American Financial Services Association
Consumer Mortgage Coalition
Mortgage Bankers Association

May 2, 2011

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Re: Proposed Escrow Rules
Regulation Z
Docket No. R-1406

Dear Ms. Johnson and Ms. Ayouch:

The undersigned trade associations appreciate the opportunity to submit comments on this proposed rule. The Board of Governors of the Federal Reserve System (the Board) proposes to amend Regulation Z in part to implement provisions in the Dodd-Frank Act[1] that amend the Truth in Lending Act (TILA) relating to escrow accounts. The proposal would also require new disclosures about escrow accounts and termination of escrow accounts. We agree with the Board that escrows can protect consumers in many circumstances. We very strongly support clear, concise escrow disclosures.

[1] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the Dodd-Frank Act).

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I. Summary

The proposed rule would implement two sections[2] of the Dodd-Frank Act that govern escrow accounts, requiring escrows on loans in some circumstances, permitting them in other circumstances, setting a minimum duration of certain escrows, and requiring a number of new disclosures.

Dodd-Frank § 1461, one of the provisions the rule would implement, uses particularly complicated language. The proposed rule reflects a careful, thorough analysis of the language, and would largely implement consumer protections that Congress intended.

The proposal would provide several very helpful clarifications of when escrows are required. It would also provide a very helpful implementation of a Dodd-Frank provision that permits servicers to require escrows for the life of a loan. The rule would implement a helpful consumer protection by exempting from mandatory escrows insurance premiums for planned unit developments, condominiums, and cooperatives, when the homeowner does not pay for insurance directly. We similarly support the proposal not to require escrows on subordinate loans, on which escrows are not appropriate. The Homeowners Protection Act of 1998 (HPA) overlaps with escrow rules in some areas, and the Board has tried to avoid creating conflicting laws, which is always important. We are also pleased that the Board proposes to activate various institutional exemptions from the escrow requirements, although we believe they will be of limited use.

We discuss below some areas in which the proposal would impose requirements that exceed the requirements or authority of the statute, and we suggest some clarifications and refinements in this regard. We urge the Board to adopt the recommendations in this letter.

The proposed rule would also require a new set of escrow disclosures, and it would create a definition of "transaction coverage rate" that could reach well beyond escrows to affect a number of non-escrow Dodd-Frank provisions. We are very concerned about the timing, although not necessarily the substance, of these aspects of the proposed rule.

There is currently in place a comprehensive set of escrow disclosures under Real Estate Settlement Procedures Act (RESPA) rules. The Board's proposed rule is not accompanied by a Department of Housing and Urban Development (HUD) proposal to remove those RESPA disclosures when the Board's proposal becomes final. That means the RESPA disclosures would remain in place, while TILA rules would add yet another layer of nearly duplicative disclosures. The Board does not explain why it proposes to require duplicative disclosures. It does not suggest, for example, that there is a flaw in the existing RESPA disclosures that leaves consumers at risk.

If the Board were to finalize this rule, these duplicative disclosures may be in place for only a short time. Consumer mortgage disclosures are, right now, in the process of being

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[2] Dodd-Frank Act §§ 1461 and 1462, at 124 Stat. 2178-82.

entirely redesigned. Congress mandated in Dodd-Frank that the RESPA and TILA disclosures be integrated. The Consumer Financial Protection Bureau (CFPB) has made that project an early priority, and has begun even before the CFPB is fully operational. It is likely, therefore, that the CFPB will have integrated disclosures in place soon. All RESPA and TILA mortgage disclosures must be integrated, meaning escrow disclosures will be integrated.[3] As a result, this rulemaking would require implementation of an entirely new set of duplicative escrow disclosures, and a few months later, when the disclosures are integrated, the industry would be required to replace at least part of the duplicative disclosures with integrated escrow disclosures.

We do not yet know which part of the redundant disclosures the CFPB will remove, which it will retain, or whether it will replace both with entirely new disclosures. It is possible that the CFPB will adopt escrow disclosures exactly as the Board now proposes and repeal every overlapping RESPA disclosure, but that is mere conjecture. Even if we fully supported the proposed disclosures, we cannot support implementing costly systems changes based on conjecture that the systems changes might not need to be replaced soon.

The transaction coverage rate in the proposed escrow rule would replace the annual percentage rate (APR) in a comparison to the average prime offer rate (APOR). The proposed rule would use this comparison to define higher-priced mortgage loans (HPMLs) on which escrows would be required. However, Dodd-Frank requires APR-to-APOR comparisons in areas unrelated to escrows, as we describe below. It would be inappropriate to revise the definition used for this comparison in a rulemaking specific to escrow accounts. All the purposes for which it will be used should be implemented consistently and together. Considering only the escrow uses of that comparison may increase the likelihood that the CFPB will revise the definition as it considers the nonescrow aspects of the comparisons, meaning that creditors would soon have to remove and restart its implementation, at great expense.

This is not to say we entirely disagree with the substance of the Board's proposals. We do object to being required to provide duplicative consumer disclosures because they will overburden consumers with yet more papers to manage and to understand. Even when the content of the disclosures is clear, *the volume of consumer mortgage disclosures today is a serious impediment to consumer understanding*.

We also object to having to implement changes that require very significant implementation resources, when a few months later creditors nationwide would need to remove and replace that implementation, at additional significant cost, and begin

[3] "The Bureau shall publish a single, integrated disclosure for mortgage loan transactions (including real estate settlement cost statements) which includes the disclosure requirements of this title [TILA] in conjunction with the disclosure requirements of the Real Estate Settlement Procedures Act of 1974 that, taken together, may apply to a transaction that is subject to both or either provisions of law. The purpose of such model disclosure shall be to facilitate compliance with the disclosure requirements of this title and the Real Estate Settlement Procedures Act of 1974, and to aid the borrower or lessee in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures." Dodd-Frank Act § 1100A(5), new TILA § 105(b).

implementation of a new set of requirements. This would impose unnecessary regulatory burden.

The Board has not adequately considered this unnecessary regulatory burden as required under either the Paperwork Reduction Act or the Regulatory Flexibility Act. Both of those laws are designed to prevent unnecessary regulatory burdens such as some of the burdens this rulemaking would impose. We set out our Paperwork Reduction Act and Regulatory Flexibility Act positions in an Appendix to this letter because of their length, and incorporate them herein by reference.

We very strongly urge the Board, for the short time before integrated disclosures are in place, to deem delivery of escrow disclosures under RESPA rules to be compliant with TILA. We also suggest that the Board not require implementation of the transaction coverage rate, again, for the short time until an integrated definition is in place. This approach would very, very substantially reduce regulatory burden without significantly effecting consumers.

II. New Mortgage Disclosures Should Await Integration

Consumer mortgage disclosures have been confusing for far too long, and there are far too many of them. We have advocated for years that they be streamlined and made clear. Despite the best of intentions, the current disclosure regime confuses consumers rather than help them make informed decisions about which loan products are best for them.

Finally, in July 2010, Congress mandated that the RESPA and TILA disclosures be integrated and that consumers receive a single disclosure form rather than the stack of confusing forms consumers receive today. To make certain integration happens, Congress required that integration in, not one, but three places in the Dodd-Frank Act.[4]

Nowhere in this proposed rule does the Board address this Congressional mandate, how this rulemaking will affect the integration process, or whether the implementation team at the CFPB concurs in this proposal. This team has already begun the integration process and has made it a high priority.

The triple mandate is in Title X of the Dodd-Frank Act, which does not become effective until the designated transfer date. It is therefore possible that the Board believes it needs to proceed with the proposed escrow rule before then. This view, however, ignores the need for consumer protection, is contrary to the substance of the statutory triple mandate, and ignores the schedule Congress established.

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[4] The Dodd-Frank Act requires integration in each § 1032(f), § 1098(2)(A), as well as in § 1100A(5). 124 Stat. at 2007, 2103-04, and 2108.

The substance of the triple mandate is that the disclosures need to be integrated because consumers need to be protected. We believe this is an important goal, and there is no reason to delay integration.

Further, the statutory language makes clear that Congress intended integration to begin before the designated transfer date. Congress requires the CFPB to propose an integrated disclosure form by a date certain, "unless the Bureau determines that any proposal issued by the Board of Governors and the Secretary of Housing and Urban Development carries out the same purpose."[5] The Board and HUD can only propose an integrated disclosure if they do so before the designated transfer date, when their relevant rulewriting authority transfers to the CFPB. That is, *Congress clearly intended integration to begin before the designated transfer date.*

Moreover, the present rulemaking would implement a provision in Title XIV. Congress does not require Title XIV regulations, with one irrelevant exception, until 18 months after the designated transfer date.[6] To argue that the present rulemaking can proceed now because the triple mandate does not yet matter would reverse the timing Congress established. Congress intended that integration work begin right away, before the designated transfer date. Proceeding with a Title XIV rulemaking that makes the disclosures *less* integrated while not working on integrating the rules is the opposite of what Congress intended in enacting Dodd-Frank.

The Board does not discuss the substance of the RESPA escrow disclosures or describe some flaw in them that the Board must fix or that it has unsuccessfully tried to persuade HUD to fix. The Board does not propose to integrate its proposed escrow disclosures with HUD's escrow disclosures.

We believe that requiring new mortgage disclosures that are not integrated is no longer within the Board's authority because *Congress enacted the triple mandate.*

Congress was also very clear that the new disclosure should be "a single, integrated disclosure"[7] rather than multiple disclosures. The proposed rule would require another redundant layer of disclosures, on yet another piece of paper, even though *Congress mandated an end to redundant, overlapping disclosures*.

III. The Proposed Disclosures Duplicate Existing Disclosures

The Board describes in many places that the disclosures it requires are "necessary[.]" It does not mention the possibility that existing disclosures are sufficient. RESPA and its

[5] Dodd-Frank Act § 1032(f), 124 Stat. at 2007.
[6] Dodd-Frank Act § 1400(c), 124 Stat. at 2136.
[7] The Dodd-Frank Act requires "a single, integrated disclosure" in each § 1032(f), § 1098(2)(A), as well as in § 1100A(5); 124 Stat. at 2007, 2103-04, and 2108.

implementing Regulation X currently require escrow disclosures that are clear, detailed, and understandable.

We spend several pages below illustrating the RESPA disclosures to demonstrate how duplicative the Board's proposed disclosures are. We do not discuss which aspect of RESPA or TILA disclosures is better or worse because neither will be in place a few months hence. Rather, we emphasize the similarity of the substance of both sets of disclosures. *That similarity makes the enormous regulatory burden of implementing new duplicative disclosures for a short time and the burden of soon removing them quite inappropriate.*

Lenders must provide consumers with HUD's Settlement Costs Booklet.[8] It is easy for consumers to understand and has, for example, a clear table of contents. It clearly explains escrow accounts. For example, it states:

> **Taxes and Insurance:** In addition to the principal and interest portion of your mortgage payment, you will have to pay property taxes and insurance to protect the property in the event of disaster such as a fire or flood. Based on your down payment, you may also have to pay mortgage insurance. Your lender may require an escrow or impound account to pay these items with your monthly mortgage payment. If an escrow account is not required, you are responsible for making these payments.
>
> **Mortgage insurance** may be required by your lender if your down payment is less than 20% of the purchase price. Mortgage insurance protects the lender if you default on your loan. You may be able to cancel mortgage insurance in the future based on certain criteria, such as paying down your loan balance to a certain amount. Before you commit to paying for mortgage insurance, find out the specific requirements for cancellation. Mortgage insurance should not be confused with mortgage life, credit life, or disability insurance that are designed to pay off a mortgage in the event of a borrower's death or disability. Your *Good Faith Estimate* should not have any charges for mortgage life, credit life, or disability insurance.
>
> **Homeowner's (hazard) insurance** protects your property in the event of a loss such as fire. Many lenders require that you get a homeowner's policy before settlement.
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> **Flood insurance** will be required if the house is in a flood hazard area. After your loan is settled, if a change in flood insurance maps brings your home within a flood hazard area, your lender or servicer may require you to buy flood insurance at that time.

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[8] RESPA § 5(d). We recommend that the CFPB transform the HUD Settlement Booklet so that the information is presented in an interactive, visual manner, and that the CFPB distribute it over the Internet for free where consumers will find it. We believe this educational information should be readily available *long before* a consumer approaches a lender about getting a mortgage loan because the information would be more effective were consumers to receive it before filing a loan application.

RESPA good faith estimates (GFEs) disclose, on page 1, the following:

> Some lenders require an escrow account to hold funds for paying property taxes or other property-related charges in addition to your monthly amount owed of $ ________ .
> Do we require you to have an escrow account for your loan?
> ☐ No, you do not have an escrow account. You must pay these charges directly when due.
> ☐ Yes, you have an escrow account. It may or may not cover all of these charges. Ask us.

HUD's booklet explains this disclosure:

> **Escrow Account Information**
>
> Some lenders require an escrow account to hold funds for paying property taxes or other property-related charges in addition to your monthly amount owed of $ 1,173.00 .
> Do we require you to have an escrow account for your loan?
> ☐ No, you do not have an escrow account. You must pay these charges directly when due.
> ☒ Yes, you have an escrow account. It may or may not cover all of these charges. Ask us.
>
> The GFE also includes a separate section referred to as "Escrow account information," which indicates whether or not an escrow account is required. This account holds funds needed to pay property taxes, homeowner's insurance, flood insurance (if required by your lender) or other property-related charges.
>
> If the GFE specifies that you will have an escrow account, you will probably have to pay an initial amount at settlement to start the account and an additional amount with each month's regular payment. If you wish to pay your property taxes and insurance directly, some lenders will give you a higher interest rate or charge you a fee. **If your lender does not require an escrow account, you must pay these items directly when they are due.**

On page 2, the GFE discloses the following:

9. Initial deposit for your escrow account This charge is held in an escrow account to pay future recurring charges on your property and includes ☐ all property taxes, ☐ all insurance, and ☐ other ________ .	

and:

11. Homeowner's insurance This charge is for the insurance you must buy for the property to protect from a loss, such as fire. *Policy* *Charge*	

HUD's Booklet also explains these GFE disclosures:

> Block 9 contains the initial amount you will pay at settlement to start the escrow account, if required by the lender. . . .
>
> Block 11 contains the annual charge for any insurance the lender requires to protect the property such as homeowner's insurance and flood insurance.

The HUD-1 settlement statement requires the following disclosures:

900. Items Required by Lender to Be Paid in Advance			
901. Daily interest charges from to @ $ /day	(from GFE #10)		
902. Mortgage insurance premium for months to	(from GFE #3)		
903. Homeowner's insurance for years to	(from GFE #11)		
904.			

