explain to a borrower why the lender credit in the Loan Estimate was $4,000, but $0 in the Closing Disclosure, despite the fact that they did receive all $4,000 worth in closing costs paid by the credit union.

Credit unions want to write loan programs that benefit consumers and make business sense for the credit union. Now that most settlement costs are subject to zero tolerance under TRID, credit unions which offer programs that pay all closing costs can end up providing the borrower with cash payments because an estimate for a closing cost exceeded the actual costs for services. Paying cash to a borrower because a third-party provided a conservative estimate of its costs does not make business sense.

It is difficult for credit unions to justify offering "no cost" loans which offer to cover all closing costs, when the credit union may have no choice but to pay money out of pocket to the borrower because an appraisal came in under budget. Thus, the regulation has created a set of circumstances where committing to offering "cash towards settlement" is, from a risk-based decision making perspective, the more favorable structure of a loan. As a result, many credit unions are moving away from "no cost" loans where all closing costs are paid, to "cash towards closing" loans, where the credit union commits only to a lump sum. Of course, this means that consumers without immediate cash on hand may face a bill at the time of closing to cover revised costs above the general lender credit, which, were it not for the Bureau's treatment of lender credits, the credit union would have been willing foot for them. This has a strong impact on lower- and middle-income consumers who benefit from charge-specific lender credit options.

There could be disclosure methods for distinguishing between specific and general lender credits which would be less confusing, while still disclosing the true cost of credit. For example, the Bureau could provide a definition for "lender credits" in Section 1026.37(g)(6)(ii), including separate definitions for "general" and "specific" credits. As now, it could require "general" lender credits to be disclosed in Box J of the form, with "specific" lender credits being notated throughout the form. For example, they could be listed alongside the cost they offset, e.g., "Title Work … $300", "Title Work Lender Credit … $(300)." Alternatively, specific credits could be listed as a separate "Other" line item in Box H under Section 1026.37(g)(4)(iv) as an item contractually to be paid to a person other than the creditor, e.g., "Lender Paid Closing Costs … $300." Either option would more accurately convey to borrowers the underlying obligations involved with the specific credits, and avoid confusion between the Loan Estimate and Closing Disclosure.

Further, once specific and general credits are disclosed in the Loan Estimate separately, a good faith analysis for specific lender credits should allow the credit to "float" with cost. Comments 5 and 6 to Section 1026.19(e)(3)(i) should be amended to indicate that if the cost decreases, a specific lender credit attached to that cost should be permitted to decrease with it. This would correct the incentives the current good faith analysis currently creates to provide lump sum general credits over flexible specific credits, which are more favorable to consumers.

Lastly, defining the terms in the regulations themselves would bring a common feature of loans out of the TRID shadows. Issuing sample forms illustrating lender credits with accompanying fact patterns, and providing FAQs would further clarify these issues.

Insufficiency of Sample Forms

The Bureau has provided samples of completed Loan Estimates and Closing Disclosures to assist credit unions in determining how to apply the rules and complete the forms. A serious limitation of these forms as a resource is that the factual scenarios used to complete these forms are not released. This leaves credit unions in the position of reverse-engineering the sometimes-complex mathematics underlying completed forms, or guessing at the hypothetical legal obligations which underlie the charges in the sample forms.

Further, the forms are often overly simplistic. As the Bureau's webinars have shown, there is frequently more than one way to accurately complete the forms. Offering closed-universe factual scenarios and using them to illustrate multiple methods of accurately reflecting the same transaction would assist credit unions immensely in making their own decisions about how best to complete the forms. Illustrations of specific sections of the forms have been offered in isolation during webinars, but these forms are not hand-completed in isolated sections. While a webinar may clarify one point, it frequently will not carry that choice through to the cash to close table or the Closing Disclosure, raising further questions that go unanswered. The TRID forms exist both separately and as a whole; they are interrelated documents that are both cumulative and self-referential. The guidance offered should reflect that. Offering factual scenarios with a complete set of forms for each scenario would assist credit unions in seeing the complete picture of the Bureau's intentions for the forms, and therefore assist them in their decision-making when completing the forms for unusual transactions.

Additionally, there are several instances where the sample forms are completed in violation of the rules. For example, the CFPB's website contains sample form "H-25(B) Mortgage Loan

Transaction Closing Disclosure – Fixed Rate Loan Sample," which contains several errors. Below are three such errors:

- On page 1, the "Issuance Date" and "Closing Date" are the same, implying a violation of 12 C.F.R. § 1026.19(f)(ii)(A).
- On page 3, the "Adjustments and Other Credits" line in the "Calculating Cash to Close" table contains a final value of -$1,035.04, in violation of 12 C.F.R. § 1026.38(i)(8)(i), which requires the amount be disclosed "rounded to the nearest whole dollar."
- In the same table on page 3, the "Total Closing Costs," "Down Payment/Funds from Borrower," "Deposit," and "Cash to Close" entries in the "Loan Estimate" column each list an amount with two decimal places in violation of 12 C.F.R. § 1026.38(t)(4)(i)(C), which requires these amounts, as whole numbers, be truncated at the decimal place as required by the commentary found at 12 C.F.R. Part 1026, Supp. I, comment 38(t)(4)-2 (incorporating comment 37(o)(4)(i)(B)-1).

These may seem like technical nit-picking, but it illustrates the highly technical and complex nature of completing these forms in accordance with these regulations -- to the point that determining whether or not a number should be rounded requires reviewing the regulation text and the official commentary to two different sections of Regulation Z. If the Bureau cannot create sample forms that comply with the rules it wrote based on facts it created, how is a credit union supposed to properly comply with the rules given an infinite variety of factual scenarios?

The sample forms included in the appendices to Regulation Z should be amended to correctly reflect the requirements of the regulation. Further, additional sample forms should be offered on the CFPB's website, either formally included in the regulation, or as informal guidance. These sample forms should include pairs of Loan Estimates and Closing Disclosures, and should be accompanied with fact patterns, so the relationship between the forms and the underlying obligations can be tracked and understood in a holistic manner. Where the Bureau has stated in webinars it would accept multiple alternative methods of disclosure, these forms should be either notated as such, or the alternatives should be illustrated in the forms.

Pre-approvals/Pre-qualifications

The CFPB has informally indicated that borrowers may still obtain pre-approvals before applying for loan, as long as all six items of information which constitute an "application" are not provided and any documentation provided is submitted voluntarily. Nevertheless, confusion remains regarding how to collect information necessary for a pre-approval or pre-qualification without triggering disclosure requirements.

NAFCU recommends that the Bureau clarify that pre-approvals are a different stage of the loan application process, and as long as consumers are clear that a preapproval, and not a loan, is being sought, any information needed by the credit union may be requested from the consumer to provide a pre-approval or pre-qualification without triggering disclosures. In the alternative, the CFPB could clarify that although pre-approvals are a different stage of the process (a) the credit union may not request all six items of information for an application and (b) the consumer may voluntarily provide all information required by the credit union, if a pre-approval is sought.

Conclusion

We appreciate the opportunity to share our thoughts on the CFPB's proposal to make amendments to the TRID rules. Should you have any questions or concerns, or if you would like to discuss this issue further, please feel free to contact me or Alexander Monterrubio, NAFCU's Director of Regulatory Affairs, at amonterrubio@nafcu.org or (703) 842-2244.

Sincerely,

Carrie R. Hunt

Carrie Hunt
Executive Vice President of Government Affairs & General Counsel