November 5, 2012

Ms. Monica Jackson
Office of the Executive Secretary
CFPB
1700 G Street NW
Washington, DC 20255

Sent Electronically: http://www.regulations.gov

Re: Proposed Rule on Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA) (Regulation X) and The Truth In Lending Act (TILA) (Regulation Z) (the “Proposed Rule”); DOCKET No. CFPB-2012-0028; RIN 3170-AA19

Dear Ms. Jackson:

The following comments are submitted on behalf of the Real Property, Trust and Estate Law Section of the American Bar Association and its members who are attorneys for lenders and attorney agents for title companies who are engaged in the real estate practice and title insurance and settlement services across the country. The comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

These comments were prepared by members of the Single Family, Multifamily and Special Use Group of the Real Property Trust and Estate Law Section of the American Bar Association (the “Section”). Although the members of the Section who prepared these comments may have clients who would be affected by the issues addressed, or may have advised clients on the application of such issues, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a submission with respect to, or otherwise influence the development or the outcome of, the specific subject matter of these comments.

Residential real estate settlement services are provided by a variety of providers across the country, including title companies and escrow companies. Fourteen states provide that either attorneys or title/settlement companies provide settlement services. In many parts of the
country settlement services are provided by attorneys, usually real estate attorneys, who act as agents for title insurance underwriters, prepare the settlement statements, and conduct the closings themselves. Nine states require that attorneys conduct settlements and, collectively, twenty-three states have attorneys involved in conducting and providing settlement services as either a requirement or as an option to the consumer along with title/settlement companies. The Section has a significant number of its 22,000 members engaged in the provision of settlement services on a regular basis. ¹

Attorneys who provide residential settlement services and mortgage lending attorneys bring a unique perspective to the issues presented by the Proposed Rule. Their legal education and legal experience, combined with the everyday practical experience of handling all types of real estate closings, may lead these attorneys to have a greater understanding of the intersection between the underpinnings of the Proposed Rule and the practical effects and consequences (both intended and unintended) of the Proposed Rule.

Settlement attorneys work in the context of sale and purchase transactions and in refinance or similar loan transactions. The functions they perform in each context differ. In the refinance transaction, their role is fairly limited and may include only title work, preparation of the settlement statement and conducting the closing. By comparison, in sale and purchase transactions, the settlement attorney performs many additional functions. A residential settlement attorney coordinates many different activities and serves as the focal point for gathering and disseminating information and for ensuring that all conditions of the transaction are met by the closing date established by the parties’ purchase and sale agreement. A good settlement attorney tries to ensure that a sale and purchase transaction closes on time and in conformance with the parties’ agreement and expectations.

Although the scope of disclosure to the consumer regarding the loan and settlement services costs is quite similar in either the sale or refinance transaction, the sale and purchase transaction includes many other costs of closing and reflects many tasks and services provided by third parties unrelated to the lender or the settlement agent. Disclosure that goes beyond

¹ For purposes of these comments, we are not taking a position on whether or not real estate settlement attorneys who conduct residential mortgage loan closings are exempt from supervision by the CFPB by virtue of the practice of law exemption in Section 1027(e) of the Dodd-Frank Act (DFA). Further, we are not taking a position as to whether real estate settlement attorneys are “service providers” to financial institutions and thereby subject to CFPB supervision under DFA Sec. 1024(f) and Sec. 1025(d). These comments assume that real estate settlement attorneys might be subject to the Proposed Rule.
the loan and settlement costs in the sale transaction or rules that do not provide sufficient flexibility in the sale transaction may give rise to many unintended and undesirable consequences, as described in greater detail below. The Proposed Rule needs to recognize the very significantly different dynamics between a refinance and a sale and purchase transaction.

Attorneys recognize the need for consumers to understand the costs of closing loan transactions or closing sale and purchase transactions. Attorneys understand the vital importance of good and timely disclosure. At the same time, it seems abundantly clear that many (if not most) consumers do not fully understand the costs, even when explained to them by an attorney who actually understands the disclosures and recognizes the importance of having the consumer understand them.

Consumers rely heavily on the confidence, direction and trust established with their real estate agent, who has typically guided them through the home buying process for several months. The relationship is a professional fiduciary relationship bound by a brokerage agreement that includes ethical responsibilities and legal obligations. While some consumers take advantage of comparing costs of lenders and settlement agents and make their own independent decisions, most rely on the advice of their real estate agent, their friends and their family. The Proposed Rule ultimately is premised on the assumption that consumers would shop around if only they have received good disclosure. In the experience of settlement attorneys and other settlement agents, that premise is weak, and we are concerned that no scope, timing or amount of disclosure is going to make consumers shop around more.