1000. Reserves Deposited with Lender						
1001. Initial deposit for your escrow account				(from GFE #9)		
1002. Homeowner's insurance	months @ $	per month	$			
1003. Mortgage insurance	months @ $	per month	$			
1004. Property taxes	months @ $	per month	$			
1005.	months @ $	per month	$			
1006.	months @ $	per month	$			
1007. Aggregate Adjustment			-$			

The Booklet explains these disclosures clearly:

> **900 Series, Items Required by Lender to be Paid in Advance**
>
> | 900. Items Required by Lender to be Paid in Advance | | |
> |---|---|---|
> | 901. Daily interest charges from 1/31/2010 to 2/1/2010 @ $ 28.00 /day | (from GFE #10) | $28.00 |
> | 902. Mortgage insurance premium for months to | (from GFE #3) | |
> | 903. Homeowner's insurance for 1 years to Insure-It ($600 P.O.C. by borrower) | (from GFE #11) | |
>
> These are charges which the lender requires to be prepaid at settlement.
>
> Line 901 lists the daily interest charges collected for the period between the date of your settlement and the first day of the next month. This charge is disclosed in Block 10 of your GFE. In this example, the loan closed on 1/31/10, and the interest on the GFE was calculated with a 1/31/10 closing date so the charges are the same on both. This amount on Line 901 may differ from the amount on the GFE if the settlement date changes.
>
> Line 902 lists the charge for any up-front mortgage insurance premium payment due at settlement. This is one of the charges disclosed in GFE Block 3 of your GFE. In this example, there is no payment due.
>
> Line 903 is the charge for the homeowner's insurance policy and is one of the charges disclosed in Block 11 of your GFE. In the example, the homeowner's insurance was paid prior to the day of settlement so the charge is listed as "P.O.C. by borrower". P.O.C. stands for "Paid Outside of Closing". You typically have to bring a pre-paid insurance policy to your settlement.

1000 Series, Reserves Deposited with Lender

1000. Reserves Deposited with Lender						
1001. Initial deposit for your escrow account					(from GFE #9)	$350.00
1002. Homeowner's insurance	1	months @ $ 50.00	per month	$ 50.00		
1003. Mortgage insurance	1	months @ $ 100.00	per month	$ 100.00		
1004. Property Taxes	2	months @ $ 200.00	per month	$ 400.00		
1005.		months @ $	per month	$		
1006.		months @ $	per month	$		
1007. Aggregate Adjustment				-$ 200.00		

This series of the HUD-1 lists the amounts collected by the lender to be placed in your escrow account for future payments of items such as homeowner's insurance, mortgage insurance and property taxes. Line 1007 is an adjustment to make sure lenders are only collecting the maximum amount allowed by law. In this example, even though the first year's homeowner's insurance premium has already been paid, the lender has started escrowing money to pay the next bill.

When establishing an escrow account, the servicer or lender must conduct an escrow analysis to determine the amount of the initial deposit.[9] An escrow account statement must be delivered within 45 days of establishing an escrow.[10] This statement must show the amount of the monthly payment, the portion of the payment going into the escrow account, the estimated taxes, insurance, and other charges to be paid from the escrow, and the anticipated disbursement dates.[11] It must state the amount of the escrow cushion.[12] It must identify the payees or what the disbursements are for.[13] It must also include a trial running balance.[14]

A permissible format for the initial escrow disclosure is as follows:[15]

[9] 24 C.F.R. § 3500.17(g)(1).
[10] 24 C.F.R. §§ 3500.17(g)(1) (within 45 days of settlement if an escrow is established at settlement); 3500.17(g)(2) (within 45 days after escrow is established after settlement and not as a loan condition).
[11] 24 C.F.R. § 3500.17(g)(1)(i).
[12] *Id*.
[13] 24 C.F.R. § 3500.17(h)(3).
[14] 24 C.F.R. § 3500.17(g)(1).
[15] 60 Fed. Reg. 24734, 24736 (May 9, 1995). HUD removed this form from codification in an effort to streamline its regulations, but preserves the material and makes it available as public guidance. 61 Fed. Reg. 13232 (March 26, 1996).

APPENDIX G–1: *INITIAL* ESCROW ACCOUNT DISCLOSURE STATEMENT — FORMAT

[Servicer's name, address, and toll-free number.]

***INITIAL* ESCROW ACCOUNT DISCLOSURE STATEMENT**

THIS IS AN ESTIMATE OF ACTIVITY IN YOUR ESCROW ACCOUNT DURING THE COMING YEAR BASED ON PAYMENTS ANTICIPATED TO BE MADE FROM YOUR ACCOUNT.

Month	Payments to Escrow Account	Payments from Escrow Account	Description	Escrow Account Balance
Initial deposit:				$_______

[A filled-out format follows.]

(PLEASE KEEP THIS STATEMENT FOR COMPARISON WITH THE ACTUAL ACTIVITY IN YOUR ACCOUNT AT THE END OF THE ESCROW ACCOUNTING COMPUTATION YEAR.)

Cushion selected by servicer: $__________.

YOUR MONTHLY MORTGAGE PAYMENT FOR THE COMING YEAR WILL BE $__________, OF WHICH $__________ WILL BE FOR PRINCIPAL AND INTEREST, $__________ WILL GO INTO YOUR ESCROW ACCOUNT, AND $__________ WILL BE FOR DISCRETIONARY ITEMS (SUCH AS LIFE INSURANCE, DISABILITY INSURANCE) THAT YOU CHOSE TO BE INCLUDED WITH YOUR MONTHLY PAYMENT.]

[YOUR FIRST MONTHLY MORTGAGE PAYMENT FOR THE COMING YEAR WILL BE $__________, OF WHICH $__________ WILL BE FOR PRINCIPAL AND INTEREST, $__________ WILL GO INTO YOUR ESCROW ACCOUNT, AND $__________ WILL BE FOR DISCRETIONARY ITEMS (SUCH AS LIFE INSURANCE, DISABILITY INSURANCE) THAT YOU CHOSE TO BE INCLUDED WITH YOUR MONTHLY PAYMENT. THE TERMS OF YOUR LOAN MAY RESULT IN CHANGES TO THE MONTHLY PRINCIPAL AND INTEREST PAYMENTS DURING THE YEAR.]

[INSTRUCTIONS TO PREPARER: The servicer is to use the appropriate option above describing the principal and interest payments for the coming year. The reference to payments for discretionary items should be omitted if there are no such payments included with the monthly payment. This instruction paragraph should not appear on the form.]

The Settlement Costs Booklet also explains the initial and annual escrow account disclosures:

> If your loan requires an escrow account, the servicer of your loan must give you an initial escrow account statement at your settlement or within the following forty-five (45) days. That form will show all of the payments which are expected to be deposited into your escrow account and all of the disbursements which are expected to be paid from the escrow account during the year. Your servicer will review your escrow account annually and send you a disclosure each year which shows the prior year's activity and any adjustments necessary in the escrow payments that need to be made in the upcoming year. You will not receive this yearly disclosure if your loan is in default. Remember that your monthly payment can increase if your taxes or insurance payments increase.

Additionally, HUD has published informative "FAQs About Escrow Accounts for Consumers."[16] These FAQs describe topics such as escrow cushions, how escrow payments vary, and how to calculate how much the lender may require in an escrow account.

In its consumer testing for the present rulemaking, the Board tested only its own forms, not HUD's forms, and did not provide the consumers it interviewed with the RESPA escrow disclosures. The Board did not explain its decision to selectively test only some forms. The integrated approach would have been to test both sets of disclosures together – in a "real world" loan environment – so the regulators could select the best of each and drop the worst of both.

The RESPA escrow disclosures work well. However, they are not integrated with the Board's proposed disclosures, and are not integrated with the Dodd-Frank changes to escrow requirements. Doubling the disclosures is not integrating them. It would not inform consumers, it would overload them.

Dodd-Frank requires disclosures to be integrated quickly. It does not require new § 1461 escrow disclosures to be implemented until 18 months after the designated transfer date. The proposed disclosures are very substantially duplicative of RESPA escrow disclosures, while the Dodd-Frank triple mandate requires integrated, not duplicative, disclosures. Additionally, some of the proposed disclosures are not required by Dodd-Frank at all.[17] The regulatory burden of implementing a new disclosure regime for an extremely short period, and then the burden of undoing that implementation and replacing it with something new, would be enormous. For all of these reasons, the Board should not adopt any new consumer mortgage disclosures, and should instead defer to the CFPB's integration project. In the brief interim, the Board should make clear that RESPA disclosures comply with TILA.

IV. The Proposal is Inconsistent With a Recent Board Announcement

We very much appreciate the announcement the Board made on February 1, 2011:

> [T]he Board has carefully evaluated whether there would be public benefit in proceeding with the rulemakings initiated with the Board's August 2009 and September 2010 proposals at this time. Because the Board's 2009 and 2010 TILA proposals would substantially revise the disclosures for mortgage transactions, any new disclosures adopted by the Board would be subject to the CFPB's further revision in carrying out its mandate to combine the TILA and RESPA disclosures.

[16] The FAQs are here: http://web.archive.org/web/20070403030842/http://www.hud.gov/offices/hsg/sfh/res/respafaq.cfm

[17] Proposed § 226.19(f) would require disclosures about escrows for all loans secured by first liens on a real property or dewlling. Dodd-Frank requires disclosures only when an escrow is required, not when an escrow is voluntary, and not when there is no escrow established. Proposed § 226.20(d) would further require a disclosure when an escrow will be cancelled. Dodd-Frank does not require cancellation notices.

> In addition, a combined TILA-RESPA disclosure rule could well be proposed by the CFPB before any new disclosure requirements issued by the Board could be fully implemented. For these reasons, the Board has determined that proceeding with the 2009 and 2010 proposals would not be in the public interest. Although there are specific provisions of these Board proposals that would not be affected by the CFPB's development of joint TILA-RESPA disclosures, adopting those portions of the Board's proposals in a piecemeal fashion would be of limited benefit, and the issuance of multiple rules with different implementation periods would create compliance difficulties.

This announcement came the day after an interim final rule[18] began requiring a new disclosure that is both divergent from and redundant of RESPA disclosures. The Board in December published a revision to that rule, also in the form of an interim final rule. Both of these rules arise from the Board's 2009 TILA proposal. The Board is adopting rules in piecemeal fashion with different implementation periods, which is making compliance extremely difficult.

We appreciate the Board's position against piecemeal rulemakings. In the same spirit, the new disclosures required by the present rulemaking should await integration.

V. The Board's Assertion of Authority for Duplicative Disclosures is Inconsistent With the Integration Mandate

The Board relies on three legal bases for the present rulemaking, including TILA § 105(a). Congress enacted that authority in 1968, and it is indeed broad. Until the designated transfer date, it will read:

> The Board shall prescribe regulations to carry out the purposes of this subchapter. Except in the case of a mortgage referred to in section 103(aa), these regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

The exception for § 103(aa) mortgage loans was enacted in 1994, and this language was designated as a subsection in 1980. Other than those changes, this authority to require disclosures existed from 1968 until the 2010 triple mandate.

The Board asserts in its proposal that the following duplicative disclosures are "necessary":

[18] 75 Fed. Reg. 58470 (September 24, 2010). This interim final rule requires a new interest rate and payment summmary disclosure. Compliance with it became mandatory January 30, 2011.

- Preconsummation disclosure of what an escrow is and how it works.[19]

- Whether a mortgage loan will have an escrow, and the implications of not having one.[20]

- The amount required to fund the escrow at consummation.[21]

- The amount of the periodic payments that will go into the escrow.[22]

- Mortgage payments can change with changes in property tax or hazard insurance costs.[23]

- Other names for an escrow account.[24]

- A telephone number that the consumer can call to request an escrow account, or to request that it not be closed, and the date by which the consumer must make the request.[25]

- An existing escrow is being closed and the risk of not having an escrow.[26]

- Why an escrow is being closed.[27]

- A number to call to request that an escrow that is closing be retained if the creditor offers that option.[28]

Escrow accounts have existed longer than TILA, and they have not changed significantly since 1976 when RESPA permitted escrow cushions. If the duplicative disclosures the Board proposes were necessary, the Board would have required them in 1968 under its broad § 105(a) authority. The fact that it did not do so firmly establishes that the duplicative disclosures are unnecessary, and that the RESPA escrow disclosures are sufficient. The Board's several assertions of authority for the proposed disclosures, that duplicative disclosures are "necessary[,]" are not consistent with the statutory requirement that disclosures be integrated and not duplicative.

The reason the Board has never before found escrow disclosures under TILA are necessary is that a different agency has a well-developed, long-tested, complete set of

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[19] 76 Fed. Reg. 11598, 11602 (March 2, 2011).
[20] 76 Fed. Reg. 11598, 11602 (March 2, 2011).
[21] 76 Fed. Reg. 11598, 11602 (March 2, 2011).
[22] 76 Fed. Reg. 11598, 11602 (March 2, 2011).
[23] 76 Fed. Reg. 11598, 11602 (March 2, 2011).
[24] 76 Fed. Reg. 11598, 11602 (March 2, 2011).
[25] 76 Fed. Reg. 11598 at 11603 and 11607 (March 2, 2011).
[26] 76 Fed. Reg. 11598, 11607 (March 2, 2011).
[27] 76 Fed. Reg. 11598, 11607 (March 2, 2011).
[28] 76 Fed. Reg. 11598, 11607 (March 2, 2011).

disclosures. There are many state disclosures in place as well. HUD and state disclosures are still in place, so additional Regulation Z disclosure requirements would merely be duplicative.

It is true that the Dodd-Frank Act revised the *form* of escrow disclosures, primarily by requiring that they be integrated. The law does not require new *substantive* disclosures beyond what is already required by RESPA rules. The reason Congress put the revisions in TILA rather than in RESPA, as it did most of Title XIV, was to increase the application of TILA statutory damages, not to permit the Board to be out of compliance with the triple mandate.

VI. This Rulemaking Should Not Revise a Fundamental TILA Definition That Reaches Beyond Escrows, and That is Central to the CFPB's Integration Project

Under Regulation Z today, an HPML is defined by comparing the loan's APR to the APOR, a measure of market interest rates.[29] The Dodd-Frank Act also uses a comparison of APR and APOR to define certain loans for which an escrow is required.[30] It would require one threshold for conforming loans and another for jumbo loans.

The Board proposes to use a different comparison. The Board re-proposes a concept from its 2010 Regulation Z proposal, which, in turn, was based on a 2009 Board proposal. Neither of those proposals is final, and the Board announced February 1, 2011 that it will not finalize either. In the present proposal, the Board explains:

> [T]he Board recognized [in 2010] that the use of the annual percentage rate as the coverage metric for the higher-priced mortgage loan protections poses a risk of overinclusive coverage, which was intended to be limited to the subprime market. . . . The data . . . on which the average prime offer rate is based, are limited to contract interest rates and points. Annual percentage rates, on the other hand, are based on a broader set of charges, including some third-party charges such as mortgage insurance premiums. The Board also recognized [in 2010] that, under the 2009 Closed-End Proposal, the annual percentage rate would be based on a finance charge that includes most third-party fees in addition to points, origination fees, and any other fees the creditor retains. Thus, that proposal would expand the existing difference between fees included in the annual percentage rate and fees included in the average prime offer rate.[31]

[29] 12 C.F.R. § 226.35(a).
[30] Dodd-Frank Act § 1461(a), 124 Stat. at 2178-79 (new TILA § 129D(b)(3)).
[31] 76 Fed. Reg. 11598, 11609 (March 2, 2011).

