MORTGAGE BANKERS ASSOCIATION

October 18, 2016

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

Re: Docket No. [CFPB-2016-0038], RIN 3170-AA61 - Amendments to Federal Mortgage Disclosure Requirements under the Truth in Lending Act (Regulation Z)

Dear Ms. Jackson:

The Mortgage Bankers Association[1] (MBA) appreciates the opportunity to comment on the subject proposal by the Consumer Financial Protection Bureau (Bureau) (hereinafter the Proposal) to address issues under the Know Before You Owe/Truth in Lending-Real Estate Settlement Procedures Act Integrated Disclosure (KBYO) Rule. We commend the Bureau's work in addressing myriad issues and particularly appreciate its efforts regarding several issues raised by MBA and other industry associations to clarify the rule. We also look forward to future rulemaking efforts to clarify and improve the KBYO Rule.

Before we offer our comments, however, we want to thank the Bureau for proposing to clarify several key concerns including that: (a) cooperatives are covered by the KBYO Rule, regardless of whether the cooperative is treated as real property by state law; (b) the good faith standard under 1026.19(e)(iii) applies to the items identified in such section even when paid to affiliated service providers; (c) informational Loan Estimates (LE) can correct information for consumers; (d) redisclosure of a Closing Disclosure (CD) is not required because of changes in per diem interest at the time of consummation; and (e) the rounding rules are simpler. Finally, we are particularly grateful for the Bureau's resolution of the "black hole" or authority to rebaseline the Closing Disclosure which will help lenders and consumers more easily navigate unexpected events that might occur near the end of the home-buying process.

In this comment, MBA will address the following points and respectfully urges that any final rule give particular attention to the subjects discussed below:

1. **The Diagnostic Examination Period**. MBA appreciates the current diagnostic examination approach as it recognizes both the complexity of the rule and the industry's efforts to comply in good faith with the KBYO requirements. We strongly urge that this

[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.

policy be formally extended until the changes necessitated by a final rule under the Proposal have been fully implemented and it is clear that the compliance difficulties with this complex and massive rule have been largely resolved. With this policy and the Bureau's and industries' active engagement as compliance moves forward, consumers will be much better served. We also request that the Bureau confirm that the diagnostic examination approach applies to the tolerances for costs. While the tolerance concept for costs pre-dated the KBYO rule, the KBYO rule significantly altered the concept, and this required significant changes in programming, policies, procedures and training.

2. **Cures and Corrections.** Although we recognize that in announcing the Proposal, the Bureau stated that cures and corrections would not be addressed, clarifying language is still needed on these subjects. Such clarifications are needed to avoid unnecessary disruptions in the secondary marketplace that cause undue increases in costs and reduce the availability of credit to consumers. The clarifications we propose would allow correction of certain numeric errors, apply the current Truth in Lending Act (TILA) correction provisions to KBYO disclosures where there is no overcharge to a consumer and reiterate the availability of the Closing Disclosure or CD to correct errors on the Loan Estimate (LE). MBA strongly believes these changes will work to incent compliance and avoid consumer confusion and harm for the reasons explained.

3. **Both Retroactive and Prospective Effective Dates.** Provisions of the rule clarifying ambiguities and uncertainties should, where the lender has followed an approach embodied in the Proposal, be effective retroactively to the effective date of the rule, October 3, 2015. Where the lender's approach differs from the interpretation in the rule and where systems changes are required to be implemented, lenders should have at least twelve months after the final rule is effective to make such changes and undertake necessary testing and training.

4. **Refining the Proposal Regarding Rebaselining with a CD.** MBA strongly supports the proposed clarification regarding use of a CD to rebaseline fees and believes it is a necessary clarification to address the changes in consumers' circumstances and needs. We do, however, respectfully urge a few refinements in the provision that are discussed in greater detail below.

5. **Exemption for Certain Loans.** MBA supports efforts to facilitate the use of housing finance agency loans to provide reasonable down payment assistance and appreciates the Bureau's efforts in this regard. Nevertheless additional attention should be given to whether the proposed exemption is sufficient to achieve its objective. Accordingly, while we support the exemption so far, we believe this issue warrants further discussion with lenders, housing finance agencies (HFAs) and the Bureau to determine whether to broaden the exemption or to take another course to facilitate these loans.

6. **Timing and Waivers.** Additional guidance would be useful on the circumstances when consumers can waive the three day waiting period for purchase money loans. Absent such guidance, there have been virtually no waivers. In order to ensure consumers who have a financial emergency can move forward without delay additional examples are needed.

7. **New Tolerance for Total of Payments**. MBA appreciates the Bureau's decision to establish a tolerance for "Total of Payments." Such a tolerance should explicitly

complement the other tolerances which address components of the TOP to avoid confusion and be established at a more realistic level.

8. **Tolerance Where No Shopping List.** MBA opposes the adoption of a zero tolerance for shoppable services where a shopping list is not provided to the consumer. Maintaining a 10 percent tolerance on third party fees—HUD's former approach--where there is a failure to provide a shopping list is sufficient incentive. It disincentivizes such failure by making the lender responsible for third party charges of entities not known to the lender to a significant extent. Establishing a zero tolerance as proposed is too harsh and makes lenders responsible for the precise amount of third party charges of entities that they have no knowledge or control over. Notably, this approach may have the unintended consequence of resulting in marginally higher prices to consumers that receive shopping lists. In this connection we also ask the Bureau to revise Section 8.7 of the revised Small Entity Compliance Guide issued on October 12, 2016 which provides that the 0% tolerance applies.

9. **Rate Lock on an LE.** The final rule should clarify whether in all situations a revised LE is mandatory when there is a rate lock, whether or not the rate and costs change, or if it is required only when there is a need to disclose a revised estimate. Lenders should not risk violating the rule when their policy is based upon a reasonable reading of the rule.

10. **Interest Rate Dependent Charges on a Corrected CD**. MBA appreciates the Bureau's work to clarify that interest rate dependent charges may be revised on a corrected CD if the interest rate is locked on or after the date on which the creditor provides a CD and the CD is inaccurate as a result. In such case, the creditor must provide a corrected CD at or before consummation reflecting any changed terms (and would have to provide a corrected CD with another waiting period if the APR became inaccurate). MBA believes, however, that additional language is necessary to clarify this matter.

11. **Lender and Seller Credits.** In response to the Bureau's question whether lenders should have the option of disclosing lender or seller credits as either credits specific to particular charges or general credits applicable to settlement costs, MBA urges that both options be available at this time. Some lenders would prefer a single approach, others indicate that optionality is likely necessary. MBA urges that optionality be retained and the matter studied further for several reasons: (1) the application of seller credits is governed by contracts between buyers and sellers which may dictate one or either approach; (2) Government programs such as the Department of Veterans Affairs (VA) program dictate the use of specific credits; and (3) changes to one modality will necessitate new systems changes.

