MORTGAGE BANKERS ASSOCIATION

October 10, 2017

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

RE: Amendments to Federal Mortgage Disclosure Requirements Under the Truth in Lending Act (Regulation Z) (Docket No. CFPB-2017-0018/ RIN 3170-AA61)

Dear Ms. Jackson:

The Mortgage Bankers Association ("MBA")[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") proposed amendments to the TILA-RESPA Integrated Disclosure ("integrated disclosure") requirements.

I. Background

Although we suggest certain modifications, we strongly support the Bureau's proposal to clarify the integrated disclosure rule to address the regulatory black hole that has hampered consumers and lenders since the rule went into effect in October 2015. Concerns regarding the black hole focus on the following sentence in comment 19(e)(4)(ii)-1:

> If, however, there are less than four business days between the time the revised version of the disclosures is required to be provided pursuant to § 1026.19(e)(4)(i) and consummation, creditors comply with the requirements of § 1026.19(e)(4) if the revised disclosures are reflected in the disclosures required by § 1026.19(f)(1)(i).

The proposal states that this sentence creates a "four-business day limit."[2] Because the integrated disclosure rule does not address any other circumstances in which a Closing Disclosure ("CD") may be used to reset tolerances, many in the industry have interpreted this sentence to prevent creditors from using a CD to reset tolerances outside the four-business day

[1] The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mba.org.
[2] There are varying interpretations on how to interpret the quoted sentence, which leads to inconsistent application of the rule. The Bureau's proposal would resolve these issues to everyone's benefit.

limit, thereby creating what the industry commonly refers to as the "black hole" when the creditor cannot reset tolerances using a CD. As a result, when changes occur after the CD has already been issued and the four-business day limit is exceeded, the creditor is faced with a choice between absorbing cost increases and passing that cost on to other consumers in the form of increased prices or instead denying the application.

If finalized as proposed, the amendments would resolve the black hole issue by eliminating the four-business day limit and allowing creditors to reset tolerances using a CD, regardless of how many days there are between the date the CD is issued and consummation.[3] Resolving the black hole issue will benefit consumers and the mortgage industry alike by providing clarity, leaving choice in consumers' hands, and keeping costs down.

The rule as currently written has created confusion among lenders as to whether and when they may use the CD to reset tolerances when a change in circumstance or other permitted change occurs. This confusion results in uneven consumer experiences with some lenders issuing a CD to reset tolerances while others believe they are not permitted to do so. The CFPB's interpretation of the rule essentially imposes an arbitrary prohibition against charging fees that creditors would otherwise be allowed to charge, simply because the consumer has had *too much time* to consider certain cost increases prior to closing.

According to our members, the black hole has resulted in:

- Harm to consumers when creditors are forced to deny consumers' requests to delay closings;
- Increased cost of credit for all consumers because many creditors believe that costs cannot be charged when a black hole event occurs even if there has been a valid permitted change and are therefore forced to spread these costs across all loans;
- Increased compliance costs that are passed through to all consumers; and
- Harm to competition, as smaller creditors and their customers are disproportionately affected because smaller creditors must spread increased costs across a smaller population of loans than larger creditors.

The proposed amendment will resolve these issues, ultimately benefiting consumers by providing certainty for creditors and flexibility for consumers when unexpected issues arise before closing. The amendments will not diminish the current rule's requirement that creditors provide accurate, good faith disclosures to consumers in advance of consummation. Indeed, consumers will continue to benefit from the current rule's protections against 'bait and switch' or similar tactics because, under the current rule and the proposal, tolerances can only be reset based on valid, documented changes in circumstances or other permitted changes.[4] Finally, any

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[3] The proposal comes after a prior proposed amendment relating to the black hole was not finalized. *See* Proposed Amendments to Federal Mortgage Disclosure Requirements Under the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 54317 (Aug. 15, 2016). The preamble to that prior proposal indicated that the Bureau only intended to clarify that initial and corrected CDs may be used to reset tolerances as long as the four-business day limit is met. However, many interpreted the proposed comment to eliminate the black hole and allow creditors to reset tolerances using a CD in almost any circumstance, regardless of whether the four-business day limit was exceeded.

[4] Moreover, the parties will want to avoid changes that could result in a new three day waiting period because the APR exceeds the tolerance under Regulation Z.

potential for abuse will be discouraged by lenders' quality control reviews and audits, as well as secondary market reviews and due diligence.

For these reasons and the reasons explained below, MBA strongly supports the proposal and urges the Bureau to finalize it with the modifications discussed below.