The Board in this 2011 rulemaking, [32] as it did in 2010,[33] proposes to use instead of the APR a "transaction coverage rate," which is the APR calculated without prepaid finance charges unless the creditor, mortgage broker, or an affiliate of either retains the charges.

The Dodd-Frank Act uses APOR comparisons for more purposes than merely escrow rules. It also uses APOR comparisons for:

- The definition of the interest rate that makes a loan a high-cost mortgage;[34]
- The treatment of *bona fide* discount points in the high-cost mortgage points and fees test;[35]
- Ability-to-repay balloon loans;[36]
- Calculating points and fees on qualified mortgages;[37]
- The definition of qualified mortgage;[38] and
- The definition of higher-risk mortgage,[39] to which special appraisal rules will apply.

These are among the more significant changes Dodd-Frank made to the TILA. It is critically important that all these new requirements be implemented consistently, in a well-planned and careful manner. It would be ill advised to consider any of these new requirements in isolation because they are all related. The escrow rule needs to be done in coordination with the other provisions that use APOR comparisons.

We are quite concerned about the possibility that there could be multiple, inconsistent definitions if these several comparisons are addressed separately. *Even minor differences in the definitions could create enormous compliance burdens,* even if the practical effect of the differences is minor.

Even if the CFPB were to use the very same definition that the Board proposes in each of the comparisons, implementing the definition in a piecemeal fashion would be unnecessarily burdensome. It would be far less labor-intensive to implement the uniform definition all at once.

RESPA and TILA regulations, as written today, differ in their treatment of third-party charges. Regulation X limits creditors' ability to control certain third-party charges, while the 2010 Regulation Z proposal would penalize creditors who try to comply with Regulation X. This is one area where the two sets of rules, as written today, simply do not work together. Integrating mortgage disclosures is not simply a matter of selecting

[32] Proposed 12 C.F.R. § 226.45(a)(2)(i).
[33] Then-proposed 12 C.F.R. § 226.35(a)(2), 75 Fed. Reg. 58539, 58710 (September 24, 2010).
[34] New TILA § 103(aa)(1)(A)(i).
[35] New TILA § 103(dd).
[36] New TILA § 129C(a)(6)(D)(ii).
[37] New TILA § 129C(b)(2)(C)(ii).
[38] New TILA § 129C(c)(1)(B)(ii).
[39] New TILA § 129H(f)(2).

which disclosure form has the clearest format. Integration will get to the most fundamental rules underlying the disclosures.

Certainly the regulators will be addressing these important issues as they integrate RESPA and TILA rules. A number of important issues will need to be addressed in the process, including tolerances under TILA rules for third-party charges and RESPA § 8 liability for third-party charges. The regulators will also need to strike a difficult balance between the need for accurate disclosures before a loan closes, and the fact that settlement service providers, such as title companies, need flexibility to handle the many third-party charges that can and routinely do change unexpectedly immediately before a real estate transaction closes.

We appreciate the Board's initiative and the care the Board has taken to work in this inherently difficult policy area. At the same time, we do not believe the Board can or should proceed while addressing only the TILA rules. RESPA rules are also important, and the integration of RESPA and TILA rules is very important.

We urge the Board to revise any Regulation Z definitions that may affect mortgage loans only with other regulators as part of the integration project.

The purpose of the transaction coverage rate definition in an escrow rule is to define when escrows are required on HPMLs. For the short time before integrated rules are in place, the definition would not have much effect because, as Dodd-Frank makes clear, servicers are free to require escrows, and very commonly do, even on non-HPMLs.

Implementing the proposed transaction coverage rate definition in an escrow rule would impose significant regulatory burden because it would require costly systems changes. It could be in place for a short time before it may need to be removed and replaced, which would require additional costly systems changes.

For these reasons, we urge the Board to use the APR rather than a transaction coverage rate for defining HPMLs until the CFPB decides what fundamental changes to make or not make to TILA definitions.

VII. Provisions That Would Not Interfere With RESPA-TILA Integration

The proposed rule does contain provisions other than consumer disclosure requirements. The proposed rule would establish when escrow accounts are and are not required on HPMLs. These provisions would not interfere with the RESPA-TILA integration project, and the Board should adopt them with our suggested refinements.

A. The Proposed 5-Year Escrow Term is Helpful

The proposed rule would provide that required escrow accounts on HPMLs may not be cancelled (unless a loan is terminated) unless the loan is at least five years old, at least 20 percent of the original property value is unencumbered, and the consumer is not delinquent or in default.[40] We support implementation of this proposed five-year escrow account term. The Dodd-Frank Act requires it.[41] After five years, the consumer may have enough equity in the house to have an incentive to cover insurance and taxes reliably. Before then, the escrow can help the consumer manage uneven payments and avoid default.

We request, however, a clarification that the requirement to continue to maintain an escrow account when a borrower is experiencing payment difficulties does not alter the RESPA provisions relieving a creditor of the obligation to advance funds to make disbursements in a timely manner when the borrower's payment is more than 30 days overdue.[42]

B. Unnecessary Escrows Are Not Required

The Dodd-Frank Act provides that escrow accounts need not be established for loans secured by shares in a cooperative.[43] It further provides that insurance premiums need not be escrowed for loans secured by dwellings or units if the consumer must join an association that has an obligation to maintain a master policy insuring the dwellings or units.[44]

The proposed rule would implement these provisions as to HPMLs, which is helpful. It would also make an important clarification that insurance premiums need not be escrowed on HPMLs secured by dwellings in planned unit developments or similar arrangements where the governing association provides the insurance.[45] This avoids imposing an insurance escrow requirement on loans for which the consumer does not pay insurance directly, which is important. Escrows of hazard insurance premiums in these cases would usually be unnecessary.

There is, however, a need for escrows in the event that a homeowners' association fails to pay for required insurance or fails to provide sufficient insurance coverage, and the borrower also does not obtain sufficient insurance coverage. In this event, it is important that any final rule not interfere with servicers' legal obligation to obtain insurance and to establish an escrow.

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[40] Proposed 12 C.F.R. § 226.45(b)(3).
[41] Dodd-Frank Act § 1461(a), new TILA § 129D(d).
[42] 24 C.F.R. § 3500.17(k)(2).
[43] Dodd-Frank Act § 1461(a), new TILA § 129D(e).
[44] Dodd-Frank Act § 1461(a), new TILA § 129D(e).
[45] Proposed 12 C.F.R. § 226.45(b)(2)(i) and (ii).

C. Provisions That Would Not Interfere With RESPA Integration Need Not Await Integration

Much of the proposed rule would impose unnecessary regulatory burden by requiring duplicative disclosures and a new transaction coverage rate definition that would need to be revised when TILA rules are integrated with RESPA rules. However, rules regarding when an escrow account is required are not as burdensome to implement. The Board's proposal rule that would mandate escrow accounts on HPMLs does not require integration with current RESPA rules because RESPA rules do not overlap in this area. This part of the proposed rule could be finalized without having to undo the compliance work a few months hence.

We support finalizing the provisions of the proposed rule, with our recommended changes, that only set out when an escrow account is required on HPMLs, without requiring a disclosure or defining "transaction coverage rate." These provisions are the proposed deletion of § 226.35(b) and the addition of proposed § 226.45(b).

VIII. Proposed Small Creditor Exemption Would be Ineffective

The proposed rule would require escrows on certain loans, with an exemption for certain small creditors. This is based on the Dodd-Frank provision that authorizes the Board to exempt from the mandatory escrow requirement creditors that operate predominantly in rural or underserved areas that do a small volume of mortgage lending and that retain their loans in portfolio. Proposed § 226.45(b)(2)(iii) would provide that the escrow mandate "does not apply to a transaction if, at the time of consummation" the creditor met the small creditor definition.

A. The Exemption Must Survive a Transfer to be Effective

While we support the idea of the exemption, we are concerned that the language does not make fully clear that "the transaction" that is exempt means the entire mortgage loan, as opposed to only the consummation of the loan. This distinction is critical if the exemption for small creditors is to have any effect.

If a small creditor that qualifies for the exemption were to originate a loan, and later sell the loan or servicing rights to an entity that does not qualify for the exemption, would an escrow become mandatory? If so, in what amount of time? What if the borrower refuses to fund the escrow?

If the Board were to require escrows when a nonexempt creditor acquires a loan or servicing rights from an exempt creditor, it would effectively eliminate the small creditor exemption. Nonexempt parties would not be willing to make a purchase and be out of compliance with Regulation Z. Potential purchasers could not be certain the loan is exempt without a detailed, labor-intensive examination that would make the purchase cost-prohibitive. Potential purchasers would therefore only consider purchasing servicing rights or loans when there is an escrow as required for nonexempt originators. This would, in effect, eliminate the small creditor exemption that Congress and the Board intended.

B. Small Creditors Need Safety and Soundness Flexibility

It is important for safety and soundness reasons that small creditors have flexibility to sell their assets. An exempt creditor holding a loan, or servicing rights to loan, without an escrow that would be required for a nonexempt creditor, could be a depository institution that fails. That institution's receiver, conservator, or successor may not be exempt. Unless the successor has a safe harbor from liability, the asset may be unmarketable and would have severely diminished value. *An escrow regulation should not interfere with the deposit insurance funds' ability to minimize their losses.*

Whether a seller is a private entity or federal agency, purchasers need a safe harbor to protect them from liability for an originator's non-compliance with the small creditor exemption because purchasers are unable to determine the small creditor's compliance or noncompliance. Failure to include this protection would render the exception entirely ineffective. For these reasons, we recommend making the regulation very clear that if an exempt creditor originates a loan without a required escrow, under the exemption, that loan would never be required by § 226.45(b) to have an escrow, and would hold the purchasing entity harmless against any liability in connection with the lack of an escrow, including for failing to provide disclosures required for loans with escrows.

C. Tracking Exempt Creditors Would be Costly

It is important to understand that, even if the exemption were to survive a transfer, the small creditor exemption as drafted would be quite costly to implement. Any nonexempt creditor that purchases a loan or servicing rights would need to implement some way of learning whether any loan that has no escrow qualifies for the exemption. Some creditors may purchase from many sellers. These purchasers would need to track whether each originating lender and assignee is exempt, and whether it was exempt when it originated a loan or owned the servicing. This would require large market participants to track creditors nationwide, on an ongoing basis, to determine whether they are exempt at all times. Exempt creditors may change names, and each name change would need to be tracked as well. When a creditor purchases many loans or servicing rights to many loans at once, it would need to determine whether each loan without an escrow is exempt, and would need to do so in a very short amount of time. This is simply not feasible.

While well intentioned, the small creditor exemption as drafted would result in creditors refusing to purchase loans and servicing rights to any loan that lacks an escrow account as required for nonexempt creditors.

D. How to Make the Small Creditor Exemption Effective

We suggest a way to make the small creditor exemption effective smoothly. The regulation could provide that any *purchaser* of servicing rights to a loan without an escrow is always deemed in compliance with the mandatory escrow requirement. This would completely remove the need to track exempt creditors. *It would still require nonexempt creditors to establish required escrows on loans they originate. Nonexempt creditors would still be subject to examination and liability for their noncompliance.* If the originating creditor were not exempt and did not establish a required escrow, that creditor should not be permitted to evade liability by the simple expedient of a servicing transfer.

We suggest that the Board could accomplish this by revising § 226.45(b)(2)(iii) as follows:

> (iii) Except as provided in paragraph (b)(2)(v) of this section, paragraph (b)(1) of this section does not apply to a transaction if, at the time of consummation:
> (A) During the preceding calendar year, the creditor extended more than 50% of its total first-lien higher-priced mortgage loans in counties designated by the Board as "rural or underserved" under paragraph (b)(2)(iv) of this section;
> (B) During either of the preceding two calendar years, the creditor and its affiliates together originated and retained the servicing rights to 100 or fewer loans secured by a first lien on real property or a dwelling; and
> (C) Neither the creditor nor its affiliate maintains an escrow account of the type described in paragraph (b)(1) of this section for any extension of consumer credit secured by real property or a dwelling that the creditor or its affiliate currently services.
> **(D) For purposes of this subparagraph (iii), the term "creditor" refers only to the creditor that was the creditor at the time of consummation.**

We recommend that the Board adopt this approach because it would be a clean, low-cost solution that would make the exemption fully effective as Congress and the Board intend.

IX. Concepts Should be Consistent with Homeowners Protection Act

We appreciate and support the Board's efforts to write its rule consistently with the HPA. The Dodd-Frank provisions about when escrows are required differ from HPA requirements for terminating PMI. We support the proposed rule because it does not appear to create conflicting laws, provided that the Board continue to recognize servicers' statutory right to require escrows for the life of a loan.

The Dodd-Frank Act requires escrow accounts on certain loans, unless the loan is terminated, for five years, "unless and until—"

> (1) such borrower has sufficient equity in the dwelling securing the consumer credit transaction so as to no longer be required to maintain private mortgage insurance;
> (2) such borrower is delinquent;

> (3) such borrower otherwise has not complied with the legal obligation, as established by rule[.][46]

A. Sufficient Equity

Dodd-Frank does not define the term "sufficient equity." There are multiple standards for when a borrower has enough equity to permit PMI termination. The HPA has three standards, and the GSEs, FHA, and state laws have others. As a result, this issue requires a clarifying regulation.

The Board proposes to permit cancellation of an escrow account when two conditions are satisfied. One condition relates to equity:

> At least 20% of the original value of the property securing the underlying debt obligation is unencumbered[.][47]

The Board explains that this proposal is modeled after the HPA.[48] However, the HPA requires PMI termination on outstanding loans in three circumstances:

- Borrower cancellation. PMI may terminate, upon the borrower's written request, when the balance is first scheduled to reach 80 percent of the original property value, based solely on the amortization schedule, if the borrower has a good payment history, the loan is current, the value of the property securing the loan has not declined below its original value, and the borrower certifies that there is no subordinate lien.[49] Original value means the lesser of the sales price reflected in the contract, or the appraised value at the time of consummation; for a refinance, it is the appraised value on which the creditor relied.[50] The borrower must satisfy the servicer's requirements for evidence that the property value has not declined below its original value.[51]

- Automatic termination. PMI must terminate when the unpaid principal balance, based solely on the applicable amortization schedule, is first scheduled to reach 78 percent of the original value of the property securing the loan, if the loan is or becomes current.[52]

- Final termination. If there is no automatic termination or borrower cancellation, PMI must terminate at the midpoint of the amortization period, if the loan is current.[53]

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[46] Dodd-Frank Act § 1461(a), new TILA § 129D(d).
[47] Proposed § 226.45(b)(3)(ii)(A).
[48] 76 Fed. Reg. 11598, 11613 (March 2, 2011).
[49] Homeowners Protection Act § 3(a).
[50] Homeowners Protection Act § 2(12).
[51] Homeowners Protection Act § 3(a)(4)(A).
[52] Homeowners Protection Act §§ 2(18), 3(b).
[53] Homeowners Protection Act § 3(c).