12. **Payoffs**. Final guidance should make clear that payoffs should not be disclosed as closing costs on both the standard and alternative form and instead should be consistently disclosed as payoffs. Similarly, construction costs, regardless of whether loan proceeds to cover such costs are placed in a reserve or similar account (which the Bureau refers to as a "holdback") also should not be treated as charges.

13. **Model Forms.** MBA strongly opposes the Bureau's proposal to take away safe harbor protection for the sample forms that provide sample and frequently dynamic language to fill in the forms. If adopted as proposed, only use of the blank model forms will provide a

safe harbor and the guidance offered by the sample language will no longer be available. As a result, there would be no model forms or clauses providing a safe harbor for various required language that must be inserted, such as the bullet points in the Loan Terms section, text (such as "*only interest*") that must be inserted in the Projected Payments section, and text (such as: "See Total Loan Costs (D) and Total Other Costs (I)") that must be inserted in the Calculating Cash to Close section. The fact that certain calculations or language in the forms has not all been consistent with the rule and commentary should be addressed by making it consistent, and not eliminating the safe harbor for necessary text insertions. Sample language or model clauses, formerly used by the Federal Reserve for its forms (see, for example, Appendices H-4(A) to (C), H-4(E) to (K), H-5 to H-7), are necessary to help ensure compliance to protect consumers**.**

14. **Availability of Borrower and Seller Information.** MBA appreciates the Bureau's comments on the applicability of Gramm Leach Bliley to the provision of disclosures to parties other than the borrower including real estate agents. Questions remain however whether this applies to seller's agents, buyer's agents or both. (Note that in most cases, unless a buyer-broker relationship is established, all real estate brokers and agents in a transaction represent the seller.) In a similar vein, lenders have had difficulty in obtaining "settlement statements" and seller CD's from settlement agents. A set of frequently asked questions about the responsibilities of the respective parties to provide information would be particularly useful considering the varied roles and responsibilities of those providing services in conjunction with a real estate transaction.

Discussion

1) The Diagnostic Examination Period

MBA appreciates the current diagnostic examination approach to KBYO compliance since it recognizes both the complexity of the rule and the industry's efforts to comply in good faith with the Rule's requirements. We strongly urge that this policy be formally extended until the changes necessitated by a final rule under the Proposal have been fully implemented and it is clear that the compliance difficulties have been largely resolved.

In correspondence with Congress and trade associations including MBA, the Director set forth the Bureau's position on KBYO examinations[2] that they would at least initially be "diagnostic and not punitive" and recognize efforts to comply in "good faith." MBA appreciates this examination policy since it recognizes both the enormous complexity of the rule and the industry's extraordinary efforts to comply.

The industry continues to make improvements in its understanding of and compliance with the KBYO Rule but some new compliance questions have emerged and some early questions remain. Moreover, adjustment to the forthcoming changes embodied in the Proposal will necessitate an additional period of implementation and adjustment that will again require considerable coordination with vendors and service providers.

[2] June 3 letter to Congress, December 29 to MBA, Testimony before the House Financial Services Committee.

For these reasons, we urge the Bureau to formally extend its diagnostic examination policy with sensitivity to good-faith efforts for a period of time beyond the implementation date or dates specified in the forthcoming final rule. This policy should pertain until the rule has been fully implemented and it is clear that the compliance difficulties with the rule and the forthcoming amendments have been largely resolved. MBA respectfully requests that this extension of the good faith enforcement period be expressly included in the final rule.

The MBA also requests that the Bureau confirm that the diagnostic examination approach applies to the tolerances for costs. While the tolerance concept for costs pre-dated the KBYO rule, the KBYO rule significantly altered the concept, and this required significant changes in programming, policies, procedures and training.

2) Cures and Corrections

a. Clarifying KBYO and TILA Cures and Corrections is Warranted

MBA greatly appreciates Director Cordray's letter to David Stevens, Chairman and Chief Executive Officer of MBA and other trade associations on December 29, 2015 to provide additional guidance on corrections and cures. The letter was particularly timely considering that soon after the rule, secondary market investors and due diligence firms began returning or placing in "suspense" numerous loans largely because of inconsistent interpretations regarding the rule jeopardizing the availability of credit.

MBA asked that these matters be addressed in the rule to avoid concerns going forward and to help minimize harm to the marketplace. In announcing the Proposal, however, the Bureau explicitly states that it will not propose any additional cure provisions. It explains that it is "concerned that further definition of cure provisions would not be practicable without substantially undermining incentives for compliance with the rule" and that "further defining cure provisions would be extraordinarily complex."[3]

MBA respectfully disagrees. The KBYO rule is: (a) enormously detailed and prescriptive and ambiguities with respect to implementation continue to arise; (b) immaterial KBYO errors remain prevalent; (c) the lack of ability to correct non-material errors leads to higher costs for consumers; and (d) most importantly, the changes we advocate are meant to surgically target those errors that are not material to the shopping process but that have impacted lenders' ability to sell loans. Accordingly, MBA respectfully urges that the Bureau address three key areas of concern: (1) numeric errors; (2) application of Section 130(b) to errors and (3) use of the CD to correct errors on the LE.

The requested clarifications are well within the purview of this rulemaking. They address ambiguities in the rule that were created by the Bureau's adoption of certain limited cures in the Rule, and the resultant need to utilize Section 130 of the Truth in Lending Act to cure violations. The Bureau has not yet clarified how to apply Section 130 of TILA to the myriad disclosure requirements under the Rule.

Filling these gaps will not cause or incentivize lenders to provide borrowers with erroneous disclosures; rather, filling the gaps will allow creditors to provide borrowers with corrected,

[3] 81 Fed. Reg. 54,320 (August 15, 2016).

accurate disclosures in the event of inadvertent, non-material errors and will ease concerns about secondary market purchases, ultimately lowering borrowers' costs.

b. Numeric Errors

MBA appreciates that the rule presently permits creditors to cure an error if the error is both non-numeric and clerical. In addition, TILA permits creditors to correct errors if certain criteria are met: (i) the creditor has not received notice of the error from a consumer, regulator or a court; (ii) the creditor provides notice of the error to the consumer; and (iii) the consumer is not required to pay an amount greater than what was disclosed at closing. Unlike the Rule's cure provision, however, TILA's correction authority only protects against litigation or other enforcement and does not eliminate the underlying violation. Although this difference may seem superficial, it is an important distinction to securitizations and is an integral factor in the creditor's decision-making when examining whether to issue a redisclosure to a consumer.