II. CFPB's Request for Information

The proposal seeks information about a number of issues, including:

1. The frequency and timing of unexpected changes that occur after the CD has been issued;
2. The extent to which creditors have absorbed cost increases that could not be charged because they were incurred during a black hole period and how that affects pricing; and
3. Other information relating to early issuance of the CD, including:
    a. Whether creditors would provide the CD earlier in the process and before terms are finalized if the amendments are finalized as proposed;
    b. Whether creditors are currently providing CDs substantially earlier than the deadline to provide them, whether providing CDs early creates harms, and whether the amendments would exacerbate those harms or create other issues;
    c. Whether the CFPB should adopt measures to prevent sending the CD too early; and
    d. Whether the proposed change would cause information overload.

We address these requests below.

III. Comments

A. The Bureau's proposed amendments are needed to address the black hole, which continues to increase compliance burden and costs.

The proposed rule will address serious problems that have affected many consumers since the integrated disclosure requirements took effect. Closings are often delayed at the last minute for reasons beyond the creditor's control. The reasons for these delays run the gamut, from a consumer's illness to an unexpected problem during a walk-through, or a flood or another natural disaster. Creditors may reduce some black hole risk by waiting to mail the CD until six business days before closing, leaving less time for an unexpected event to occur. However, there will always be changes in circumstances or other permitted changes that occur after the CD is issued and that may delay closing. Creditors cannot control these events.

Ensuring compliance with the four-business day limit in light of these last minute changes is an incredibly complex task that adds unnecessary costs and complexities to compliance programs. Increased compliance costs, in turn, unnecessarily increase the cost of credit for all consumers using creditors who apply the limitation.

Consumer-requested delays or other changes in circumstances can trigger additional costs to close the loan through additional inspection fees, rate lock extensions, and other charges. But for the black hole, creditors would be able to disclose these increases and charge consumers for them. Instead, under the current rule, creditors must quickly decide whether to absorb the fees, deny the application, or deny the applicant's request to extend the consummation date. These decisions adversely affect consumers in a number of ways.

First, if the creditor cannot absorb the costs, the consumer must choose between closing on time or restarting the application process so that charges can be properly assessed. The current rule arbitrarily removes the option for the consumer to pay increased costs that result from the consumer's requested change, or other unforeseen event. This in turn imposes additional hardships on the consumer, who may be forced to further delay closing and incur additional costs as he/she resubmits application materials, particularly when closing on time simply is not an option. This is likely felt the most by consumers who experience an illness or other life event that causes a delay, which in turn causes fees to increase due to a permitted change. The proposed amendments would remove this unnecessary obstacle and put reasonable choices back into consumers' hands.

Second, if the creditor chooses to close a loan impacted by the black hole and absorb the cost of any fee increases that it cannot charge the applicant, the creditor passes on these absorbed fees to other consumers in the form of higher rates or origination fees. Some creditors may include a premium in their pricing because of the uncertainty created by the black hole. Such practices disproportionately affect consumers using small creditors, who may have more difficulty estimating their exposure to black hole cures, and must spread the costs over fewer loans. These creditors may be forced to significantly increase their pricing to account for the absorbed costs.

The cost of absorbing fees is not insignificant. For example, a large creditor reported in one month alone that tolerance cures totaling about $60,000 were attributable to the black hole. Although the black hole cures were not the largest category based on number of cures, they were the largest category of cures by total dollar amount. The black hole accounted for almost double the total dollar amount of cures compared to the next most expensive cure reason.

As another example, one mid-sized creditor reported that the black hole has accounted for between 13% and 37% of that creditor's tolerance cures each month over a recent five month period. This creditor's costs associated with the black hole fluctuate primarily based on the volume of purchase money mortgages, because last minute delays are most likely to occur in connection with purchase transactions. In this creditor's experience, the black hole problem has not improved since the integrated disclosure requirements took effect.

B. *The Bureau's proposal will not improperly incentivize creditors to provide the CD early with terms and costs that are nearly certain to be revised*

First, the MBA has consulted with a number of creditors and believes that the proposed rule will not incentivize creditors to issue CDs significantly earlier than they do under the current rule. As a practical matter, creditors have heavily invested in processes for issuing CDs that work for their business models, and are unlikely to incur the costs of changing their established procedures at this juncture simply because the black hole is being addressed. Creditors' procedures vary as to when they issue a CD. Some creditors wait until they have a "clear to close" before issuing the CD, and others will issue the CD somewhat earlier, after certain conditions have been met (e.g., when the loan has been approved, the rate is locked, collateral value is confirmed, and income and asset conditions have been satisfied). Because the proposed rule would still require that increased charges stem from a change of circumstance or other permitted change before a creditor could use a CD to reset tolerances, the proposed change does not appear to provide incentives to change these procedures. Changing the process to issue CDs earlier for these creditors would be a large, costly task that creditors generally do not seem to think is warranted. Because of TILA's civil liability provisions, lenders are unlikely to abuse the revised rule's flexibility. Investor reviews and due diligence would identify inappropriate issuance of CDs, as would supervision and enforcement.