The Board proposes to use the HPA's borrower cancellation standard, with some differences. Proposed comment 45(b)(3)-3 would provide:

> The term 'original value' in § 226.45(b)(3)(ii)(A) means the lesser of the sales price reflected in the sales contract for the property, if any, or the appraised value of the property at the time the transaction was consummated. In determining whether 20% of the original value of the property securing the underlying debt obligation is unencumbered, the creditor or servicer shall count any subordinate lien of which it has reason to know. If the consumer certifies in writing that the equity in the property securing the underlying debt obligation is unencumbered by a subordinate lien, the creditor or servicer may rely upon the certification in making its determination.

As under the HPA, the Board proposes to permit borrowers to certify to the servicer whether there are subordinate liens. This is helpful because it uses the same standard as the HPA. However, the regulation should be clear that a creditor's or servicer's reliance cannot be the basis for liability. Rather, we urge the Board to make clear that a certification by the borrower is sufficient to show the servicer complied with this requirement even if the borrower makes a false statement. This would greatly reduce litigation risk and would eliminate any costly research.

The Board asks whether subordinate loans should be disregarded when calculating the consumer's equity. We believe not, because subordinate loans directly and significantly affect the consumer's equity. Moreover, by reducing the consumer's equity, subordinate loans can reduce the incentive a consumer has to pay property taxes and insurance. These are reasons why subordinate loans should be taken into consideration, not ignored.

The Board proposes to require servicers to consider subordinate liens of which it has "reason to know." This term is not clear. If the borrower does not certify that there are no subordinate liens, must the servicer search land records?[54] Searches can be costly. If they are required, the servicer will either need to charge the cost to the borrower or deny the cancellation request.

How is the servicer to establish the amount of a subordinate lien? Is it the value recorded in land records? If so, servicers will need to search land records and assess the cost of the search to the borrower. If the subordinate loan is an open-end loan, must the servicer determine the amount drawn down or the maximum credit line? Does the title search or other determination become stale? We recommend that servicers have the ability to rely on an account statement from the subordinate lender that the borrower submits that is no

[54] In many cases, a credit history will show subordinate liens. However, in some cases it will not. If two people jointly own a piece of property, they may each individually borrow against it, so that the credit report of one borrower would not show the debt of the other. The servicer may be unaware of the second property owner if that person acquired an interest in the property after the loan was originated.

more than 60 days old at the time the creditor relies on it. Servicers should be permitted but not required to seek additional documentation from a consumer.

The proposed rule would measure the percentage of a property value that is "unencumbered[.]"[55] The meaning of the term unencumbered is unclear because a security interest in a parcel of land normally encumbers the entire parcel, regardless of the loan size in relation to the property value. The security instrument rather than the loan encumbers the land. We recommend relating the loan amount to the property value, as in the HPA

B. Does "Sufficient Equity" Only Apply to Loans with PMI?

The Board solicits comment on whether it should interpret TILA § 129D(d)(1) narrowly to refer only to consumers that pay for PMI. We believe that such a narrow view would be inappropriate. First, Congress did not enact language to that effect. Second, where Congress listed reasons to delay escrow cancellation, the sufficient equity provision is first in the list, signifying its importance to Congress. Third, the reason Congress used language that, in effect, references the HPA is that Congress intended the two statutes to work together. As a result, we urge the Board not to limit the equity requirement to only those loans that maintain PMI.

C. PMI May Last Shorter or Longer Than Five Years

The Dodd-Frank Act requires that mandatory escrows last for a minimum of five years.[56] The HPA prohibits PMI, and therefore an escrow for PMI premiums, after one of three thresholds (discussed above) is reached. Sometimes the PMI termination threshold is reached before five years have elapsed, and other times only after five years.

In other words, the Board's proposed rule would require five-year escrows on HPMLs even when the HPA does not permit PMI for five years. In this event, while PMI would no longer be in place, the escrow for other items would remain. We believe the Board's proposal appropriately reflects this specific five-year statutory requirement.

Conversely, in some cases the PMI would remain in place longer than five years. This may appear to create a conflict, requiring a PMI escrow after five years elapse. Relevant here the Board's recognition[57] that Dodd-Frank Act gives servicers statutory authority[58] to require escrows for longer than five years, including for the life of the loan. This Board recognition of the statutory authority resolves any potential conflict or confusion.

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[55] Proposed 12 C.F.R. § 226.45(b)(3)(ii)(A).
[56] Dodd-Frank Act § 1461(a), new TILA § 129D(d).
[57] Proposed 12 C.F.R. § 226.45(b)(3)(i) uses the permissive "may".
[58] Dodd-Frank Act § 1461(a), new TILA § 129D(f) (for loans on which escrow is not mandatory) and new TILA § 129D(d) (permitting mandatory escrows to last longer that five years, with no required termination until loan payoff).

We therefore believe it is important for the recognition to be carried forward to a final regulation.

D. Property Value

Both the HPA and Dodd-Frank use a measure of equity in the property, which necessitates a measure of the property value. Dodd-Frank does not specify a measure. However, the HPA uses the lesser of the sales price reflected in the contract, or the appraised value at the time of consummation (for refinanced loans, the appraised value on which the creditor relied).[59] The HPA compares this value to the principal balance based on the amortization schedule (without regard to curtailments).[60]

The proposed regulation uses the term "the original value"[61] and the proposed commentary would explain that original value means:

> the lesser of the sales price reflected in the sales contract for the property, if any, or the appraised value of the property at the time the transaction was consummated.[62]

We appreciate the Board's recognition that there may not be a sales contract, such as when an owner inherits a property.

The Board adopted the term original value from the HPA,[63] and we appreciate the Board's attempt to harmonize its regulation with the HPA. The Board solicits comment on this approach, however, noting that property values are currently depressed:

> The Board is cognizant of the recent nation-wide decline of property values. The Board recognizes that, under the proposal, a creditor or servicer may honor a consumer's request to cancel their escrow account when the consumer has met all of the pre-conditions of § 226.45(b)(3) even when the consumer does not have 20% equity in their home because of depressed property values at the time. The Board believes that using some method other than the HPA as a model for determining when a borrower has sufficient equity in the property would prove too complicated and create uncertainty.[64]

We suggest that the Board permit servicers flexibility to use any reasonable measure of property value for purposes of proposed § 226.45(b)(3)(ii)(A) to ensure that the property has not decreased below the original value.

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[59] Homeowners Protection Act § 2(12).
[60] Homeowners Protection Act §§ 2(2), 2(7), and 2(18).
[61] Proposed 12 C.F.R. § 226.45(b)(3)(ii)(A).
[62] Proposed Comment 45(b)(3)-3.
[63] 76 Fed. Reg. 11598, 11614 (March 2, 2011).
[64] 76 Fed. Reg. 11598, 11614 (March 2, 2011).

If the Board were to require servicers to obtain appraisals, servicers would have to pass the cost to the borrower. The cost would be disproportionately high in relation to the limited consumer benefit of cancelling an escrow. We are pleased that the Board did not propose a full appraisal for such a narrow purpose.

We suggest that servicers be permitted flexibility because property values do change after a loan is consummated. We suggest that servicers be permitted to use the appraised value at origination, the price as reflected in the sales contract, or a valuation obtained from an automated valuation model (AVM) or a broker's price opinion (BPO). AVMs and BPOs can provide valuations quickly and at low cost. We recognize that Dodd-Frank prohibits the use of BPOs for property valuation at origination.[65] However, retention or cancellation of an escrow is *far* less significant than underwriting and originating a loan. Any possible inaccuracy in a valuation is therefore far less important for escrow cancellation determinations than for originations. Consumers would directly benefit from a lower cost valuation. Dodd-Frank clearly authorizes servicers to retain escrows for the life of the loan. If the cost of escrow terminations were disproportionately high, servicers would avoid terminations.

E. Delinquency or Nonpayment Default

The Dodd-Frank Act retains escrow accounts if the borrower is delinquent or "otherwise has not complied with the legal obligation, as established by rule[.]"[66] The "as established by rule" language appears to intend that a regulation define the term.

Dodd-Frank specifically uses noncompliance with the "legal obligation," which includes the loan and the mortgage or other security instrument, and therefore explicitly includes nonpayment defaults. There are several types of nonpayment default, such as selling the property without repaying the loan, failing to use hazard insurance proceeds to repair a damaged property when economically feasible, demolishing or wasting the property, or creating a lien prior to the creditor's lien, such as a mechanic's lien. We recommend clarification in a regulation by mentioning both the loan and the security instrument, as below.

The proposed regulation would delay cancellation of an escrow when the consumer "currently is not delinquent or in default on the underlying loan obligation."[67] This is certainly consistent with the Dodd-Frank Act. However, we urge the Board to make the regulation consistent with the HPA, given the correlation to PMI escrows. Both Dodd-Frank and the HPA are designed to protect consumers. Escrow accounts assist consumers by breaking large, infrequent payments into smaller monthly payments. Consumers who have difficulty making periodic loan payments with *pro rata* escrowed items are the ones most likely to have difficulty saving for and making infrequent, large payments for taxes and insurance.

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[65] Dodd-Frank § 1473(r), 124 Stat. at 2198.
[66] Dodd-Frank Act § 1461(a), new TILA § 129D(d)(2) and (3).
[67] Proposed 12 C.F.R. § 226.45(b)(3)(ii)(B).

We, therefore, recommend that the Board also include in § 226.45(b)(3)(ii)(B) that the consumer have a "good payment history" as defined in the HPA.[68] This would increase consistency between two sets of rules, while offering better consumer protection. We recommend that the Board amend proposed § 226.45(b)(3)(ii)(B) to read:

> The consumer currently is not delinquent**,** ~~or~~ **is not otherwise** in default on **either** the underlying debt **or on the mortgage or security** obligation**s, and has a good payment history as defined in the Homeowners Protection Act of 1998**.

We also recommend a consumer convenience. If a consumer requests an escrow termination but is declined because the loan is delinquent or in default, after the consumer achieves a good payment history and is not in default, the servicer should be able to honor the escrow termination request without requiring the borrower to submit another request.

It is important to keep in mind that when servicers continue an escrow account because a loan is delinquent or in default, it is for the purpose of administering funds the borrower has put into the account. The servicer is not required to advance funds to pay taxes and insurance for the defaulting borrower.

X. Congress Did Not Require Escrows Longer Than Five Years

There are both consumer protection risks and safety and soundness risks that we believe the Board needs to address regarding escrow terminations. Dodd-Frank requires that mandatory escrows last for at least five years. After five years, Dodd-Frank permits cancellation of a mandatory escrow if three conditions are met. The borrower must have sufficient equity in the property, the loan must be current, and the loan must not otherwise be in default.[69] At this point, Dodd-Frank gives servicers a clear statutory right to cancel the escrow.

The Board proposes to add an additional requirement for termination of mandatory HPML escrows. It proposes to prohibit a servicer from terminating the escrow unless the servicer receives "a consumer's request to cancel the escrow account."[70]

It is likely that the cost of maintaining escrows will increase in the near future for a number of reasons. For one of many possible examples, the Dodd-Frank Act requires

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[68] A good payment history means that both:
- During the 12 months beginning 24 months before the later of PMI cancellation or a request for permissible cancellation, the borrower was not 60 or more days past due, and
- During the 12 months before the later of PMI cancellation or a request for permissible cancellation, the borrower was not 30 or more days past due. Homeowners Protection Act § 2(4).

We suggest the Board adapt this definition by substituting escrow termination for PMI cancellation,

[69] Dodd-Frank Act § 1461(a), new TILA § 129D(d).

[70] Proposed 12 C.F.R. § 226.45(b)(3)(i)(B).

each servicer to pay interest on escrowed funds as prescribed by applicable state or federal law.[71] If the costs of maintaining HPML escrows were to rise to the point that they become unprofitable, servicers would need to cancel them. Without the option to cancel unprofitable HPML escrows, servicers would need to avoid states that impose prohibitive costs on escrows, increase the cost of HPML loans in those states, or withdraw HPML loans from the marketplace. None of these options would be helpful to consumers.

Not providing an option to cancel unprofitable escrow accounts would present a serious safety and soundness risk. It would require servicers to continue unprofitable operations. This is inappropriate policy.

Additionally, there may be a seriously delinquent loan or a property with destruction so severe that the creditor determines that foreclosure is not viable. In this event, the creditor ceases active collection and places the account in a charged off status. In this case, it would be appropriate to permit the servicer to cancel the escrow account and provide notice that the borrower is now directly responsible for tax and insurance obligations.

Dodd-Frank does not condition the servicer's right to cancel an escrow on receipt of the borrower's written request. Rather, the servicer's statutory right to cancel is very explicit. TILA § 129D(b) provides that escrows are required in some circumstances. When subsection (b) requires an escrow, it "shall remain in existence for a minimum period of five years[.]"[72] It may remain longer than five years.

When subsection (b) does not require an escrow—

> [N]o provision of this section shall be construed as precluding the establishment or an impound, trust, or other type of account . . .
> (1) on terms mutually agreeable to the parties to the loan; [or]
> (2) at the discretion of the lender or servicer, as provided by the contract between the lender or servicer and the borrower. . . ."[73]

While the Board has authority under TILA § 129D(b)(4) to mandate escrows on additional types of loans, the Board does not have authority to condition a servicer's clear statutory authority under § 129D(d) and (f) to require escrows.

For all of these reasons, the Board should not interfere with servicer's explicit authority.

XI. Waiting Periods Can be Harmful to Consumers

[71] Dodd-Frank Act § 1461(a), new TILA § 129D(g)(3).
[72] Dodd-Frank Act § 1461(a), new TILA § 129D(d).
[73] Dodd-Frank Act § 1461(a), new TILA § 129D(f).

The Dodd-Frank Act requires a disclosure and a three-day waiting period before consummation of a loan if an escrow "is required under subsection (b)[.]"[74] While some consumers may benefit from three-day waiting periods, consumers can be harmed by waiting periods that unnecessarily delay closings. For example, a consumer may have a contract to buy a house, and another contract to sell a house, that require closing by a date certain. Delayed closings can create substantial financial hardships for consumers, such as loss of a good-faith deposit and breach of contract claims. A waiting period can also cause a consumer to lose a rate lock. When interest rates are rising, losing a rate lock can be very costly to a consumer. *The economic harm from waiting periods can far outweigh any escrow benefits.*

Waiting periods do not seem to offer any benefit when a consumer with an escrow is refinancing into a loan that also has an escrow, or when a consumer without an escrow is refinancing into a loan that also has no escrow.

We urge the Board to require waiting periods only when required by statute because of their potential for consumer harm.