There are approximately 75[4] numeric disclosures on the CD for which the consumer does not appear to have a private right of action under TILA. Under the current rule, the creditor has no method of curing errors regarding these disclosures because these errors involve numbers. Conversely, if the Bureau were to redefine its cure provision to allow correction of these numeric errors, creditors would have a clear path and an incentive to cure numeric errors just as they do non-numeric errors so consumers will have accurate CDs. For these reasons, we urge the Bureau's establishment of provisions for correction of numeric clerical errors that are not material disclosures.

c. The Application of Section 130(b) to Certain "Amounts"

As discussed above, Section 130(b) of TILA sets forth specific steps that a creditor or assignee must take to correct an error that occurred on a disclosure, and shield itself from liability. These steps were clear and easily applied in a pre-KBYO environment to the final TIL disclosure given at closing, where the accuracy of the disclosure (*i.e*., APR, payment stream, amount financed, total of payments) was mathematically related to the accuracy of the finance charge.

The CD, however, unlike the Final TIL, contains a number of disclosures that may give rise to damages, but that are unrelated to the finance charge. It is unclear how Sec. 130(b) applies to correct these disclosures. Consider the following:

- **Loan Officer NMLS:** The loan officer NMLS number does not represent a value; and, thus, there is no "amount" to be adjusted. Does this mean that a simple notice of the error to the consumer is a proper correction?
- **Estimated Taxes, Insurance and Assessments:** The value disclosed for estimated taxes, insurance and assessments includes non-finance charge items such as property taxes, homeowner's insurance and homeowner's association dues. An error to this disclosure could result in the consumer paying a higher amount than disclosed (however, because the APR is not affected by these amounts does that mean that if the creditor fails to adjust the account and notifies the consumer it provided an effective correction?).
- **Projected Payments Table:** Creditors must disclose the highest amount of mortgage insurance that is associated with payment or the range of payments

[4] This number cannot be accurately measured because the true number depends on the specific loan at issue. For example, a loan that utilizes the alternative form for non-seller transactions will arguably have fewer numeric disclosures because it utilizes the payoff table instead of the summaries of transactions tables (which are number intensive).

disclosed. If the creditor mistakenly discloses a blank or "-" instead of the highest value for a particular range of years how does the creditor correct that error? Does the creditor adjust the account to credit MI for the amount of years displayed in the table even if the calculation of MI used to calculate the finance charge and APR were accurate? How should the amount be adjusted (if at all) to effectuate an effective correction for Section 130(b) purposes?

d. LE Cures

One of the most important points in the Director's December 29, 2015 letter, was the acknowledgment of existing case precedent that a consumer's claim for civil damages is based on the final disclosures provided at closing.[5] Some lenders and investors, but not all, agree that this is an accurate articulation of existing TILA case law. And now that the LE differs so significantly from the CD (*i.e*., rounded values, different disclosures (In Five Years), three page v. five page presentation) it is not as clear that consumers do not have a separate legally enforceable right for errors on the LE.[6] Nonetheless, it is vital for the secondary market that actionable errors be limited to the CD.

Even though the Bureau articulated this concept in the Director's letter, the Bureau has not formalized the statement through an official publication, making the statement essentially meaningless because it cannot be relied upon as official guidance.[7]

We understand that the Bureau is reluctant to draft regulations for an issue that historically has been the domain of the courts. We also understand that the Bureau may be reluctant to draft regulations that appear to deprive consumers of their right to seek damages for disclosure errors. Those concerns; however, misunderstand the nature of the request for clarification.

Creditors are not seeking a "free pass" to provide consumers with erroneous disclosures. Rather, creditors are requesting clarity so they can understand what their legal obligations are when delivering loans into securitizations. Said differently, creditors are requesting that the Bureau articulate its expectations for compliance. If creditors are expected to correct errors on the Loan Estimate via post-consummation disclosures, creditors will readily provide them. Creditors merely want to understand whether this is the expectation.

[5] "As a general matter, consistent with existing Truth in Lending Act (TILA) principles, liability for statutory and class action damages would be assessed with reference to the final closing disclosure issued, not to the loan estimate, meaning that a corrected closing disclosure could, in many cases, forestall any private liability." Letter from Director Richard Corday, Consumer Financial Protection Bureau to David Stevens, President and Chief Executive Officer, Mortgage Bankers Association dated December 29, 2015.

[6] For example, what should a creditor do to correct an error on the LE if the error is not redisclosed on the CD? Can it use a Section 130(b) cure and a corrected LE to cure the error? And if a creditor wants to utilize Section 130(b), does the creditor need to adjust the account per the disclosure on the LE or on the CD? And if the corrected LE must be provided to cure, does the Bureau need to clarify that such a provision of a corrected LE would not violate the prohibition against providing an LE after the provision of the initial CD under § 1026.19(e)(4). Creditors are asking these questions not to avoid liability but to understand their obligations when utilizing the corrective actions that have been permitted under TILA for decades.

[7] Since issuing the Director's letter, the Bureau has issued two documents related to liability. First, it issued the annotated forms for the Loan Estimate and the Closing Disclosure, suggesting, in conflict with the position taken in the Director's Letter that authority exists for borrowers to have a cause of action for erroneous disclosures on the LE. Second, the Bureau issued the Proposal, which did not adopt the statement on liability articulated in the Director's Letter.

3) Retroactive and Prospective Effective Dates

Provisions of the Proposal that clarify ambiguities and uncertainties should, be effective in a final rule retroactively to the effective date of the KBYO rule, October 3, 2015, and available to those lenders who followed the same or similar approach. Where the lender's approach differed from the interpretation in the rule and where systems changes are required to be implemented, lenders should have at least twelve months after the final rule is effective to make the changes and undertake necessary testing and training and other activities to comply.

The Proposal has provisions that fall into three categories: (i) new clarifications to resolve ambiguous provisions; (ii) adoption of earlier informal interpretations of ambiguous provisions provided via webinars or otherwise; and (iii) amendments to the Rule.

For those amendments that fall into the first two categories – clarifications and formal adoption of earlier informal clarifications, creditors need retroactive protection. For example, creditors may have been providing LEs and CDs for cooperatives while others may have been providing GFEs and HUD-1s rather than LEs and CDs. Given the ambiguity over the correct approach on this issue, we urge the Bureau to provide retroactive protection back to the effective date of the rule for lenders who treated cooperatives as covered or conducted reasonable state law analyses. In addition, for other similar clarifications of ambiguities, retroactive protection should be provided for lenders who conducted reasonable, good faith analyses of the rule, or acted in accordance with provisions of the forthcoming clarifications. Similarly, adoption of earlier informal interpretations of ambiguous provisions provided via webinars or otherwise should also be available retroactively, particularly for those who followed the approach embodied in the previously disseminated informal guidance.