Many providers from both the lending and settlement services industries agree that our current TILA and RESPA required disclosure forms do not appropriately disclose to the consumer the total mortgage and settlement cost involved in a loan transaction. To assist the CFPB, we recommend that the Proposed Rule: 1) Maintain the position that creditors are the most appropriate party to disclose the financial details specific to the loan portion of the transaction; 2) Provide that the settlement agents will disclose settlement and title insurance costs and all other non-loan related costs in accordance with customary local real estate practices; and 3) Consider the effects that redelivery of Closing Disclosure may have on the contractual obligations of the consumer.
Provision of the Closing Disclosure under Proposed Rule Section 12 CFR 1026.19(f)(1)

We support the CFPB’s adoption of its second option (“Alternative 2”) which sets forth joint provision of the Closing Disclosure by lenders and settlement agents.

Simply stated, Alternative 2 places the provision of important disclosures in the hands of those most capable to provide them. This will result in greater efficiency, familiarity and consistency in loan closings. Many lenders are currently unequipped to provide transaction details akin to those provided by settlement agents. Not only would the learning curve of “on the ground” local expertise, customs and practices be daunting for lenders, but the effect of such a course would unfavorably trickle down to borrowers by impacting the timing and accuracy of the Closing Disclosure. For decades, settlement agents have tailored uniformity in loan transactions that cannot be easily duplicated. Equally important is the experience of where the application of law and local practice intersect in those areas that may seem trivial but would directly impact borrowers. One example is the calculation of escrows for property taxes. Assume that under applicable law, ‘ABC County’ will assess property taxes on December 1st. In actuality, ‘ABC County’ is habitually 2 to 3 months behind in its assessments. Settlement agents in ‘ABC County’ will know this and appropriately escrow (or advise the parties). This type of decision will directly impact the amount of the borrower’s monthly payment and potentially, depending upon the shortage amount, the borrower’s ability to make such payment. For these reasons, we submit that Alternative 2 is the best option for both the industry and consumers.

As real estate attorneys, we are concerned about the potential for greater conflicts of interest if lenders were to perform the tasks that are now typically associated with settlement agents (as it appears that Alternative 1 would require). For example, in many parts of the country, settlement agents are neutral third parties who owe fiduciary duties to the seller, the buyer and the lender. As such, the settlement agent cannot favor one party to the detriment of another. We have serious concerns about whether a lender could even assume such a fiduciary role. If the lender were to assume those fiduciary duties currently undertaken by the settlement agent, the lender would placed into an inherent conflict of interest position, since the lender’s employees might reasonably be expected to be on the lookout for their lender employer’s interests first. We believe that if the lender were to assume these fiduciary duties, the assumption of these duties would itself require disclosure of those duties and would require disclosure of the
potential conflicts of interest. This might be analogous to a lawyer’s duty to disclose conflicts of interest and obtain their clients’ informed written consent prior to undertaking the representation.

Transferring all responsibilities to the lender, as would seem to occur under Alternative 1, would also create an additional regulatory and licensing burden on the lenders. In many states, providers of settlement services must be licensed by the particular regulatory authority that oversees such providers. These licensing requirements may include the passing of an examination, maintaining required bonding or insurance and continuing education requirements. For example, in the State of New Mexico, in order to quote title insurance fees, a person must be a licensed escrow agent. If Alternative 1 were adopted, all loan officers and loan processors and perhaps loan closers would need to become licensed as “escrow officers,” in addition to other licensing requirements specific to lenders.

More specifically from the perspective of real estate settlement attorneys, there are several states where by law attorneys are required to act as settlement agents. State law specifically sets forth the requirements with which settlement attorneys must comply. For example, in Delaware, closing and handling funds is deemed the practice of law. If a lender were to provide these functions as a part of a closing (even if it is just disclosure), it could be deemed the unauthorized practice of law. In addition, no attorney could be involved in such a transaction, as that would be abetting the unauthorized practice of law and would expose the attorney to discipline by the court. In such states, the adoption of Alternative 1 would run contrary to the state process for settlements and would require resolution of the federal/state law conflict that could ensue if Alternative 1 were adopted.