A. A Regulation Should Not Require New Waiting Periods

Some loans will have escrows that are not "required under subsection (b)," and some loans will not have escrows at all. The proposed rule would require an escrow disclosure *and* a three-day waiting period for all closed-end loans secured by a first lien on real property or a dwelling.[75] This is well beyond what Congress required, and would be harmful to many consumers. Congress was specific that waiting periods are not required for voluntary escrows and are not required for loans with no escrows.[76] Waiting periods beyond what Congress requires are unauthorized.

B. Additional Waiting Periods Should Not be Required After a Consumer Changes an Election

If, after receiving a notice three days before a scheduled closing, a consumer changes an election of whether to have an escrow, a new waiting period should not be required. This change of mind demonstrates that the consumer has finished asking questions and *understands* the escrow decision, so no additional time should be required. If another waiting period were to be required in this event, it could cause the consumer to withdraw the change of election to avoid the waiting period. That is, it could cause the consumer to reject a desired escrow or accept an undesired escrow. This would not be a consumer protection.

[74] Dodd-Frank Act § 1461(a), new TILA § 129D(h).
[75] Proposed 12 C.F.R. § 226.19(f) and (f)(4).
[76] Dodd-Frank Act § 1461(a), new TILA § 129D(h).

C. Waiting Periods Should Not be Required For Escrow Terminations

The Dodd-Frank Act, plainly a consumer protection law, authorizes servicers to terminate voluntary escrows, and mandatory escrows that meet the required duration, without any waiting period.[77] The proposed rule would require a three-day waiting period when an escrow terminates.[78]

A waiting period for an escrow termination does not have an apparent purpose. The Board does not address any evidence of lack of consumer understanding of escrow terminations. The Board does not establish that a disclosure alone would be insufficient. Especially given that consumer mortgage disclosures are in the process of being integrated and redesigned, any question of ineffective disclosures can be addressed as part of that redesign. A consumer who regrets having terminated an escrow can almost always reestablish it.

Additionally, a waiting period for a termination would be inconsistent with the HPA. The HPA requires termination of PMI in specified circumstances. In some cases, PMI is the only escrowed item, meaning that its termination also requires an escrow termination. The HPA has a statutory timing schedule that servicers must follow. It would be wholly inappropriate for the TILA escrow rule to be inconsistent with the HPA.

A waiting period for an escrow termination also contradicts proposed § 226.45(b)(3)(i)(A), which, following Dodd-Frank,[79] permits cancellation of an escrow when a loan is paid in full. Consumers do not necessarily inform servicers before paying off a loan, so servicers cannot necessarily provide a three-day waiting period before a loan is repaid. More importantly, there is absolutely no reason why a consumer would need three days to debate and ponder whether to terminate an escrow on a loan that has been repaid and no longer exists.

For all these reasons, we believe a waiting period to terminate an escrow should not be required.

D. Waiting Periods Should be Waiveable Under a Workable Standard

The Board discusses in its proposal circumstances under which a consumer may have a *bona fide* personal financial emergency permitting a waiver of the proposed waiting period. The proposed rule would permit waivers if all consumers liable on the loan give the creditor a signed, dated, written statement that describes the emergency and specifically modifies or waives the waiting period.[80] The commentary, however, would effectively prohibit any waivers:

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[77] Dodd-Frank Act § 1461(a), new TILA § 129D(f).
[78] Proposed 12 C.F.R. § 226.20(d)(4).
[79] Dodd-Frank Act § 1461(a), new TILA § 129D(d)(4).
[80] Proposed 12 C.F.R. § 226.19(f)(6).

> Whether there is a *bona fide* personal financial emergency is determined by the facts surrounding individual circumstances. A *bona fide* personal financial emergency typically, but not always, will involve imminent loss of or harm to a dwelling or harm to the health or safety of a natural person. A waiver is not effective if the consumer's statement is inconsistent with facts known to the creditor.[81]

The commentary would permit waivers only when the creditor makes a determination about the facts underlying the claim of emergency and the individual facts of each request. Creditors are unable to make factual determinations of this nature because the term "*bona fide* personal financial emergency" is vague, not easily verifiable, subjective, and imposes substantial litigation risk on creditors and servicers. Even if creditors could investigate underlying facts, by the time a creditor finishes its investigation, the three days would have lapsed. Thus, waivers would be effectively prohibited even in case of emergency.

We note that this waiver standard is very close to the standard the Board established for waivers of three-day waiting periods for rescissions.[82] We support having a consistent standard because compliance with one standard is less burdensome than compliance with multiple standards. We urge, though, that the standard be one that creditors and servicers are capable of applying so that consumers will not be disadvantaged.

E. Waiving an Escrow Waiting Period Should Not Require Waiving a Rescission Waiting Period

We are concerned that the Board's proposal, in effect, would permit preclosing escrow waiting period waivers only when the consumer also waives the rescission waiting period. We do not believe the Board intended this result.

The proposed rule would permit a consumer to waive an escrow waiting period "if the consumer determines that the loan proceeds are needed before the waiting period ends to meet a *bona fide* personal financial emergency."[83] The waiting period this refers to is that provided in § 226.19(f)(4), the escrow waiting period rather than the rescission waiting period.

Proposed escrow waiting periods run for three days before loan consummation.[84] On a refinance, a consumer also has a three-day rescission waiting period that runs for three days after consummation.

If the loan proceeds are needed before the preclosing waiting period ends, the closing must be accelerated. The post-closing rescission period would also need to be waived to make the funds available on an emergency basis before the escrow waiting period ends.

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[81] Proposed Comment 19(f)(6).2.
[82] 12 C.F.R. §§ 226.15(e)(1); 226.23(e)(1).
[83] Proposed § 226.19(f)(6).
[84] Proposed 12 C.F.R. § 226.19(f)(4).

We recommend changing proposed paragraph 19(f)(6) to provide that the preclosing waiting period is waiveable "if the consumer determines that the loan ~~proceeds are~~ **closing is** needed before the waiting period ends~~ to meet a *bona fide* personal financial emergency~~." This would permit a consumer to waive an escrow waiting period to take advantage of a rate-lock that is about to expire, and still have a full rescission waiting period.

XII. Clarifications in Disclosures

We provide suggested clarifications for the proposed disclosures. These suggestions are intended to inform the CFPB if it were to carry forward with the Board's proposal rather than use a different proposal. We reiterate our overarching concern that the industry should not be required to come into compliance with a Regulation Z revision that will be replaced shortly after implementation begins. We reiterate that these disclosures should not be required on a form separate from and in addition to the existing disclosures, but should be integrated with them.

We also note that when RESPA and TILA rules are integrated, it will be important to distinguish where RESPA and where TILA is the basis for the rule. The two statutes are different, and Congress enacted them at different times for different purposes.

> TILA's purpose is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[85]
>
> RESPA's purpose is to effect certain changes in the settlement process for residential real estate that will result—
> (1) in more effective advance disclosure to home buyers and sellers of settlement costs; . . . [and]
> (3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance[.][86]

We note that RESPA, but not TILA, requires delivery of "a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement"[87] within three business days of receipt of a loan application.[88]

TILA requires escrow in some cases and lenders require them in other cases. Credit is a borrowing, and *voluntary* escrows are not part of the terms of borrowing. They are a

[85] TILA § 102(a).
[86] RESPA § 2(b).
[87] RESPA § 5(c).
[88] RESPA § 5(d).

convenience for the consumer, not a cost of credit. The fact that they are voluntary underscores that they are not a required cost of credit and the CFPB cannot require them under TILA. The CFPB certainly will have authority to require disclosures about voluntary escrows, but it is important to be clear that its authority will not derive from TILA.

A. Escrow Accounts Are Not Necessarily Trust Accounts

The proposed disclosures, following the language in § 1461 of the Dodd-Frank Act, refer to escrow accounts as trusts. Whether an escrow account is a trust is a matter of state law. It would be misleading to tell a consumer an escrow account is a trust when it is not. We recommend against using the term "trust" in any escrow disclosure.

The Board understandably tried to implement Congressional intent. However, we cannot believe Congress intended to require a misleading disclosure about a fact as legally significant as whether an escrow is a trust.

B. The Term "Home-Related" is Vague

The proposed disclosures warn consumers about the consequences of not paying "home-related" costs, and that without an escrow, the consumer would need to pay "home-related" costs directly. The term "home-related" is vague. There are many home-related costs that are not escrowed, such as condominium dues, ground rents, and maintenance costs. It may be clearer to specify taxes, insurance, or other costs. The fact that they are related to the consumer's home will be apparent.

C. Payments May Not be Annual or Semiannual

The proposed disclosure about the risk of not having an escrow states that the consumer would need to directly pay semi-annual or annual payments. Payments commonly are at other intervals, such as quarterly or monthly, so the proposed language would be misleading. This disclosure would be more accurate if it were to say:

What would be the risk of not having taxes, insurance, or other costs escrowed?	You would be responsible for directly paying these costs, through potentially large periodic payments. The payments may not be monthly.

D. Fees May Not be Fixed Dollar Amounts

The proposed disclosure about a fee for not having an escrow account is unnecessarily specific. It specifies a "fee" only as a dollar amount. It is possible that a creditor does not assess a dollar fee for not having an escrow but charges a higher rate or points. We suggest that the disclosure read: "Will I be charged for choosing not to have an escrow? [Yes. For choosing not to have an escrow account, you will be charged [a fee of $___]

[an additional ___ percentage point(s) in your loan rate] [an additional ___ point(s) for your loan].]"

E. Consumer Requests for Escrows

Proposed Form H-25 contains the question "Can I set up an escrow on my mortgage?" We suggest more flexibility in answering the question. We suggest providing a "no" option to accommodate creditors who do not provide escrows. For those willing to set up an escrow account at any time, the date would not be relevant. For those who may not know, when providing the disclosure, whether they will offer escrows in the future, the definitive "Yes" to the question could be misleading or inaccurate.

We also recommend that the disclosure warn borrowers that they must pay taxes and insurance until an optional escrow is established.

Taking these comments together, we suggest the integrated disclosure read:

Can I set up an escrow account on my mortgage?	[No. We do not offer escrows.] [Yes, you can request an escrow at any time by contacting us at [(telephone number)][(secure website)]. You will need to pay your taxes, insurance and other costs until the escrow is established and funded.] [Please tell us if you want to set up an escrow account on your mortgage by contacting us at [(telephone number)][(secure website)].]

F. Escrows May Not Include All Taxes and Insurance

It is common to escrow for either taxes or insurance but not both. There may be more than one type of insurance on the same loan. Some homeowners purchase flood insurance coverage voluntarily and do not inform the creditor, so the premiums are not escrowed. The proposed model form for establishment of an escrow does not distinguish between different escrowed items. It states:

> We estimate that your home-related costs will total $____ for the first year of your mortgage. . . . If you did not have an escrow account, you would be responsible for directly paying your home-related costs through potentially large semi-annual or annual payments. . . . [Y]our regular mortgage payments will include an additional $___ that will be deposited into your escrow account.

We suggest that the integrated model disclosures make clear how much would go into an escrow account, initially and periodically, for each escrowed item.

XIII. Effective Dates Need Clarification

A. Unclear Effective Date of the Statute

Section 1400(c) of the Dodd-Frank Act has a complicated provision about effective dates for Title XIV provisions. It states that if a regulation implements a "section, or provision thereof," the regulation sets the effective date of the "section, or provision thereof" of the statute.[89] If there is no regulation by the deadline (18 months after the designated transfer date) for a "section[,]" the section becomes effective 18 months after the designated transfer date.[90]

This raises the question about instances where one section has multiple provisions and there is an implementing regulation for some, but not all, of those provisions. For the provision without an implementing regulation by the deadline, when does the provision become effective? Is it 18 months after the designated transfer date, or is it the date the regulation implementing another provision of the same section becomes effective? The statute is unclear.

The proposed rule would implement §§ 1461 and 1462. Section 1461 has provisions that the proposed rule does not directly address:

- TILA § 129D(b)(1) and (2) (escrows required by law, or for loans made, guaranteed, or insured by a federal or state agency);
- TILA § 129D(d) (duration of non-HPML mandatory escrows)
- TILA § 129D(f) (permitting voluntary escrows);
- TILA § 129D(g) (administration of escrows); and
- TILA § 129D(i) (insurance definitions).

We believe all Title XIV regulations that implement part, but not all, of a section need to specify precisely which provisions they intend to implement and precisely which they do not. In this way, the effective dates will be clear.

The Board states:

> This proposal would implement only the third of the four circumstances, pursuant to TILA Section 129D(b)(3), because the other three either are self-effectuating or are effectuated by other agencies' regulations.[91]

If the Board does not mean to implement (b)(1) and (b)(2), then those provisions would become effective 18 months after the designated transfer date. If that is the case, escrow accounts required by (b)(1) and (b)(2) would not be "required under subsection (b)" within the meaning of 129D(h), the disclosure requirement. This means that none of the

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[89] Dodd-Frank Act § 1400(c)(2), 124 Stat. at 2136.
[90] Dodd-Frank Act § 1400(c)(3), 124 Stat. at 2136.
[91] 76 Fed. Reg. 11598, 11610 (March 2, 2011).

new disclosures would be required for (b)(1) and (b)(2) escrows until 18 months after the designated transfer date.

We do not believe this is what the Board intended because it never discusses the possibility of having differing implementation dates for the same disclosures, depending on loan type. Rather, the Board is of the view that its proposed disclosures are important enough that they should be created before they can be integrated with RESPA disclosures.

We cannot support having different implementation dates for the same rule because of the extra burden of tracking when each loan becomes subject to the rule.

B. The Board Should Coordinate Implementation Deadlines

The proposal does not address when any final rule would be effective and when compliance would be required. We again stress the need for integration with the other upcoming disclosure changes. We urge the Board to set any final effective date only in coordination with the CFPB implementation team. Consumer mortgage disclosures are undergoing entire redesign.

We very strongly urge that implementation of all the changes be planned and coordinated together so that we can implement them in the order that minimizes redoing systems changes.

To accommodate the extensive resources that will be needed to implement new escrow rules, with or without disclosure revisions, we urge that new rules be permitted no less than 12 months to implement. This would help provide the time necessary to retool systems, educate staff, and develop internal procedures to comply with the new escrow requirements.

C. Uncertainty About Retroactivity of the Regulation

We request clarification that the requirement that escrows be maintained for five years on HPMLs will not apply retroactively to loans that predate the effective date of the regulation and that do not have escrows.

Similarly, we request clarification that escrow disclosures would not be required for loans that were originated before a new escrow disclosure rule becomes effective.

XIV. Incomplete Disclosure of Escrow Cancellation or Noncreation

When a loan does not have an escrow, the servicer must monitor the payment of required items, such as taxes and insurance. Servicers may require the consumer to send receipts of payment or verification of sufficient insurance coverage. The proposed model forms for nonestablishment or cancellation of an escrow, and the regulation, would not permit the creditor to include this important information.[92] We recommend that creditors be allowed to add information they deem important to the disclosure.