Those who followed different approaches in the face of an ambiguity prior to definitive guidance should have a year after the Proposal is finalized to make changes and undertake necessary testing and training to comply.

With respect to amendments to the Rule addressing new matters, we urge the Bureau to give creditors not less than one year to make changes, test and train and comply. As the Bureau is aware, creditors and vendors struggled to come into compliance with the launch of the Rule back in the late summer and fall of 2016 with a longer implementation period. Similar difficulties can be expected with the forthcoming amendments.

Mortgage lenders' IT departments will be at or strained beyond capacity through 2017 and 2018 with the implementation of the Home Mortgage Disclosure Act (HMDA) rule, the Uniform Closing Dataset (UCD) and the new Uniform Residential Loan Application (URLA). Requiring new changes under the Proposal in a too aggressive time frame will unduly tax resources and lead to systems problems and harm to consumers.

4) Refining the Proposal Regarding Rebaselining with a CD

MBA strongly supports the proposed clarification regarding use of a CD to rebaseline fees in proposed comment 19(e)(4)(ii)-2 and believes it is a necessary clarification to address the changes in consumers' circumstances and needs. We do, however, respectfully urge a few refinements in the provision that are discussed in greater detail below.

MBA welcomes the clarity that the Proposal would provide regarding rebaselining with a CD that would close the discussion of what has become unfortunately known as “the black hole.” The provision would allow use of a revised CD after the initial CD was provided to revise closing costs as necessary for changed circumstance and borrower requested changes without the timing element in commentary section 1026.19(e)(4)(ii)-1 that is too limiting. Lenders have expressed great frustration under the current rule when they have thought about revising the closing costs on a CD due to a borrower requested change of the closing date or changed circumstances, such as the need for an unanticipated inspection caused by property damage near closing. They have been told until now that depending on the timing, the borrower may need to start over or the lender may choose to absorb the increased costs. Either approach leads to increased costs, delays, and confusion for consumers.

While MBA welcomes this aspect of the Proposal, some changes should be made to facilitate this important correction. Specifically, we understand that the current regulatory language in section 1026.19(e)(4)(i) would not allow for a lender to rely on revised closing costs if the CD was used to disclose a rate lock. The precise problem is that official commentary to 1026.19(e)(4)(ii)-2 instructs that lenders may satisfy the requirements of this provision by using a CD, if the deadline contained in 1026.19(e)(4)(i) for the provision of revised LEs is less than 4 business days from consummation. However, the timing requirement for rate lock revisions is set forth in section 1026.19(e)(3)(iv)(D), while the timing requirement for other revisions is set forth in section 1026.19(e)(4)(i). The existing commentary provision that permits the use of a CD to revise costs (1026.19(e)(4)(ii)-1) and the proposed commentary provision (1026.19(e)(4)(ii)-2) refer only to section 1026.19(e)(4)(i) and, thus, may not apply to a change associated with a rate lock that is governed by section 1026.19(e)(3)(iv)(D).

Industry practice is that a CD may be used to disclose a rate lock (*e.g.*, when consumers have decided to keep the interest rate floating to “play the market” and lock an interest rate near closing) and that any changed fees may be relied upon, provided that the CD is provided within three business days of the lock agreement and the deadline for issuing a revised LE would have been less than four specific business days from consummation. Further, the Bureau’s proposal, which adds a comment to 19(e)(3)(iv)(D) to allow disclosing a rate lock with a revised CD, indicates that the Bureau believes lenders should be able to use a CD to disclose a rate lock.

An additional problem with the Proposal is that the proposed comment may not apply to the initial CD—a lender may not disclose a rate lock with the initial CD. This possible interpretation of the rule could harm consumers that wish to lock their interest rate three business days before closing and receive the initial CD the same day to ensure a timely closing. Timely closings are important to consumers, because they may need to vacate a rental property the same day as closing (this frequently occurs because consumers cannot afford to maintain two properties at one time).

While this aspect of the Bureau’s proposal is greatly appreciated, it should be modestly revised to resolve the problems explained above. Additionally, the Bureau could improve the final rule further by removing the instruction from the official commentary and codifying it in the regulatory text of Regulation Z, perhaps with a dedicated example in an attached official comment. Further, the Bureau could clarify the meaning of the time period stated within comments 19(e)(4)(ii)-1 and -2. There have been different interpretations of this time period, although the general industry interpretation based on the plain language of the comment has been that a CD can only be used to rebaseline if the revised LE for the changed circumstance or borrower requested change would have been required to be provided by the third or later specific business day before closing (*i.e.*, the CD can be used for changed circumstances or borrower requested changes that are learned of on the sixth or later business day before consummation, comprising sequentially of three general and three specific business days). Assuming that CD revision instructions will still be placed inside the commentary to section 1026.19(e)(4), the Bureau could improve the rule by clarifying the timing requirement that would continue to apply to the initial CD under comment 19(e)(4)(ii)-2.

Alternatively, the Bureau could revise comment 19(e)(4)(ii)-1 to provide these clarifications and ability to utilize revised CDs to disclose changed circumstances and borrower requested changes, without adding a new comment 19(e)(4)(ii)-2 for this purpose. The revisions to comment 19(e)(4)(ii)-1 could also provide the clarifications to the time period discussed above.

Again, we greatly support the proposed clarification of the ability to revise CDs as needed for the consumer when he or she request changes, there are closing delays or other changed circumstances after the CD has been issued. Considering the importance of this clarification and the ambiguity that surrounded this issue, we ask that this be a retroactive change and be effective as of the effective date of the original rule, October 3, 2015.

5) Exemption for Certain Loans

MBA supports efforts to facilitate the use of housing finance agency (HFA) loans to provide reasonable down payment, closing cost and similar homebuyer assistance (DPA) and appreciates the Bureau's efforts in this regard. Nevertheless additional attention should be given to whether the proposed exemption is sufficient to achieve its objective. Accordingly, while we support the exemption so far, we believe this issue warrants further discussion with housing finance agencies (HFAs), lenders, and the Bureau to determine whether to broaden the exemption or to take another course to facilitate these loans.