Second, even if some creditors decide to provide CDs earlier in the process, consumers will benefit from that flexibility. For example, the proposal's flexibility would allow creditors to provide the CD early to consumers who request it early so that they can review the additional information provided on the CD, such as creditor-paid and seller-paid costs and other information only disclosed on the Summaries of Transactions table. Getting the CD earlier will add time for thoughtful consumer review and questions. In addition, consumers often want to close as soon as possible. Issuing the CD earlier in the process reduces the risk that the three day waiting period will be the only obstacle to closing.

Third, early issuance of the CD should not result in information overload or otherwise confuse consumers. Although earlier issuance could result in consumers receiving corrected CDs reflecting changes that are not currently permitted, the rule's general structure remains the same. Increases in closing costs beyond tolerances both today and under the proposed amendments can only occur under a valid and documented change in circumstances or other permitted change. The integrated disclosure requirements already allow for changes that may occur after the CD is issued, including increased closing costs. Creditors can avoid any consumer confusion by explaining the process and changes to consumers as they occur.

The Bureau should not create a rule now that further limits when the CD can be provided. Attempting to resolve a problem that has not occurred may have unintended consequences, which could unnecessarily further complicate compliance, create confusion, and drive up costs for consumers. If a problem develops in the future, the Bureau should propose action at that time to address the specific problem that develops.

C. *Clarifying the commentary is needed to provide more useful examples and confirm that the initial CD can be used to reset tolerances when the interest rate is first locked*

As discussed above, the MBA strongly supports the Bureau's proposal to address the black hole. However, the proposed amendments could be improved by two changes outlined here.

1. <u>Provide more examples of common situations where creditors may use a CD to reset tolerances</u>

The MBA appreciates the Bureau's efforts in illustrating the proposed amendments. Our members believe that additional examples reflecting the use of electronic disclosures would help to provide more clarity for lender. In this vein, the MBA recommends revising proposed comment 19(e)(4)(ii)-1 to include the following additional example:

> Consummation is originally scheduled for Friday, October 20th. The creditor electronically issues the disclosures required by § 1026.19(f)(1)(i) on Friday, October 13th, and on Monday, October 16th, the consumer identifies an issue during the walk-through that must be repaired before consummation and will delay closing by three weeks. The consumer's interest rate lock will expire before the new consummation date, so the consumer requests a rate lock extension. The creditor typically charges for rate lock extensions. The creditor complies with the requirements of § 1026.19(e)(4) by issuing disclosures required by § 1026.19(f)(2)(ii) reflecting the new rate lock extension fee not later than Thursday, October 19th.

2. <u>Confirm that creditors can use the initial CD to reset tolerances when locking the interest rate for the first time</u>

As amended this year, comment 19(e)(3)(iv)(D)-2 states that the creditor can use a corrected CD to reset tolerances when the interest rate is locked for the first time on or after the date the initial CD is provided. It does not appear to permit the creditor to use the initial CD to reset tolerances when the interest rate is locked before the initial CD is provided, even if the lock occurs one day before or on the same day the initial CD is scheduled to be delivered. Commentary that specifically affirms that the initial CD may be used to reset tolerances in these circumstances is also needed.

D. The proposal to address the black hole will not increase costs to consumers or creditors.

Upon implementation, the proposed change will not increase costs for creditors. Although some creditors will need to update programming to ensure their systems permit tolerances to be reset using the CD after a valid, documented permitted change, the proposed amendment is less restrictive than the current rule.

Further, the proposed amendment should not inappropriately increase consumer costs in the long run. Currently, creditors are prohibited from charging certain individual consumers for fees that they incur as a result of a valid permitted change. Those costs are factored into future pricing, which in turn increases the cost of credit for all future consumers. In addition, increased compliance costs and the risk that the creditor may not have accurately predicted the incidence of/or the severity of black hole events are also included in pricing. If the amendments are adopted as proposed, costs from unexpected events should be apportioned to those consumers who actually incur them and costs should not increase for other consumers. Further, under the current rule, creditors are absorbing extra costs that would otherwise be avoidable. As discussed above, the proposal would allow the consumer to make an informed decision about whether to proceed with the transaction at an increased cost.

IV. Conclusion

The MBA appreciates the Bureau's attention to this critical issue that is important to both creditors and consumers. The proposal recognizes that unexpected events occur regularly and cause closings to be delayed. Those delays should not prevent closings or increase costs for other consumers who are able to close on time. Amending the integrated disclosure requirements to address the black hole will resolve these issues, and the remaining limitations on when tolerances may be reset will afford sufficient protections for consumers. Please feel free to reach out to Justin Wiseman, Associate Vice President and Managing Regulatory Counsel, with any questions at (202) 557-2854 or JWiseman@mba.org.

Sincerely,

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Residential Policy and Member Services
Mortgage Bankers Association