XV. Clarification That Regulation Removes Ambiguity

The statute provides that mandatory escrows must remain in existence for five years "unless and until . . . such borrower is delinquent [or] such borrower otherwise has not complied with the legal obligation, as established by rule[.]"[93]

We do not believe Congress intended to require an escrow for five years or "until" the loan is delinquent in under five years. Nor do we believe Congress intended to require an escrow for five years or "until" the borrower is in non-payment default in under five years. Rather, it seems clear that Congress meant that the escrow is to remain for five years, "unless" the borrower is delinquent or otherwise in default, in which case it is to remain longer than five years.

The proposed rule is consistent with this apparent Congressional intent by permitting cancellation "only upon the earlier of" certain events.[94] This is a very helpful clarification of ambiguous language.

We request that the Board be very explicit that it is clarifying the ambiguous "unless and until" language with language that could appear to have a different meaning.

XVI. The Proposed Rule Would Require Mortgage Disclosures on Nonmortgage Loans

The proposed rule is not limited to mortgage loans. It would require escrow disclosures in connection with "closed-end transactions secured by a first lien on real property or a dwelling[.]"[95] Dwellings are not necessarily real property. Manufactured homes, mobile homes, and cooperatives may be personal property under the laws of some states. Additionally, a consumer may reside in a recreational vehicle or a boat, which are most likely personal property. The Board explains:

> The Board believes that coverage of the same types of property under the disclosure requirements for the establishment as well as the non-establishment of an escrow account would promote the informed use of credit by consumers and compliance by creditors. The disclosures for the establishment of an escrow account likely would be just as useful to a consumer entering into a transaction secured by a second or vacation home or vacant or unimproved land as it would to a consumer entering into a transaction secured by a principal dwelling. Similarly,

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[92] Proposed 12 C.F.R. §§ 226.19(f)(3); 226.20(d)(3).
[93] Dodd-Frank Act § 1461(a), new TILA § 129D(d)(2) and (3).
[94] Proposed 12 C.F.R. § 226.45(b)(3)(i).
[95] Proposed 12 C.F.R. § 226.19(f); § 226.20(d).

> the disclosures for the non-establishment of an escrow account should cover all dwellings, whether or not they are deemed to be real or personal property under state law. Furthermore, the coverage of all dwellings would eliminate the analysis that creditors would have to undertake to determine whether and which disclosures would be triggered when a transaction will be secured by any one of various types of dwellings.[96]

We agree with the Board that the distinction between real and personal property under state law should not affect escrow accounts for loans on manufactured homes, mobile homes, and cooperatives. However, we do not believe it would be useful to require escrow accounts or disclosures on loans secured by other types of personal property that could, in rare circumstances, be a dwelling, such as recreational vehicles or boats.

It is not clear what would be the average prime offered rate for a comparable vehicle or boat loan, so it is unclear how to determine whether the loan is higher-priced. Assuming a definition of higher-priced mortgage loan for a vehicle or boat loan could be created, this effectively would mean that the Board proposes that a creditor give a consumer who borrows against a motor vehicle or boat a disclosure about whether "your mortgage" has an escrow. It is quite unlikely the consumer will understand this disclosure. The consumer may believe the creditor delivered the disclosure in error, and would therefore disregard it.

The Board wishes to prevent the difficulty of determining which type of disclosure to give based on dwelling type. The difficulty is that creditors will not be able to define "dwelling." This uncertainty would cause creditors making closed-end loans on anything that might be used as a dwelling to give an escrow disclosure. We recommend excluding boats, vehicles, and trailers from the escrow rule.

XVII. Conclusion

Congress requires that RESPA and TILA rules be integrated. To the extent that any Regulation X or Regulation Z amendment would affect that important integration project, it must work towards, not against, integration. The disclosures this proposed rule would require do not contribute to integrated disclosures. Those disclosures should be pursued only as part of integrated rules. The proposed definition of a "transaction coverage rate" for the same reason should be pursued only as part of integrated rules.

Proposed rules regarding when an escrow account is and is not required would not affect the integration project. We support finalizing that part of this rulemaking separately from the integration project, with our recommended changes.

[96] 76 Fed. Reg. 11598, 11600-01 (March 2, 2011).

We are and remain willing to assist the Board with the important tasks of assessing and quantifying regulatory burden.

Sincerely,

American Financial Services Association
Consumer Mortgage Coalition
Mortgage Bankers Association

cc: Office of Management and Budget
Paperwork Reduction Project [7100-0199]
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APPENDIX TO COMMENT LETTER

I. The Board Has Not Complied With the Paperwork Reduction Act

A. Purpose and Legislative History of the Paperwork Reduction Act

Congress enacted the Paperwork Reduction Act to reduce unnecessary regulatory burden.

> The purposes of this chapter are to—
> (1) minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons . . . .[97]

The legislative history of the law makes clear that Congress intended the law to do as its name states – reduce paperwork.

> The Paperwork Reduction Act takes statutory steps needed to reduce and minimize the burden government paperwork imposes on the public. . . . The bill . . . ensures that paperwork required from the public is first checked to see whether the information requested is:
> (1) needed;
> (2) not duplicative; and
> (3) collected efficiently.[98] . . .
> There is, in our opinion, an overriding objective to insure [sic] that the paperwork burden government imposes on the public is neither duplicative nor burdensome.[99] . . .
> It is the intent of this legislation to reduce and minimize the government paperwork and reporting requirements imposed on all sectors of the public.[100]

Congress reaffirmed this legislative history in 1995, when it broadened the Paperwork Reduction Act.[101]

B. Required Procedures for Valid Collections of Information

The Paperwork Reduction Act regulates, and places limitations on, what it terms a "collection of information." Despite its name, a collection of information includes, among other things, a federal regulation that requires regulated parties to make disclosures to third parties. The present proposed rule would require creditors to make disclosures to consumers, and would therefore be a collection of information subject to the Paperwork Reduction Act.

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[97] 44 U.S.C. § 3501.
[98] S. Rep. 96-930, at 2 (1980).
[99] *Id*. at 14.
[100] *Id*. at 59.
[101] The purpose of the 'Paperwork Reduction Act of 1995' (S. 244, as amended), is to:
(1) Reaffirm the fundamental purpose of the Paperwork Reduction Act of 1980—to minimize the Federal paperwork burdens imposed on the public by Government[.]" S. Rep. 104-8, at 1 (1995).

A collection of information must be preceded by several specific procedural steps. If the necessary procedures are not followed, the collection of information is unenforceable.

A collection of information that is in a regulation must be reviewed initially, it must be published and there must be a public comment period, the sponsoring agency must certify to a number of specified facts, and the collection of information must be approved.

In most cases, an agency reviews the collection of information initially, then the Director of the Office of Management and Budget (OMB) reviews it, and the Director of OMB gives final approval or disapproval. In the case of the Federal Reserve Board, OMB has delegated to the Board authority to review and approve collections of information.[102] In this discussion, references to statutory language and legislative history will replace "Director" with "Board" to reflect this delegation.

The Paperwork Reduction Act requires the [Board] to:

> [M]inimize the Federal information collection burden, with particular emphasis on those individuals and entities most adversely affected.[103]

To emphasize the importance of reducing and minimizing the regulatory burden of information collections, Congress again directed each agency to:

> [R]educe information collection burdens on the public[.][104]

When an agency initiates a collection of information, it must review the collection before submitting it to the [Board]. The review must, among other things, include:

> [A]n evaluation of the specific need for the collection of information;[105] [and]
> [A] specific, objectively supported estimate of burden[.][106]

After this review, *Federal Register* publication is required, followed by a 60-day comment period.[107]

After the comment period and before an agency submits a collection of information to the [Board] for review, the agency must:

> [C]ertify (and provide a record supporting such certification, including public comments received by the agency) that each collection of information . . .

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102 5 C.F.R. Part 1320, Appendix A at 1(a).
103 44 U.S.C. § 3504(c)(3).
104 44 U.S.C. § 3506(b)(1)(A).
105 44 U.S.C. § 3506(c)(1)(A)(i).
106 44 U.S.C. § 3506(c)(1)(A)(iv).
107 44 U.S.C. §§ 3506(c)(2)(A); 3507(d)(1)(B).

> (A) is **necessary** for the proper performance of the functions of the agency, including that the information has practical utility;
>
> (B) is not **unnecessarily duplicative** of information otherwise reasonably accessible to the agency;
>
> (C) **reduces** to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency, including with respect to small entities . . .
>
> (E) is to be implemented in ways consistent and **compatible**, to the maximum extent practicable, **with the existing reporting** and recordkeeping practices of those who are to respond;
>
> (F) indicates for each recordkeeping requirement the length of **time persons are required to maintain the records** specified;
>
> **(H)** has been developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected, including the processing of the information in a manner which shall **enhance**, where appropriate, **the utility of the information** to agencies and the public[.][108]

The [Board] may then approve or disapprove of the collection of information.

> Before approving a proposed collection of information, the [Board] shall determine whether the collection of information by the agency is **necessary** for the proper performance of the functions of the agency, including whether the **information shall have practical utility**. Before making a determination the [Board] may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the [Board] determines that the collection of information by an agency is unnecessary for any reason, the agency may not engage in the collection of information.[109]

If the [Board] approves the information collection, it is assigned a "control number." This process and the control number are necessary for a collection of information to be enforceable.

> (a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if—
>
> (1) the collection of information does not display a valid control number assigned by the [Board] in accordance with this subchapter; or
>
> (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

[108] 44 U.S.C. § 3506(c)(3) (emphasis added).
[109] 44 U.S.C. § 3508 (emphasis added).

(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.[110]

C. The Proposed Rule Violates Both the Spirit and Language of the Paperwork Reduction Act

Congress enacted the Paperwork Reduction Act to reduce and minimize regulatory burdens, as discussed above. In contrast to these important purposes, the proposed rule would unnecessarily increase regulatory burden.

The proposed rule would create new disclosure requirements relating to escrow accounts in connection with consumer mortgage loans. RESPA rules already have in place a comprehensive set of required escrow disclosures. The proposed rule would require new disclosures in addition to, not instead of, the RESPA disclosures. The two sets of disclosures are in substance extremely similar. *See* section III of this comment letter, above. Therefore, there is no reason for the proposed disclosures. Consumers already receive too many disclosures, which are often overlapping and sometimes contradictory. This is the reason Congress enacted its triple mandate that the disclosures be integrated, as discussed above.

The proposed rule would add a redundant collection of information, unnecessarily requiring redisclosures of the same information. Thus, the proposed disclosures would unnecessarily increase regulatory burden.

In addition, the new disclosures likely would be in place only for a short time. When the regulators integrate the RESPA and TILA rules, they will have to integrate any final rule that results from the present rulemaking. It is highly likely that the regulators will retain some, but not all, aspects of both the RESPA and TILA rules. That means it is likely that creditors nationwide would need to undo some of the changes the present rulemaking would require.

The proposed disclosure would be costly to implement. Implementation would require changes to the technology systems that the industry uses to: determine which loans require which disclosures; track the date by which the disclosures are required; produce disclosures; and track delivery of disclosures. Consumers will certainly ask questions about the new disclosures and requirements. This means loan originators nationwide will need to be trained in all the new requirements. Consumer questions will come into servicers' call centers, so responses to foreseeable questions will need to be scripted and inserted into the technology systems that call centers use to accurately answer questions quickly. Those who use the scripts will need to be trained. Gaps in the responses to consumer questions inevitably arise with new disclosures and requirements. These will need to be tracked, managed, and addressed. Every change will need to be

[110] 44 U.S.C. § 3512.

communicated to every loan originator. Amended call center scripts will need to be implemented.

The industry's mortgage technology systems are highly specialized and complex. They have many interacting and intersecting operations, so that changing one affects many. Systems changes require careful and deliberate change management documentation and processes, extensive testing of changes, and often revisions in response to test results. Systems changes require advanced skills that are so specialized that they are not widely available.

The proposed disclosures would require a number of changes that would need to be at least partially undone when the regulators integrate TILA and RESPA rules. Removing system changes is also burdensome.

The proposed disclosures would impose a very heavy burden that is not required; would not benefit consumers; and would be in place for a very short period of time, after which creditors would be required to undo the rule's implementation. For these reasons, the proposed disclosures violate both the language and the spirit of the Paperwork Reduction Act.

D. The Proposed Collection of Information Lacks the Required Evaluation of a "Specific Need"

The Paperwork Reduction Act requires an "evaluation of the specific need for the collection of information[.]"[111] The Board's analysis lacks one. There is no need for the proposed disclosures, for the following reasons.

First, the proposed disclosures are beyond the Board's authority because the triple Congressional mandate to integrate mortgage rules prohibits any rule that would move away from the required integration, as discussed above.

Second, the proposed disclosures are unnecessary because they would be redundant. Under RESPA rules, lenders and settlement service providers are required to deliver to consumers disclosures that are substantially the same as those this rulemaking proposes. The Board does not take the position that there is anything amiss with the RESPA escrow disclosures. The Board would simply add another redundant layer of disclosures.

Third, it is unnecessary as evidenced by the fact that the Board has had authority to require this rule since 1968 and has never before 2011 determined that use of that authority was necessary. The Board cites no fact about recent changes relating to escrow accounts that make a redundant disclosure suddenly necessary.

Fourth, neither §§ 1461 or 1462 of the Dodd-Frank Act, which the proposed rule would implement, require the Board to undertake any rulemaking.

[111] 44 U.S.C. § 3506(c)(1)(A)(i).

E. The Collection of Information Lacks Objective Support for its Arbitrary Burden Numbers

The Paperwork Reduction Act requires an agency to review a "specific, objectively supported estimate of burden[.]"[112]

In the present rulemaking, the Board states:

> The Board estimates that the 1,138 respondents regulated by the Federal Reserve would take, on average, 40 hours (one business week) to update their systems and internal procedure manuals and to provide training for relevant staff to comply with the new disclosure requirements in §§ 226.19(f) and 226.20(d).[113]

This statement is neither objective nor supported. It is a conclusory statement lacking factual support of any type.

Significantly, it did not take into account specific facts previously made known to the Board. In a comment letter to the Board dated December 24, 2009, Docket Number R-1366, the Consumer Mortgage Coalition responded to the Board's estimate that that rulemaking would impose a burden of 200 hours, stating:

> We respectfully submit that this estimate is extremely low.
> The notice of proposed rulemaking runs almost 200 *Federal Register* pages. Just reading the proposal, let alone understanding its implications, took days. Preparing this comment letter required assembling a team who then worked on this project for over four months. Once the final rule is published, the industry will then have to implement the rule, which will then reasonably take at least 24 months. There are a number of different loan origination technology systems across the industry, as well as within individual companies. Implementing Regulation Z amendments will require each revision to be programmed, implemented, and then tested, separately in each of these origination systems. Changes to loan origination systems must be made in a coordinated fashion because each change can impact other changes that are being designed and made simultaneously. Coordination itself is a labor-intensive task.
> For some perspective, we note that at one large lender, implementing the Regulation Z amendments that became effective October 1, 2009 required over 70,000 hours. Implementing the recent amendments to Regulation X took twice that amount of time, and those rules are still changing. Implementing the present rulemaking will likely require more resources than the October 2009 rulemaking but less than Regulation X.