Under the Proposal the criteria for the current exemption from providing the LE and CD would be relaxed. Where the exemption is applicable, the standard TILA disclosures would still be provided**.** While, as indicated, we support reasonable exemptions to facilitate HFA loans of this type, there are several concerns.

a. Lenders May be Phasing Out the GFE, HUD-1 and Section 18 TIL Disclosure

We understand that some lenders and loan origination systems are no longer maintaining RESPA document creation capability, since these documents are largely obsolete for most of their business. There is reason to expect the same for creation of the standard section 1026.18 TILA disclosures. The Bureau has acknowledged that manual creation of disclosures can be problematic.

b. The Section 18 TIL Disclosure Is Not Straightforward For Some Lenders Due to the Nature of HFA Subordinate Terms and Costs

The Bureau has indicated that certain portions of section 1026.18 instructions would be relatively straightforward for a "soft" DPA subordinate loan. Yet, based on our information, other portions of section 1026.18 apparently are not. For example, we have heard from lenders that some LO systems cannot create section 1026.18 disclosures where the interest rate or finance charge is zero. Some systems require entry of a figure greater than zero to function. This again leaves some lenders only with the ability to manually complete the section 1026.18 disclosures. We have also received comments from some lenders suggesting there is confusion regarding section 1026.18's requirements. Specifically, we understand that some lenders may be uncertain whether the deferred/forgiven payments schedule must be disclosed and whether the conditions upon which payment is required. There is confusion whether these repayment features must be disclosed per 1026.18(g), (h), (i), or (s)(5).

Additionally, we understand that there is concern that some lenders may overlook that 1026.18(o) requires disclosure of security interest related fees (*i.e.*, recording fees). Failure to satisfy section 1026.18(o) results in these fees being considered a finance charge and such a failure may trigger further errors involving the finance charge disclosure.

c. The Bureau Should Further Consider a More Suitable Exemption for HFA Loans

In the Proposal, the Bureau seeks comment on a broad disclosure exemption for loans originated by HFAs. MBA sees the benefit of special rules for HFA loans and believes there are several courses the Bureau could pursue. The Bureau could:

- Further exempt HFA program DPA loans from the requirements of section 1026.18 or the potential liabilities for errors that come with TILA disclosures. It is unclear, however, whether the CFPB expects the old Regulation Z disclosures under 1026.18 to be given when a loan is not subject to Regulation Z. As the proposal notes, Regulation Z only applies to a loan "when four conditions are met: (i) The credit is offered or extended to consumers; (ii) The offering or extension of credit is done regularly; (iii) The credit is subject to a finance charge or is payable by a written agreement in more than four installments; and (iv) The credit is primarily for personal, family, or household purposes." 12 CFR 1026.1(c)(1). If a loan has no finance charge and is payable in four or fewer installments, nothing in Regulation Z should apply to that loan, including the KBYO disclosures, the partial exemption and the old Section 1026.18 disclosures.

- Collaborate with HFAs and lenders to design a generic disclosure for these programs. This solution would be consistent with HUD's original 2010 exemption, which required a "written disclosure [at or before settlement] that effectively describes the loan terms, repayment conditions, and any costs associated with the loan." We understand the Bureau may have desired a specific disclosure requirement, rather than a general principles-based disclosure requirement. But the Bureau could 0promulgate an effective disclosure for such loans that provide a safe harbor for compliance with the general principles-based requirement in the original HUD exemption. MBA would also be pleased to work with the Bureau on an industry program under section 1032(e) of the Dodd-Frank Act to test such a new disclosure.

- The Bureau could build on the current exemption. In this connection, we understand that lenders who actively partner with HFAs have challenges satisfying the partial exemption, particularly and most often due to recording fees, transfer taxes, or a Settlement or Closing Fee charged by a third party settlement provider. They ask that the Bureau consider applying similar logic afforded to the proposed treatment of recording fees and transfer taxes, to other fees that are not in the control of the creditor. Or at the very least, the Bureau could add such fees as an allowable fee to maintain the exemption or exclude them from the 1% threshold. Although creditors are aware of and understand the required disclosures for federally related mortgage loans, HFAs may not have the same level of understanding. This has resulted in differing interpretations of which disclosures are required to be compliant and, in some instances, resulted in salability issues in the secondary market**.** So we are also requesting that they clearly define disclosure requirements so there are no gray area's left open to interpretation.

- The Bureau could clarify that lenders and HFAs have the option of providing the KBYO disclosures for loans that would otherwise be subject to the exemption (both for loans subject to TILA and REPSA, or loans subject only to RESPA). Many lenders have systems in place to generate the KBYO disclosures and would be able to produce the KBYO disclosures much more easily than the section 18 disclosures or a newly promulgated disclosure. In addition, the KBYO disclosures have been consumer tested and are generally understood by consumers. The Bureau could also clarify how such loans would be disclosed on the KBYO disclosures (*e.g.*, whether they should be disclosed as a balloon loan).

Whatever approach or approaches are chosen, we urge the Bureau to collaborate with the HFAs and the industry to develop a solution that is flexible enough to meet the different state/local restrictions that apply to HFAs ,e.g., some state laws prevent them from being the creditor on the note.

We also urge that any approach be clearly defined. All HFAs do not have the same level of understanding of disclosures nor do all industry players have the same ability to manage risk for these loans. If the rules are not well-defined, lenders large and small may understandably avoid these valuable programs for consumers.

In summary, we believe that the current and the proposed exemption deserve further consideration to ensure that DPA loans from HFAs are available to consumers served by HFA programs. MBA would appreciate an opportunity to work with the Bureau on improving this exemption.

6) Timing and Waivers

MBA understands and appreciates the Bureau's goal of affording consumers sufficient time to review and understand their loan terms and documents. Nevertheless, additional guidance is needed that relaxes the restrictions in circumstances when consumers can waive the three-business day waiting period for purchase money loans. Currently, absent such additional guidance, there are virtually no such waivers even for consumers who may experience real hardship because of the wait.

The Rule only permits a waiver of the three-business day waiting period in the case of a *bona fide financial emergency*. But it is not clear from the rule what constitutes such an emergency outside of a borrower in foreclosure, but the gravity of different financial situations for consumers who have not defaulted on their loans can also be a bona fide emergency especially for low and moderate income borrowers. For example, delays that might require the payment of additional fees to moving companies, or to cover the cost of short-term living arrangements can have a potentially devastating impact on low and moderate income borrowers, even though the effect on more affluent borrowers might be small. Low and moderate income borrowers have little chance to rebuild cash reserves and diminishing these reserves may place them at much greater risk of financial harm including early payment default.

In addition, some real estate contracts may have “time is of the essence” clauses that have been triggered, meaning that in some circumstances borrowers may lose their deals and earnest money deposits if they are forced to wait three-business days to review their disclosures. These situations may, in fact, also represent *bona fide financial emergencies* to such consumers.

Notwithstanding, considering the lack of guidance, few creditors are willing to risk allowing a waiver. The preamble suggests delays to closing may constitute an inconvenience. We believe that for low and moderate income borrowers, the consequences may be much more severe than a mere inconvenience. The loss of a few thousand dollars can be an emergency to such consumers, but because of the Bureau’s rigid rules regarding waivers, virtually no creditors allow waivers for these consumers. This aspect of the rule may be harming consumers more than helping them.

