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12 CFR Parts 1024 and 1026

High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X); Proposed Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Parts 1024 and 1026

[Docket No. CFPB–2012–0029]

RIN 3170–AA12

High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amends the Truth in Lending Act by expanding the types of mortgage loans that are subject to the protections of the Home Ownership and Equity Protection Act of 1994 (HOEPA), by revising and expanding the triggers for coverage under HOEPA, and by imposing additional restrictions on HOEPA mortgage loans, including a pre-loan counseling requirement. The Dodd-Frank Act also amends the Truth in Lending Act and the Real Estate Settlement Procedures Act by imposing certain other requirements related to homeownership counseling. The Bureau of Consumer Financial Protection (Bureau) is proposing to amend Regulation Z (Truth in Lending) and Regulation X (Real Estate Settlement Procedures Act) to implement the Dodd-Frank Act's amendments to the Truth in Lending Act and the Real Estate Settlement Procedures Act.

DATES: Comments must be received on or before September 7, 2012, except that comments on the Paperwork Reduction Act analysis in part VIII of this **Federal Register** notice must be received on or before October 15, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2012–0029 or RIN 3170–AA12, by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552.
- *Hand Delivery/Courier in Lieu of Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552.

All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Paul Ceja, Senior Counsel & Special Advisor; Stephen Shin and Pavneet Singh, Senior Counsels; and Courtney Jean, Counsel, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of Proposed Rule

Background

The Home Ownership and Equity Protection Act (HOEPA) was enacted in 1994 as an amendment to the Truth in Lending Act (TILA) to address abusive practices in refinancing and home-equity mortgage loans with high interest rates or high fees. Loans that meet HOEPA's high-cost triggers are subject to special disclosure requirements and restrictions on loan terms, and borrowers in high-cost mortgages have enhanced remedies for violations of the law.[1] The provisions of TILA, including HOEPA, are implemented in the Bureau's Regulation Z.[2]

In response to the recent mortgage crisis, Congress through the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) expanded HOEPA to apply to more types of mortgage transactions, including to purchase money mortgage loans and home-equity lines of credit. Congress also amended HOEPA's existing high-cost triggers, added a prepayment penalty trigger, and expanded the protections associated with high-cost mortgages. The Bureau is now proposing to amend Regulation Z to implement the Dodd-Frank Act amendments to HOEPA.

The proposal also would implement other homeownership counseling-related requirements that Congress adopted in the Dodd-Frank Act, that are not amendments to HOEPA. The proposal would generally require lenders to distribute a list of homeownership counselors or counseling organizations to consumers within a few days after applying for any mortgage loan. The proposal also would implement a requirement that first-time borrowers receive homeownership counseling before taking out a negatively amortizing loan.

Scope of HOEPA coverage

The proposed rule would implement the Dodd-Frank Act's amendments that expanded the universe of loans potentially covered by HOEPA. Under the proposed rule, most types of mortgage loans secured by a consumer's principal dwelling, including purchase money mortgage loans, refinances, closed-end home-equity loans, and open-end credit plans (*i.e.,* home-equity lines of credit, or HELOCs) are potentially subject to HOEPA coverage. Reverse mortgages would still be excluded.

Revised HOEPA thresholds

Under the Dodd-Frank Act, HOEPA protections would be triggered where:

- A loan's annual percentage rate (APR) exceeds the average prime offer rate by 6.5 percentage points for most first-lien mortgages and 8.5 percentage points for subordinate lien mortgages;
- A loan's points and fees exceed 5 percent of the total transaction amount, or a higher threshold for loans below $20,000; or
- The creditor may charge a prepayment penalty more than 36 months after loan consummation or account opening, or penalties that exceed more than 2 percent of the amount prepaid.

The proposed rule would implement the Dodd-Frank Act's amendments to HOEPA's triggers for determining coverage and would provide guidance on how to apply the triggers. For instance, for purposes of the APR trigger, the interest rate used to determine HOEPA coverage for variable-rate loans or plans would generally be based on the maximum margin permitted at any time during the loan or plan, added to the index rate in effect at consummation or account opening. The average prime offer rate for open-end credit plans would be determined based on the average prime offer rate for the most closely comparable closed-end

[1] For purposes of this notice of proposed rulemaking, the terms ''high-cost mortgage,'' ''HOEPA-covered loan'' or ''HOEPA loan'' refer interchangeably to mortgages that meet HOEPA's high-cost triggers.

[2] 12 CFR part 1026.

mortgage loan. The definition of ''points and fees'' would conform closely to what has previously been proposed to implement requirements of the Dodd-Frank Act concerning assessment of consumers' ability to repay mortgage loans, such as by including loan originator compensation for closed-end mortgage loans.

The Bureau is also seeking comment on whether to adopt certain adjustments or accommodations in its HOEPA implementing regulations if it adopts a broader definition of ''finance charge'' under Regulation Z. That change, which the Bureau is proposing in connection with its proposal to integrate mortgage disclosures,[3] would otherwise cause more loans to exceed the APR and points and fees triggers and be classified as high-cost mortgages under HOEPA.