While the Proposed Rule provides that creditors are singularly responsible for the accuracy of Closing Disclosure content, we believe that the better alternative would be for lenders and settlement agents to be jointly responsible for the accuracy of their respective contributions. In theory, we understand an interest in assigning a single point of liability. In practice, however, lenders responsible for the accuracy of Closing Disclosure content—including information provided by settlement agents—will justifiably seek to exercise control over the final content. Unintended consequences of such a practice would be transaction level confusion, delay and risk shifting between lenders and settlement agents. From the borrower’s perspective, a likely result could be frustration from delay and inconvenience caused by, e.g., a potential rate lock expiration, missed time from work due to multiple scheduling, forfeiture of earnest money deposit and contract expiration/seller walking. Also, this would implicate the Costs to Small Entities for Alternative 1 described within the CFPB’s Summary of the Proposed Rule as lenders seek to fill the shoes historically worn by settlement agents.
Timing and Redisclosure of the Closing Disclosure under Proposed Rule
Section 1026.19(e)(1)

The Proposed Rule provides an exception to the redelivery of Closing Disclosure for a “bona fide personal financial emergency” as a basis for a borrower to elect to waive the three business day waiting period over the integrated disclosures. The determination of what constitutes a bona fide personal financial emergency is fact specific. The example provided in the Proposed Rule, imminent loss of a home to foreclosure, is useful, but we believe that additional examples or safe harbor scenarios are needed. A much more common situation is the breach of a sales contract caused by the buyer’s inability to fund the purchase by the agreed upon closing date. If the guiding principle is that the disclosure should not cause more harm than good, then the total failure of the transaction for which financing is required would seem to meet the definition of a financial emergency. Leaving the standard undefined will create a great deal of harm to buyers, as well as expose creditors and settlement agents to unnecessary risk.

Extending the TILA disclosure requirements to what was previously RESPA territory does not take into account the structural and historical differences between information originating during the lending phase, which is solely a negotiation between the creditor and borrower, and the information that is assembled for the purchase and sale closing, which involves coordination of the creditor, borrower, seller, their legal counsel, their real estate brokers, the title and settlement company, and governmental entities at all levels, each with their own time frames and requirements. It is ironic that, from the perspective of a closing professional, a house, affixed to the ground and part of the real estate, becomes a moving target if redelivery of the Closing Disclosure is required. Providing for the three day waiting period makes sense at the beginning of the transaction, and gives the consumer valuable time to weigh his or her loan options. Because of the very limited exceptions to the three-day redisclosure, there is the potential for great mischief to the closing itself. If redisclosure leads to serial three-day delays in closing, this will not likely provide the consumer with a successful or cost effective experience.

The Proposed Rule proposes an exemption from redisclosure for de minimis increases in the borrower’s costs. It provides that no redisclosure is needed for changes of less than $100.00. This level of accuracy, representing 0.05% of the median cost of a single family home in the United States, is likely to put pressure on the accurate estimating of loan expenses. The penalties for delay, including duplicative work, the rescheduling of all of the parties needed for closing, and the risk that the transaction cannot be
extended, far exceed the protection to the borrower. A higher safe harbor amount, possibly coupled with a mechanism to allow the borrower the flexibility to waive redisclosure, would result in a better outcome for the consumer.

The Proposed Rule also exempts from redisclosure changes due to consumer and seller negotiations. It recognizes that the regulation of the lender and settlement agent should not intrude on the borrower’s right to contract with the seller. For the same reasons, unilateral decisions by the buyer should not trigger a redisclosure cycle. For example, it is very common for buyers at the closing to request enhancements and endorsements to the coverage of their title insurance or survey. If the buyer wishes to acquire coverage beyond what is customary in the local marketplace, simple changes requested by the buyer at the closing may require a redisclosure cycle. It would be a much better result for the buyer if they were able to make these purchase decisions without disrupting the transaction. This would also allow the borrower to retain counsel up to the closing date and receive the benefits of counsel without putting the transaction at risk.

In conclusion, the goal of the Proposed Rule should be to try to ensure that consumers have good information in a timely manner; the Proposed Rule, however, should recognize that settlement attorneys and other settlement agents really can and do explain transactions to their consumers, and the Proposed Rule should allow enough flexibility to have consumers make informed choices without jeopardizing the underlying transaction. Consumers are much better served under the Alternative 2. It more closely tracks the current practice, with the least amount of procedural disruption. The creditors have access to financial details specific to the transaction, while the settlement agents provide information gleaned from the myriad of local real estate practices. Equally important, consumers benefit from having independent settlement agents in the transaction. Reducing the role of the settlement agents reduces the potential for market oversight, creates the potential for conflicts of interests, and may affect competitive pricing of the services.
Thank you for your consideration of our comments.

Very truly yours,

Tina Portuondo  
Chair, Real Property, Trust and Estate Law  
Section of the American Bar Association  

cc: Cara Lee T. Neville, Secretary, American Bar Association  
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