We encourage the Bureau to provide additional guidance relaxing the definition of a “bona fide financial emergency,” warranting a waiver that would allow creditors to base a waiver on the borrower’s particular financial circumstances.

7) New Tolerance for Total of Payments

MBA supports the Bureau’s decision to establish a tolerance for “Total of Payments” or “TOP.” We respectfully urge, however, that the new tolerance be designed to complement the tolerances which address components of TOP and that the tolerance itself be established at a more realistic level.

The Bureau proposes to amend the Total of Payments (TOP) section (1026.38(o)(1)) to add the following tolerance for the amount disclosed as the TOP:

The disclosed TOP shall be treated as accurate if the amount disclosed as the total of payments:

(i) Is understated by no more than $100; or
(ii) Is greater than the amount required to be disclosed.

This mirrors the existing tolerance for the finance charge set forth in 1026.18(d). The Bureau also proposes to amend sections 1026.23(g) and 1026.23(h) to add TOP tolerances for purposes of the right to rescind that mirror the existing tolerances for the finance charge in those sections.

Under the Rule, the TOP comprises all principal and interest, plus mortgage insurance and loan costs. The Bureau stated in the preamble to the Proposal that it believed including loan costs in the TOP calculation, rather than the finance charge, will enable consumers to better identify costs included in the calculation.

These loan costs, however, include charges that are not “finance charges,” but which already are subject to good faith tolerances under § 1026.19(e)(3)(i) and (ii). It is important to note that many of the loan costs are title-related services, outside the lender’s control, and that the accuracy of those figures depends on the title company or settlement agent. Unfortunately, settlement agents do not have an affirmative obligation to disclose to lenders near-perfect estimates of closing costs.

Accordingly, there is concern that a lender could meet these tolerances and exceed the TOP tolerance. To address this concern, we respectfully urge that a final rule provide that when the components of the TOP, including loan costs, are within their respective tolerances, that the new "Total of Payments" tolerance is satisfied. We also believe that the proposed under-disclosure tolerance of $100 should be increased, considering that the TOP includes more items than the finance charge (which is subject to a $100 under-disclosure tolerance), and one of the elements of the TOP is loan costs, which include various costs that are outside the lender's control.

8) Tolerance Where No Shopping List

MBA opposes the proposed zero tolerance for shoppable services where a shopping list is not provided. Such an approach is ill-advised since it makes lenders responsible for third party charges that they have no control over and, ironically, may result in marginally higher prices to consumers that receive shopping lists.

Under Dodd-Frank, the Bureau was required to merge the disclosures that existed under Regulations X and Z. Part of this effort also involved adopting (or not) the guidance that accompanied the regulations issued by the Department of Housing and Urban Development (for Regulation X) and the Federal Reserve Board (Regulation Z). Although the Bureau did not fully adopt HUD's tolerances in its 2010 RESPA reform, the KBYO Rule's Commentary did adopt one important provision. Specifically, the Bureau adopted the concept that if a lender fails to provide the consumer a shopping provider for a shoppable service, the tolerance on that fee is 10 percent.[8]

In implementing its 2010 rule, HUD confronted the issue of how to "cure" situations when a lender fails to provide borrowers with a shopping list for service providers. At the time, HUD determined that the appropriate penalty for such failure was to treat every service provider in the world as if it were on the list. The effect of this is to prevent the lender from availing itself of the "no tolerance" available to it when consumers choose their own service providers. This result strikes the correct balance. We believe that the Bureau originally, and HUD before it, made the correct policy choice and recommend that the Bureau leave the tolerance as currently drafted in the Rule.

Under the current KBYO Rule, the tolerance on the fees disclosed for shoppable services are held to a ten percent tolerance when a list is not provided.[9] This provides sufficient incentive for the lender to provide a list; otherwise, the lender is committed to charges over which he had no control. A harsher position as proposed is unnecessary. Moreover, if the Bureau modifies the tolerance, consumers who receive shopping lists will be harmed because they will potentially pay up to ten percent more for services than a similarly situated consumer who reaps an economic benefit from the lender's mistake.

Moreover, lenders are likely to need to recoup the increased cost of having to cover all increases in charges of third party providers with which they have no relationship or control. It is also expected that third party providers that learn of a lender's failure to provide the written list

[8] 12 C.F.R. Off. Staff Comm. 1026.19(e)(3)(iii)-2. " If the creditor permits the consumer to shop consistent with § 1026.19(e)(1)(vi)(A) but fails to provide the list required by § 1026.19(e)(1)(vi)(C), good faith is determined pursuant to § 1026.19(e)(3)(ii) instead of § 1026.19(e)(3)(iii) regardless of the provider selected by the consumer, unless the provider is an affiliate of the creditor in which case good faith is determined pursuant to § 1026.19(e)(3)(i)."

[9] Comment 19(e)(3)(iii)-2 i

of providers will unreasonably increase their charges, because they will understand that the lender will need to cover the increases. Unfortunately, these increased costs can be expected to lead to higher origination charges. The Bureau has been concerned about the risks of unreasonable increases in the costs of settlement services in other contexts, and we believe the Bureau should be similarly concerned in this context. This proposal would effectively harm consumers.

Finally, this change would require additional systems changes to properly test a new tolerance for an already complicated tolerance regime.

9) Rate Lock on an LE

The Proposal states that, "Section 1026.19(e)(3)(iv)(D) requires the creditor to provide a revised Loan Estimate to the consumer no later than three business days after the date the interest rate is locked." [10]

We believe there is confusion on whether lenders are obligated to provide a revised Loan Estimate when the interest rate is locked, but the rate lock results in no change to the interest rate, points, lender credits, or other closing costs. Some believe such a revised LE is required in such circumstances. While others believe that the revised LE is only required if the rate lock does result in an increase in costs subject to tolerances (or a decrease in lender credits), because section 1026.19(e)(3)(iv)(D) exists in the "reasons for revision" section of the rule, rather than as an independent requirement. Both of these interpretations are based on a reading of the regulatory language in 1026.19(e)(iv) and (e)(iv)(D):

"… a creditor may use a revised estimate of a charge instead of the estimate of the charges… if the revision is due to any of the following reasons: … The points or lender credits change because the interest rate was not locked when the [previous LEs] were provided…."

The final rule should clarify whether a revised LE is mandatory when there is a rate lock in all situations, whether or not the rate and costs change, or if it is required only when there is a need to disclose a revised estimate, and in a situation in which the rate originally was not locked, which raises the issue of whether an LE is required with a re-lock or lock extension. . Lenders should not risk violating the rule when their policy is based upon a reasonable reading of the rule.

10) Interest Rate Dependent Charges on a Corrected CD

MBA appreciates the Bureau's work to clarify that interest rate dependent charges may be revised on a corrected CD if the interest rate is locked on or after the date on which the creditor provides a CD and the CD is inaccurate as a result. In such case the creditor must provide a corrected CD at or before consummation reflecting any changed terms. MBA believes, however, that additional language is necessary to clarify this matter.