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[112] 44 U.S.C. § 3506(c)(1)(A)(iv).
[113] 76 Fed. Reg. 11598, 11615 (March 2, 2011).

The Board estimated the burden for the present rulemaking without addressing this evidence. The Board does not express any reason to doubt the accuracy of this evidence, nor did it counter this evidence with any information. Yet the Board arrives at an estimate that is very different from this evidence. It is true that the two rulemakings are different, but the Board does not address any of the differences.

In summary, rather than using an "objectively supported" estimate as Congress required, the Board did not take into consideration objective facts and used, instead, an estimate without basis. The Paperwork Reduction Act does not permit this.

F. The Board Exhibits a Practice of Not Supporting Its Burden Numbers

Below is a review of the burden estimates in six recent Board rulemakings relating to consumer mortgage loans. Each shares one characteristic with the present rulemaking. That characteristic is the Board in each case estimated the initial regulatory burden under the Paperwork Reduction Act to be **exactly the same**, 40 hours, although the rules are quite different. The rules are:

1. Adding an inflation adjustment to a TILA exemption threshold, 75 Fed. Reg. 78636 (December 16, 2010).

2. An interagency risk-based pricing rule under the Fair Credit Reporting Act, 75 Fed. Reg. 2724 (January 15, 2010).

3. A loan transfer notice interim final rule, 74 Fed. Reg. 60143 (November 20, 2009.

4. An interagency rule on furnishing information to credit reporting agencies, 74 Fed. Reg. 31484 (July 1, 2009).

5. A rule on disclosures under the Mortgage Disclosure Improvement Act, 74 Fed. Reg. 23289 (May 19, 2009).

6. A rule on higher-priced mortgage loans, 73 Fed. Reg. 44522 (July 30, 2008).

The Board's statements in each of these rulemakings describe what the rules require and state burden estimates, with no objective support.

In the rulemaking numbered 1 above, the Board states:

> The Board estimates that the proposed rule would impose a one-time increase in the total annual burden under Regulation Z. The 1,138 respondents would take, on average, 40 hours (one business week) to update their systems to begin to

> comply with the requirements of Regulation Z for loans that are no longer exempt.[114]

In the rulemaking numbered 2 above, the Board states:

> *Estimated Time per Response:* 40 hours (one business week) to reprogram and update systems, provide employee training, and modify model notices with respondent information to comply with final requirements.[115]

In the rulemaking numbered 3 above, the Board states:

> The new disclosure requirement will impose a one-time increase in the total annual burden under Regulation Z for respondents supervised by the Federal Reserve that engage in mortgage acquisitions. The Board estimates that 68 respondents supervised by the Federal Reserve will take, on average, 40 hours (one business week) to update their systems, internal procedure manuals, and provide training for relevant staff to comply with the new disclosure requirements in § 226.39.[116]

In the rulemaking numbered 4 above, the Board states:

> 24 hours to implement written policies and procedures and training associated with the written policies and procedures, 8 hours to amend procedures for handling complaints received directly from consumers, 8 hours to implement the new dispute notice requirement[.] [24 + 8 + 8 = 40.][117]

In the rulemaking numbered 5 above, the Board states:

> [T]he Board estimates that each of the 1,138 respondents supervised by the Federal Reserve System would take, on average, 40 hours (one business week) to update their systems, provide additional staff training, and update internal procedures to comply with the proposed disclosure requirements in §§ 226.17 and 226.19.[118]

In the rulemaking numbered 6 above, the Board states:

> The final rule will impose a one-time increase in the total annual burden under Regulation Z by 46,880 hours from 552,398 to 599,278 hours. This burden increase will be imposed on all [1,172] Federal Reserve-regulated institutions that are deemed to be respondents for the purposes of the PRA. [46,880 ÷ 1,172 =

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[114] 75 Fed. Reg. 78636, 78642 (December 16, 2010).
[115] 75 Fed. Reg. 2724, 2748 (January 15, 2010).
[116] 74 Fed. Reg. 60143, 60151 (November 20, 2009).
[117] 74 Fed. Reg. 31484, 31504 (July 1, 2009).
[118] 74 Fed. Reg. 23289, 23298 (May 19, 2009).

40.][119]

None of these statements discuss or mention any objectively supported estimate. They merely describe the rule and conclude the initial burden is 40 hours. It appears that the Board has no support, objective or otherwise, for its estimates. It would an extraordinarily unlikely coincidence for reasoned, supportable estimates of the regulatory burden imposed by seven very different rules to find exactly the same burden.

The estimates also appear highly unrealistic. The statutory definition of "burden" includes "the **total** time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency," including a list of activities.[120] The list includes all aspects of coming into and maintaining compliance with a regulatory requirement.[121] The Board has taken the position that an inflation adjustment for a TILA exemption based on dollar amount of a loan imposes the same regulatory burden as a rule that requires a new consumer disclosure, or as its broad rule on higher-price mortgage loans. These assumptions lack a factual basis.

The Board also says in one rulemaking that an average creditor could update its systems, and do everything else necessary, in 40 hours. As has been explained to the Board in the past, this is not reasonably possible. Systems changes are far more involved than the Board acknowledges. It takes more than 40 hours just to determine what a rule requires, determine which business operations a systems change will affect, and select who to assign to the systems change project. Educating everyone involved in the project on what needs to change and what the needed result is, alone, takes hours. This is all before the systems change work even begins to be planned, designed, scheduled, installed, tested, or revised. Moreover, many creditors have more than one system impacted by a rule. Each system must be changed separately for a new rule, so multiple, independent, systems change projects are necessary.

It does not appear that the Board considered the requirements mandated by the Paperwork Reduction Act.

We propose a discussion or dialogue between the Board and mortgage creditors so that we can inform the Board about the process of complying with mortgage rules. This would enable the Board to make realistic and supported estimates of the immense regulatory burden of its rules, as the Paperwork Reduction Act requires.

[119] 73 Fed. Reg. 44222, 44595 (July 30, 2008).
[120] 44 U.S.C. § 3502(2).
[121] 44 U.S.C. § 3502(2).

G. The Proposed Disclosures Are Unnecessary

The Paperwork Reduction Act requires the Board's rulemaking to be "necessary for the proper performance"[122] of the Board's functions. The legislative history explains what this requires:

> The [Board] is required, before approving, modifying, or denying a proposed information request, to determine whether the collection is needed for the performance of agency functions. Necessity is thus the test under this section. This determination is to include whether the collection of information:
>
> (1) Has practical utility for the agency,
>
> (2) Is not more than the minimum needed to meet the agency's objective, or
>
> (3) Is not duplicative of similar information otherwise accessible.[123]

In its Paperwork Reduction Act discussion, the Board states "This information collection is required to provide benefits to consumers and is mandatory (15 U.S.C. 1601 et seq.)." This citation is to all of TILA, a lengthy statute. This sentence is a conclusion rather than an analysis. There is no determination that the proposed disclosures have practical utility. There cannot be a determination that duplicative disclosures do not exceed the minimum needed to protect consumers. There cannot be a determination that duplicative disclosures are not duplicative of other disclosures.

The Board does not cite to a particular provision in TILA that mandates the regulation. None exists. The Board fails to mention the Dodd-Frank triple mandate, which prohibits this rulemaking altogether. The Board does not analyze HUD's escrow disclosures, and it does not explain why HUD's escrow disclosures are so deficient that the Board's redundant escrow disclosures are now necessary. Finally, the Board does not mention that it has had authority since 1968 to require escrow disclosures but has not done so, because the disclosures are unnecessary.

Thus, while the statute requires the Board to reduce regulatory burden by imposing it only when "necessary[,]" the Board would impose regulatory burden when unnecessary. This is not within the meaning or the spirit of the Congressional goals or the language of the Paperwork Reduction Act.

H. The Information Collection Would Increase Regulatory Burden Rather Than Reduce it as Practicable and Appropriate

The Paperwork Reduction Act requires that a collection of information "reduces to the extent practicable and appropriate the burden . . . ."[124] The proposed disclosures would

[122] 44 U.S.C. § 3506(c)(3)(A).
[123] S. Rep. 96-930, at 47 (1980).
[124] 44 U.S.C. § 3506(c)(3)(C).

increase regulatory burden without reason. As discussed above, the proposed disclosures exceed the Board's authority, and are unnecessary.

Moreover, the proposed redisclosures would inappropriately increase regulatory burden by imposing a number of requirements that will be amended when RESPA and TILA rules are integrated. A final rule in the present rulemaking could be published before July 2011. Integration of RESPA and TILA rules is already in process and is a high priority for the CFPB. The CFPB could publish a proposed integrated rule soon after the designated transfer date and have a final rule a year later. That would mean the requirements of the present rulemaking would be in place for a year or less before they would need to be removed, and costly implementation of new rules would have to begin anew.

A "practicable and appropriate" approach would be for the Board to do what it announced in its February 1, 2011 announcement. That is, put an end to increasing compliance burdens through piecemeal rulemakings, and defer to the integration project because it will replace the Board's rulemakings and forms very soon.

It is beyond the bounds of the Paperwork Reduction Act to impose a heavy regulatory burden for an unnecessary rule that will be replaced, but in the meantime, will deluge consumers with additional, redundant disclosures.

I. The Information Collection Would Duplicate Regulatory Burden Rather Than Make it Consistent and Compatible With Existing Requirements

The Paperwork Reduction Act requires the Board to impose regulatory burdens only "in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of those who are to respond[.]" Congress intended:

> Each agency is to carry out its information activities in an efficient, effective, and economical manner.[125]

The Board's analysis fails to discuss any serious attempts it made to reduce burden or make its burden consistent with existing RESPA burdens. In its Paperwork Reduction Act discussion, the Board did not mention that HUD requires escrow disclosures that are substantively similar to those the Board proposes. The Board also did not note that the present rulemaking would add regulatory burden by requiring a new disclosure that mimics a disclosure *already required*.

The Board does discuss, in addressing the Regulatory Flexibility Act, how its preferred policy choice on the applicability of higher-price mortgage loans imposes less regulatory

[125] S. Rep 96-930, at 43 (1980).

burden than its less-desired policy choice.[126] The Regulatory Flexibility Act requires more than merely adopting the preferred policy choice, as we discuss below. The Paperwork Reduction Act requires the Board to impose burden only consistently and compatibly with existing burdens. It does not permit a collection of information that mimics and doubles existing burdens.

The Board also mentions that it proposes to permit creditors in some, but not all Regulation Z disclosures, to use "the same amounts determined for purposes of overlapping RESPA disclosure requirements."[127] This is not a regulatory concession to ease regulatory burden. It is the Board's confirmation that it finds the RESPA escrow disclosures appropriate. That is, the Board's proposed disclosures are unnecessary.

The Paperwork Reduction Act requires the Board to impose regulatory burden to be compatible with existing burdens. The Board does not mention that it could not just reduce but *eliminate* the burden of the proposed disclosures by permitting the continued use of HUD's RESPA disclosures until the regulators integrate HUD's and the Board's mortgage disclosure rules and forms. This rulemaking is beyond the Paperwork Reduction Act.

J. The Board Uses an Incorrect Record Retention Requirement

The Board is required to "indicate[] for each recordkeeping requirement the length of time persons are required to maintain the records specified[.]"[128] The Paperwork Reduction Act broadly defines "recordkeeping requirement" to include more than what the regulation at issue requires directly, and more than the agency sponsoring a collection of information requires directly. A recordkeeping requirement is defined broadly:

> [A] requirement imposed by or for an agency on persons to maintain specified records, including a requirement to:
> (A) retain such records;
> (B) notify third parties, the Federal Government, or the public of the existence of such records;
> (C) disclose such records to third parties, the Federal Government, or the public; or
> (D) report to third parties, the Federal Government, or the public regarding such records[.][129]

Congress intended record retention requirements to be subject to the clearance requirements.

[126] 76 Fed. Reg. 11598, 11618 (March 2, 2011).
[127] 76 Fed. Reg. 11598, 11618 (March 2, 2011).
[128] 44 U.S.C. § 3506(c)(3)(F).
[129] 44 U.S.C. § 3502(13).

> The term 'collection of information' replaces the term 'information' in the original Federal Reports Act, (44 U.S.C. § 3502). The substantive meaning of the original definition is retained but two specific clarifications are made. First, recordkeeping requirements, which are also defined in section 3502, are explicitly included as means of soliciting facts or opinions by an agency. Information maintained, as opposed to directly provided by federal agencies, is therefore subject to the clearance requirements for collections of information set forth in section 3507.[130]

In the present rulemaking, the Board states:

> Creditors are required to retain evidence of compliance for twenty-four months, **§ 226.25**, but **Regulation Z** identifies only a few specific types of records that must be retained.[131]

We note that the supporting statement for another Regulation Z rulemaking states very similarly:

> Creditors must keep evidence of compliance for twenty-four months. . . . No paperwork burden is deemed to be associated with the recordkeeping requirement **of Regulation Z** (subpart D, section 226.25) because **the regulation** does not specify records to be retained as evidence of compliance.[132]

This analysis is incomplete. The Paperwork Reduction Analysis is not limited to either:

- The records **Regulation Z** or the **Board** require persons to retain; or
- The length of time **Regulation Z** or the **Board** require persons to maintain records.

A "collection of information" includes record retention requirements more broadly than the Board mentions. A collection of information includes:

> [R]equiring the disclosure to . . . third parties or the public of information by or for an agency **by means of** identical questions posed to, or identical reporting, **recordkeeping, or disclosure requirements** imposed on, ten or more persons, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.[133] . . .

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[130] S. Rep. 96-930, at 36 (1980).
[131] 76 Fed. Reg. 11598, 11615 (March 2, 2011) (emphasis added).
[132] Emphasis added. Available here (*see* p. 11): http://www.federalreserve.gov/reportforms/formsreview/RegZ_20110209_omb.pdf
[133] 5 C.F.R. § 1320.3(c) (emphasis added).

> A 'collection of information' may be in any form or format, including the use of report forms; application forms; schedules; questionnaires; surveys; **reporting or recordkeeping requirements** . . . .[134]

This definition is not limited to the requirements of the collection of information immediately at issue. It can include requirements that are indirectly triggered by the first collection of information.