MBA suggests that proposed comment 19(e)(3)(iv)(D)-2 be made consistent with proposed comment 19(e)(4)(ii)-2, but added language to the commentary alone is insufficient. The commentary will still conflict with § 1026.19(e)(4)(i), which conspicuously excludes paragraph 1026.19(e)(3)(iv)(D) - Interest Rate Dependent Charges. In order to eliminate any conflict between the rule and Commentary, and any doubt about the ability to reset interest rate

[10] 81 Federal Register 54318, 54333 (2016)

dependent charges resulting from a rate lock <u>or rate lock extension</u> that occurs after a Closing Disclosure has been issued, the Bureau should amend § 1026.19(e)(4)(i) to include paragraph (D). We also understand that the preamble to the rule confuses the issue and should be addressed as well.

11) Lender and Seller Credits

MBA urges the Bureau to maintain optionality for lenders at this time with respect to the disclosure of lender and seller credits.

The Bureau is seeking comment on whether there should be single approach to disclosing lender and seller credits as either a general credit toward closing charges generally or a specific credit tied to specific charges.

Some lenders would prefer a single approach, others indicate that optionality is likely necessary. Seller credits are governed by sales contracts between the buyer and seller. Local custom frequently comes into play here as to who pays a specific fee, between buyers and sellers, such as owner's title insurance. Similarly, the particular application of lender credits is governed by a number of different forces, including borrowers' particular needs and government program requirements, *e.g.*, specific line items are expected in the VA program.

MBA urges that optionality be retained and the matter be studied further for several reasons: (1) the application of seller credits is governed by contracts between buyers and sellers, which may dictate one or either approach; (2) Government programs such as the Veterans Affairs (VA) program dictate the use of specific credits; and (3) changes to one modality will necessitate new systems changes. In addition, it is not clear that consumers are currently confused by the different approaches, and the Bureau has not conducted any consumer testing to support either approach. For these reasons, there does not appear to be a need to require a singular approach at this time.

12) Payoffs

The Bureau has proposed to require that payoffs (*e.g.*, payoffs of existing liens in refinance transactions or payoffs of unsecured debt in purchase transactions) and construction holdbacks be disclosed as closing costs in "Section H. Other" pursuant to §§ 1026.37(g)(4) and 1026.38(g)(4) on the standard forms. At the same time, these amounts would be disclosed as payoffs in the Payoffs and Payments row and table on the alternative forms. MBA recommends that the Bureau, instead, clarify that payoffs and construction holdbacks should not be disclosed as closing costs on both the standard and alternative forms, and instead should be consistently disclosed as payoffs on both versions of the forms.

The Proposal is perplexing as to how the payoff of debt should be disclosed to consumers. Clearly, the payoff of debt, including credit card debt, are distinctly different from a charge or fee that is required to be paid to close a loan. Yet because the payoff of such debt is a condition of a creditor's determination of a consumer's ability to repay and subsequently loan approval, the rule would seem to be requiring their disclosure as a charge on the standard forms, but as a payoff on the alternative forms. Construction costs also would be required to be treated as closing costs on the standard forms, but not on the alternative forms, even though consumers would not think of them as costs to close the loan.

MBA believes these characterizations of payoffs and construction costs will be confusing to borrowers and prevent them from focusing on meaningful charges. Under the Proposal, the amounts of actual closing costs, which a consumer should consider when evaluating a loan or negotiating its costs, would appear to be an extremely small percentage of the large amount of total closing costs that would result from disclosing payoffs and construction holdbacks as closing costs. This would frustrate the ability of consumers to evaluate their loans or negotiate their costs, which is one of the important benefits intended by the rule. In addition, consumers would have difficulty comparing loans between lenders that are using the different versions of the forms, because the different forms would disclose such payoffs or construction holdbacks very differently. It would be simpler to disclose such costs in a consistent manner as payoffs in the Summaries of Transactions and Payoffs and Payments tables for purchase and refinance transactions. Accordingly, we believe any necessary adjustments should be made to list these amounts clearly as payoffs and separate them from closing costs.

13) Model Forms

MBA strongly opposes the Bureau's proposed removal of safe harbor protection for the sample forms that provide sample and frequently dynamic language to fill in the forms.

According to the Commentary to Appendix H, any creditor that used a "model form" properly would be "deemed to be in compliance with the regulation."[11] Unfortunately, apparently because of discrepancies between the rule language and the sample forms, the Bureau now proposes to take away safe harbor "model form" protection for all of the sample forms. In addition, the Bureau appears to interpret that the sample forms are not currently model forms under TILA, because under the Bureau's interpretation the reference to the forms that have model form status is "overbroad."

MBA appreciates that when the Bureau adopted the Rule it adopted both "Model" and "Sample" forms. The sample forms contain helpful language and information that has informed many lenders' compliance efforts and helped create greater consistency in the marketplace. The forms have also proven to be particularly helpful where questions remain about certain aspects of the disclosures, including populating the AP or AIR tables.

If adopted as proposed, only use of the blank model forms will provide a safe harbor and the guidance offered by the sample language will no longer be authoritative. This could result in lenders disclosing the dynamic text required under the rule that is not illustrated in the blank forms differently, frustrating the ability of consumers to compare disclosures between lenders, as well as the ability of the industry to adopt uniform data standards and software integrations for the disclosures. In addition, the proposal would increase the legal risk of the industry, because it would remove an important safe harbor of compliance. For example, there would be no model forms or clauses providing a safe harbor for various required language that must be inserted, such as the bullet points in the Loan Terms section, text (such as "*only interest*") that must be inserted in the Projected Payments section, and text (such as: "See **Total Loan Costs (D)** and **Total Other Costs (I)**") that must be inserted in the Calculating Cash to Close section. Such a loss could result in increased costs to consumers.

[11] 12 C.F.R. Off. Staff Comm. Appendix H -30.

The Bureau and MBA acknowledge that there are inconsistencies between the sample forms and the rule and commentary. MBA believes, however, that the less disruptive and more effective solution to facilitate compliance would be for the Bureau to preserve the sample forms and the safe harbor, and either modify the sample forms or the language in the Rule and commentary to make them consistent. Another approach would be for the Bureau to adopt model clauses for all of the text that must be inserted depending on the specific loan terms. This would be consistent with the approach of the Federal Reserve Board, which adopted numerous model clauses (see, for example, Appendices H-4(A) to (C), H-4(E) to (K), H-5 to H-7),

MBA strongly believes that the Bureau should clarify that the sample forms currently have the status of model forms under TILA, pursuant to the plain language of the rule and comment app. H-30. The regulatory text of § 1026.37(o)(3) and 1026.38(t)(3) refer to forms H-24 and H-25 generally, which most lenders and investors in the industry have interpreted to be inclusive of the sample forms. In addition, it appears from the preamble of the original KBYO final rule that the Bureau specifically intended that the sample forms be model forms under TILA. Finally, the industry has relied on the plain language of the rule and comment app. H-30, as well as the preamble of the original final rule. A reversal at this point seems arbitrary and capricious.

In the alternative, if the Bureau chooses to remove the safe harbor protections from the sample forms notwithstanding to permit flexibility, it should articulate the extent of the flexibility that the Bureau is providing for the dynamic text of the disclosures, beyond what is illustrated by the blank model forms. It must be clear to lenders, vendors, and investors how much latitude a lender has to add or change information that is not otherwise illustrated in the sample forms. For example, the bullet points in the Loan Terms table and the Calculating Cash to Close table are only illustrated in the sample forms. Would lenders be permitted to use paragraphs of text instead? These questions will need to be answered by the Bureau to provide clarity to the industry.

14) Availability of Borrower and Seller Information.

MBA appreciates the Bureau's comments on the applicability of Gramm Leach Bliley Act (GLBA) to the provision of disclosures to parties other than the borrower. Questions remain, however, whether this applies to seller's agents, buyer's agents or both. In most cases, unless a buyer-broker relationship is established, all real estate brokers and agents in a transaction represent the seller, which raises questions regarding the scope of the Bureau's comments regarding agents. Typically, both real estate agents are interested in the status of the financing, to ensure their closing will take place on time, and thus, both request this information from the lender or the settlement agent.

In a similar vein, lenders have had difficulty in obtaining "settlement statements" and seller CD's from settlement agents. Lenders need these documents for a variety of reasons.

As a general matter, more information and clarity from the Bureau about the obligations and responsibilities of each party in the process, including title, settlement, and real estate agents would be of great benefit to all in the industry and would improve the consistency of the consumer experience. A set of frequently asked questions about the responsibilities of the respective parties to provide information would be particularly useful.

Other Concerns and Issues

a. Construction Lending and Renovation Loans/Permanent Phase LEs for Construction-Only Applications

The Bureau should provide additional clarity about the application of the construction lending provisions to rehab and renovation loans (for example, 203K or Fannie Mae's Homestyle products), particularly with respect to escrow holdbacks, inspection fees, and other costs.

In addition, the Bureau proposed to require lenders that generally make permanent financing available to provide consumers who apply for construction-only loans with LEs for permanent financing as well. The only situation in which a permanent loan LE would not be required is if the consumer expressly disavows any interest in one. The Bureau proposed to make these changes in two commentary provisions clarifying section 1026.17(c)(2)(6)(ii) and 1026.19(e)(1)(iii), proposed comments 17(c)(6)-6 and 19(e)(1)(iii)-5.

MBA strongly disagrees with this proposal. Consumers who apply for construction-only loans may not be interested in permanent financing, even though the lender generally makes it available. Consumers would be confused to receive an LE for a permanent loan that they have not applied for. This would add to unnecessary paperwork for consumers, and make it more difficult for them to evaluate the options for the loan for which they actually applied. In addition, this would significantly complicate compliance for lenders, because they would be required to provide LEs, which are subject to strict tolerance, timing, and accuracy requirements, for loans for which the consumer has not applied. In addition, there is likely no situation in which consumers would expressly disavow any interest permanent financing to a lender, because they would be concerned that the lender would treat them less favorably as a result. For these reasons, this proposal makes little sense for consumers or industry.

Further, it appears that existing comment 17(c)(6)-2 already clarifies the meaning of "may be permanently financed" to mean loans that "have 2 distinct phases, similar to 2 separate transactions." Note that this comment refers to such a loan subject to section 1026.17(c)(6)(ii) as being "similar to 2 separate transactions," which means it represents one transaction. Based on this existing comment, if a consumer applied for one construction-only loan, and not for a construction-to-permanent loan (with two phases), the loan would not be subject to the option to combine the construction-only disclosure with a permanent loan disclosure under section 1026.17(c)(6)(ii). Such a construction-only loan would not be a single transaction with two distinct phases, as described in existing comment 17(c)(6)-2. The Bureau has not proposed to delete this existing comment, and thus, the Bureau's proposed comments 17(c)(6)-6 and 19(e)(1)(iii)-5 would appear to conflict with existing commentary.

This would also be a departure from current practice under this existing commentary. There does not appear to be a need to require such a significant change in lender operations at this time. We are not aware of any complaints regarding the applicability of or compliance with comment 17(c)(6)-2. In addition, we are not aware of any borrower confusion regarding the availability of permanent financing.

If the Bureau did decide to move forward with this proposal to specifically define "may be permanently financed" and require a permanent loan LE for a construction-only loan application under comment 19(e)(1)(iii)-5, the Bureau should modify the proposed comments to define this phrase and require a permanent loan LE only when the consumer actually expresses interest in permanent financing.

b. Total Interest Percentage

MBA supports a clear determination to resolve ambiguity whether or not prepaid interest is to be included in the TIP calculation. Also, additional clarity is needed around which prepaid value should be included in the calculation.

Also, there appears to be some discrepancy between the statute, the Rule, and the comments and guidance supporting the Rule as to whether the amount of prepaid interest disclosed is accurate based on when the final disclosure is being prepared, or if it must be accurate at the time the value is disclosed to the consumer.

Specifically, the statute states the prepaid interest disclosure is based on information actually known to the creditor at the time the documents are being prepared (15 U.S.C. 1681). The Rule, in contrast, states that disclosure should be consistent with the best information reasonably available to the creditor at the time it is disclosed (1026.19(e)(3)(iii)).

It is possible that these two different timing standards could result in two different calculations of prepaid interest. The downstream effect is that it would impact the accuracy of the Total Interest Percentage.

MBA encourages the Bureau to provide additional clarity on this issue and work to ensure consistency in language and interpretation across the statue, Rule, and all other supporting guidance and implementation materials.

Conclusion

MBA appreciates your consideration of these comments and the Bureau's outstanding work on this important rule. MBA believes that if these matters can be well addressed, our mutual interest in serving the needs of a fairer more transparent market for consumers will be well served. Should you have questions or wish to discuss any aspect of these comments, please contact Ken Markison, Vice President and Regulatory Counsel, at (202) 557-2930 or kmarkison@mba.org; or Elizabeth Kemp, Assistant Regulatory Counsel, at (202) 557-2941 or ekemp@mba.org.

Thank you for your consideration of these views.

Sincerely,

Stephen A. O'Connor
Senior Vice President Public Policy & Industry Relations