> 'Collection of information' includes **any** requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. [135] . . .
>
> A 'collection of information' may implicitly or explicitly include **related** collection of information requirements.[136]

The Board's analysis of the recordkeeping requirement needs to reflect the fact that the government sponsored enterprises Fannie Mae and Freddie Mac (the GSEs) require their sellers and servicers to retain a large number of records, including Regulation Z disclosures, for longer than two years. Freddie Mac requires servicers to retail all loan records for seven years after Freddie Mac has any interest in the loan, while Fannie Mae requires retention of all records for four years after the loan is liquidated, and in some circumstances longer.[137]

When Regulation Z requires production of a document in connection with a consumer mortgage loan, the creditor or servicer often must retain it for the GSE-specified period, regardless of whether Regulation Z requires its retention at all, or for how long Regulation Z requires its retention. A valid Paperwork Reduction Act analysis must consider the actual recordkeeping requirements that an industry will bear as a direct and immediate result of a collection of information.

The Board appears to read the Paperwork Reduction Act to require the Board's certification to indicate:

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[134] 5 C.F.R. § 1320.3(c)(1) (emphasis added).
[135] 5 C.F.R. § 1320.3(c).
[136] 5 C.F.R. § 1320.3(c)(1) (emphasis added).
[137] Fannie Mae's requirement is: "After a mortgage is liquidated, the servicer must keep the individual mortgage records for at least four years (measured from the date of payoff or the date that any applicable claim proceeds are received), unless the local jurisdiction requires longer retention or we specify that we want the records retained for a longer period." Fannie Mae 2006 Servicing Guide I, 405, Record Retention (1/31/03). Freddie Mac's requirement is: "The Servicer must maintain the Mortgage file while Freddie Mac retains an interest in the applicable Mortgage and for at least seven years from the date Freddie Mac's interest in the Mortgage is satisfied." Freddie Mac Single-Family Seller/Servicer Guide Vol. 2, 52.3, Maintenance (10/1/09). The guides are available online. Fannie Mae's is at https://www.efanniemae.com/sf/guides/ssg/?from=hp and Freddie Mac's is at http://www.freddiemac.com/sell/guide/

> ~~[A]~~ **This** requirement imposed by or for ~~an~~ **this** agency on persons to maintain specified records, including a requirement **in the same regulation or requirement by this agency** to . . . retain such records[.]"

There is no basis for this reading, as it would require changing language Congress enacted. The statute is not limited to one agency's requirements. Congress intended to define recordkeeping requirement broadly. It is not limited to the collection of information of the agency directly at issue:

> The term 'recordkeeping requirement' means a requirement imposed by an agency on persons to maintain specified information. The definition includes information maintained by persons which may be but is not necessarily provided to a federal agency.[138]

This makes clear that a collection of information is not limited to recordkeeping requirements expressly imposed by that same collection of information or by the same agency that sponsors the collection of information. The Board's reading of the statute would require ignoring the definition of agency in the Paperwork Reduction Act, which is very broad:

> [A]ny executive department, military department, Government corporation, [and] **Government controlled corporation**[.][139]

Fannie Mae and Freddie Mac are Government controlled corporations. They are operated at the sole direction of their conservator, the Federal Housing Finance Agency, they are 80 percent owned by the Treasury Department, and, were it not for massive Federal funding, they would be unable to operate.

Further, OMB's regulation defines the sponsor of a collection of information broadly, and without limitation to a single agency:

> A Federal agency [meaning **any** Federal agency] is considered to "conduct or sponsor" a collection of information if the agency collects the information, causes another agency to collect the information, contracts or enters into a cooperative agreement with a person to collect the information, or requires a person to provide information to another person, or in similar ways causes another agency, contractor, partner in a cooperative agreement, or person to obtain, solicit, or require the disclosure to third parties or the public of information by or for an agency.[140]

We believe the Board needs to address the burdens its regulation would necessarily impose beyond the narrow, hypertechnical confines of Regulation Z. We also believe the

[138] S. Rep. 96-930, at 38 (1980).
[139] 44 U.S.C. § 3502(1) (emphasis added).
[140] 5 C.F.R. § 1320.3(d).

Board should consider the definition of agency in connection with this collection of information. Finally, we believe the Board should address whether the GSEs are agencies for purposes of the Board's record retention analysis.

This letter does not take the position that the GSEs should be defined as agencies under the Paperwork Reduction Act. It simply points out what a plain reading of the statute reveals. The legislative history appears to have intended to define the term agency broadly. Congress did consider the term:

> In the discussion of specific issues the Committee reaffirms the existing interpretation of the Brooks Act as it applies to government contractors by citing a legal memorandum from the Department of Justice to the General Counsel of the General Services Administration. The explicit exclusion of government-owned, contractor-operated facilities from the term agency is not intended to alter the status of that legal opinion as a correct statement of the law as it applies to 'government contractors' in general. The Committee believes that the memorandum accurately describes the law and intends no change in the law.[141]

The Senate Report quotes the referenced legal opinion. The opinion clarifies that the definition of agency is quite broad:

> The term 'federal agency' as used in the Brooks Act is defined in the Federal Property Act, 40 U.S.C. § 472(b). It means 'any executive agency or any establishment in the legislative or judicial branch of the government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction.'[142]

The Board has apparently misapplied the record retention provision. We believe this is another reason the Board's burden estimate is unsupported and is unrealistically low.

If the Board requires additional information on GSE record retention requirements, we would be pleased to add that topic to our discussion or dialogue about regulatory burden.

K. The Board Does Not Use the Information Efficiently to Enhance Its Utility To Consumers

The Paperwork Reduction Act Requires the Board to "plan[] and allocate[] resources for the efficient and effective management and use of the information to be collected, including the processing of the information in a manner which shall enhance, where appropriate, the utility of the information to agencies and the public[.][143] It also requires

[141] S. Rep. 96-930, at 36 (1980).
[142] S. Rep. 96-930, at 30 (1980).
[143] 44 U.S.C. § 3506(c)(3)(H).

the Board to "maximize the practical utility of and public benefit from information collected by or for the Federal Government.[144]

The need for practical utility is not limited to information a federal agency collects. It applies to collections of information that result in disclosures to third parties even if the agency never sees the information. This is clear from the fact that in 1995 Congress removed the words "it collects" from the definition of practical utility in what is now designated as 44 U.S.C. § 3502(11), as follows:

> (11) the term 'practical utility' means the ability of an agency to use information ~~it collects~~, particularly the capability to process such information in a timely and useful fashion[.]

This collection of information would impose regulatory burden for the purpose of providing redundant disclosures to consumers that they do not want or need, and that contribute to the information overload problem that Congress intended to terminate.

The proposed disclosures are contrary to the Paperwork Reduction Act.

L. Request for Opportunity for Interested Parties to be Heard and to Submit Written Statements

One of the Paperwork Reduction Act procedures is the following:

> Before making a determination [to approve or disapprove an information collection] the [Board] may give the agency and other interested persons an opportunity to be heard or to submit statements in writing.[145]

As demonstrated above, the Paperwork Reduction Act requirements have not been met for this rulemaking. The rule cannot be enforceable until the Board complies with all applicable requirements. The mortgage industry does not want to incur the costs of implementing a rule that will not be enforced.

The Paperwork Reduction Act issues that this rulemaking raises are significant, and we believe they have not been sufficiently debated by the many interested parties, including, but not limited to, the GSEs and the Federal Housing Finance Agency.

For these reasons, we respectfully request that, if the Board does not withdraw this collection of information, interested parties have an opportunity, under section 3508 of the Paperwork Reduction Act, to both:

- Be heard in oral argument on the Paperwork Reduction Act issues in the present collection of information; and

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[144] 44 U.S.C. § 3504(c)(4).
[145] 44 U.S.C. § 3508 (emphasis added).

- Present statements in writing on the Paperwork Reduction Act issues in the present collection of information.

We urge the Board, if it does continue with this collection of information, after receiving additional arguments and views on the Paperwork Reduction Act, to amend its Paperwork Reduction Act analysis in response to those arguments and views, and in compliance with the Paperwork Reduction Act. The Board then would need to publish its revised analysis for public comment as required by 44 U.S.C. § 3406(c)(2) and for [Board] comment as required by § 3507(d)(1)(B).

Given that it is not possible for the Board to comply with the Paperwork Reduction Act in this collection of information before the designated transfer date, we urge the Board in the alternative to simply withdraw the provisions of this collection of information that would be burdensome to implement, including all proposed disclosures and requiring implementation of the new definition of transaction coverage rate.

II. The Board Has Not Complied With the Regulatory Flexibility Act

The Regulatory Flexibility Act requires the Board's Initial Regulatory Flexibility Analysis (IRFA) to do the following:

- "[D]escribe the impact of the proposed rule on small entities."[146]
- "[W]here feasible, [include] an estimate of the number of small entities to which the proposed rule will apply[.]"[147]
- Describe "the type of professional skills necessary for preparation of the report or record[.]"[148]
- Identify "all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule."[149]

Most importantly, the Regulatory Flexibility Act requires:

> Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as . . . the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities[.][150]

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[146] 5 U.S.C. § 603(a).
[147] 5 U.S.C. § 603(b)(3).
[148] 5 U.S.C. § 603(b)(4).
[149] 5 U.S.C. § 603(b)(5).
[150] 5 U.S.C. § 603(c) and (c)(2).

A. The Board Does Not Describe the Impact of Its Proposed Rule on Small Entities

The Board does not describe the impact of the proposed rule on small entities. It simply describes what the rule would require small entities to do, and states "The effect of the proposed revisions to Regulation Z on small entities is unknown."

The Board apparently made no effort to determine the impact. This is insufficient. The Board could have simply asked small entities what the impact might be. The Board could have drawn on the expertise of the Small Business Administration to help estimate the impact. The IRFA should address, or at least acknowledge, unrefuted evidence, quoted earlier in this letter, that implementing a different Regulation Z rulemaking took tens of thousands of hours at one creditor.

B. The Board Fails to Estimate the Impact on Small Entities Despite Readily Available, Reliable Information

The Board similarly makes no real attempt to estimate the number of small entities to which the proposed rule would apply. The Board states:

> The Board is not aware of a reliable source for the total number of small entities likely to be affected by the proposal, and the credit provisions of TILA and Regulation Z have broad applicability to individuals and businesses that originate, extend, and service even small numbers of home-secured credit. . . . Certain parts of the proposed rule would also apply to mortgage servicers. The Board is not aware, however, of a source of data for the number of small mortgage servicers.[151]

There is a ready and very reliable source of the information the Board lacks. Fannie Mae and Freddie Mac know all or almost all consumer mortgage lenders and servicers nationwide. The Federal Housing Finance Agency and the GSEs together could readily obtain a highly accurate count for the Board's IRFA.

C. The Board Fails to Describe the Professional Skills Necessary to Comply With the Proposed Rule

The Board is required to describe the type of professional skills necessary for complying with the proposed rule. The Board appears not to have attempted to comply with this statutory requirement.

The Board must know through its supervision and examination of banking organizations the types of skills those organizations use. The Board could readily obtain the latest examination trends, information, and expertise through the Federal Financial Institutions Examination Council, of which the Board is a member.

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[151] 76 Fed. Reg. 11598, 11616-17 (March 2, 2011).

D. The Board Fails to Identify Conflicting Statutory Provisions, and Fails to Mention That Its Proposed Rule is Highly Duplicative of Existing Disclosures

The Board is also required to identify all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule. The Board states:

> The Board has not identified any Federal rules that conflict with the proposed revisions to Regulation Z.[152]

We have identified three conflicting laws earlier in this letter. They are each of the three mandates in what this letter terms the triple Congressional mandate to integrate RESPA and TILA rules. This proposed rule conflicts with all three.

The Board does not mention any rules that duplicate the proposed rule. This letter has identified several RESPA rules that require disclosures relating to escrow accounts. The proposed disclosures are extremely duplicative of several existing RESPA disclosures. The Board does acknowledge that its proposed disclosures "overlap" RESPA disclosures. This does not acknowledge that the proposed disclosures are highly duplicative of the RESPA disclosures.

The Board's IRFA does mention that RESPA escrow rules require periodic escrow analyses and delivery of escrow account statements that the proposed rule does *not* duplicate. It is true that the Board's proposed rule does not duplicate every RESPA rule. However, the IRFA is required to identify the rules that *are* duplicative, not the rules that are not.

The Regulatory Flexibility Act is designed to prevent conflicting and duplicative rules. The Board's failure to acknowledge that its proposed rule would conflict with the triple statutory mandate, and that it would duplicate RESPA disclosures, does not comply with the Regulatory Flexibility Act. This lack of compliance is significant because it goes to the purpose underlying the Regulatory Flexibility Act, namely regulatory flexibility. By not acknowledging that the burden of the proposed disclosures is unnecessary and redundant, the Board does not consider significant regulatory alternatives to the proposed disclosures.

E. The Board Does Not Comply with a Central Mandate of the Regulatory Flexibility Act, the Requirement to Consider Regulatory Flexibility

One of the most important requirements of the Regulatory Flexibility Act is that the agency consider "**any** significant **alternatives to the proposed rule** which accomplish the stated objectives of applicable statutes and which minimize any significant economic

[152] 76 Fed. Reg. 11598, 11617 (March 2, 2011).

impact of the proposed rule on small entities[.]"[153]

In its IRFA, the Board has not identified a single alternative to the proposed disclosures. The IRFA does describe how the Board's preferred proposed rule may impose less regulatory burden on small entities than alternatives that the Board did not consider. That approach is not what is required in an IRFA. The IRFA must describe **alternatives** to the proposed rule, not why the proposed rule will not be burdensome. We suggest some very reasonable alternatives that an IRFA in this rulemaking is incomplete without:

- Do not require duplicative disclosures. There is no reason for them. Instead, permit creditors to provide the escrow disclosures that RESPA rules require, until the disclosures are integrated.

- Work towards integrating RESPA and TILA rules rather than working in the opposite direction.

- Avoid requiring small entities to come into compliance with a hugely burdensome rule that will be revised in the very near future.

Each of these reasonable alternatives would very substantially avoid unnecessary regulatory burden on small entities. Any valid IRFA must acknowledge the existence of, and address, each of these reasonable alternatives.

III. The Board Should Compare the Costs to the Benefits of its Regulation

Cost-benefit analyses of rulemakings are an exercise in good government practices. They can avoid ill-advised or inappropriate rulemakings.

In the present rulemaking, the Board mentions no comparison of the costs of the rule to its benefits. OMB stated in its 2010 report to Congress:

> Table 1-7 lists each of these rules and the extent to which GAO reported benefit and cost estimates for the rule. Of the 11 rules that were issued to regulate the financial sector, only one rule provided complete monetized benefit and cost information: the SEC's final rule on Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies. The SEC conducts some benefit-cost analysis of its rules, but it generally does not quantify and monetize benefits and costs. The Federal Reserve System promulgated five rules: three final rules and two interim final rules. The agency did not, however, prepare benefit-cost analyses to assess the effects of the rules.[154]

[153] 5 U.S.C. § 603(c).
[154] The Report is at this link, and Table 1-7 is on page 28.
http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf

Cost benefit analyses improve the quality of any rulemaking. They can avoid wasteful rulemakings such as much of the present one. We would be more than happy to provide data and input and to otherwise assist the Board in performing and supporting such an analysis.