Restrictions on loan terms

The proposed rule also would implement new Dodd-Frank Act restrictions and requirements concerning loan terms and origination practices for high-cost mortgages. For example:

- Balloon payments would largely be banned, and creditors would be prohibited from charging prepayment penalties and financing points and fees.
- Late fees would be restricted to four percent of the payment that is past due, fees for providing payoff statements would be restricted, and fees for loan modification or loan deferral would be banned.
- Creditors originating open-end credit plans would be required to assess consumers' ability to repay the loans. (Creditors originating high-cost, closed-end mortgage loans already are required to assess consumers' ability to repay.)
- Creditors and mortgage brokers would be prohibited from recommending or encouraging a consumer to default on a loan or debt to be refinanced by a high-cost mortgage.
- Before making a high-cost mortgage, creditors would be required to obtain confirmation from a federally certified or approved homeownership counselor that the consumer has received counseling on the advisability of the loan.

Other counseling-related requirements

In addition to the proposed changes discussed above, the Bureau's proposal would implement two Dodd-Frank Act homeownership counseling-related provisions that are not amendments to HOEPA.

- The proposed rule would amend Regulation X[4] to implement a requirement under the Real Estate Settlement Procedures Act (RESPA) that lenders provide a list of federally certified or approved homeownership counselors or organizations to consumers within three business days of applying for any mortgage loan. The Bureau expects to create a Web site portal to make it easy for lenders and consumers to obtain lists of homeownership counselors in their areas.
- The proposed rule would amend Regulation Z to implement a requirement under TILA that creditors obtain confirmation that a first-time borrower has received homeownership counseling from a federally certified or approved homeownership counselor or counseling organization before making a negative amortization loan to the borrower. (A negative amortization loan is one in which the payment schedule can cause the loan's principal balance to increase over time.)

Effective date

The Bureau's proposal seeks comment on when a final rule should be effective. Because the final rule will provide important benefits to consumers, the Bureau seeks to make it effective as soon as possible. However, the Bureau understands that the final rule will require lenders and brokers to make systems changes and to retrain their staff. In addition, industry will at approximately the same time be implementing a number of other changes relating to other Dodd-Frank Act provisions, some of which will take effect within one year after issuance of final implementing rules. Therefore, the Bureau is seeking comment on how much time industry needs to make these changes.

II. Background

A. HOEPA

HOEPA was enacted as part of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325, 108 Stat. 2160, in response to evidence concerning abusive practices in mortgage loan refinancing and home-equity lending.[5] The statute applied generally to closed-end mortgage credit, but excluded purchase money mortgage loans and reverse mortgages. Coverage was triggered where a loan's APR exceeded comparable Treasury securities by specified thresholds for particular loan types, or where points and fees exceeded eight percent of the total loan amount or a dollar threshold.

For high-cost loans meeting either of those thresholds, HOEPA required lenders to provide special pre-closing disclosures, restricted prepayment penalties and certain other loan terms, and regulated various lender practices, such as extending credit without regard to a consumer's ability to repay the loan. HOEPA also provided a mechanism for consumers to rescind covered loans that included certain prohibited terms and to obtain higher damages than are allowed for other types of TILA violations. Finally, HOEPA amended TILA section 131, 15 U.S.C. 1641, to provide for increased liability to purchasers of HOEPA loans. Purchasers and assignees of loans not covered by HOEPA generally are liable only for legal violations apparent on the face of the disclosure statements, whereas purchasers of HOEPA loans generally are subject to all claims and defenses against the original creditor with respect to the mortgage.

The Board of Governors of the Federal Reserve System (Board) first issued regulations implementing HOEPA in 1995. 60 FR 15463 (March 24, 1995). The Board published additional significant changes in 2001 that lowered HOEPA's APR trigger for first-lien mortgage loans, expanded the definition of points and fees to include the cost of optional credit insurance and debt cancellation premiums, and enhanced the restrictions associated with HOEPA loans. *See* 66 FR 65604 (Dec. 20, 2001). In 2008, the Board exercised its authority under HOEPA to extend certain consumer protections concerning a consumer's ability to repay and prepayment penalties to a new category of ''higher-priced mortgage loans'' with APRs that are lower than those prescribed for HOEPA loans but that nevertheless exceed the average prime offer rate by prescribed amounts. 73 FR 44522 (July 30, 2008).

With the enactment of the Dodd-Frank Act, general rulemaking authority for TILA, including HOEPA, transferred from the Board to the Bureau on July 21, 2011. Pursuant to the Dodd-Frank Act and TILA, as amended, the Bureau published for public comment an interim final rule establishing a new Regulation Z, 12 CFR part 1026, implementing TILA (except with respect to persons excluded from the Bureau's rulemaking authority by section 1029 of the Dodd-Frank Act). 76 FR 79768 (Dec. 22, 2011). This rule did not impose any new substantive obligations but did make technical and conforming changes to reflect the transfer of authority and

[3] *See* the Bureau's 2012 TILA–RESPA Proposal, available at *http://www.consumerfinance.gov/notice-and-comment/*.

[4] 12 CFR part 1024.

[5] HOEPA amended TILA by adding new sections 103(aa) and 129, 15 U.S.C. 1602(aa) and 1639.

certain other changes made by the Dodd-Frank Act. The Bureau's Regulation Z took effect on December 30, 2011. Sections 1026.31, 32 and 34 of the Bureau's Regulation Z implement the HOEPA provisions of TILA.

B. RESPA

Congress enacted RESPA, 12 U.S.C. 2601 *et seq.,* in 1974 to provide consumers with greater and more timely information on the nature and costs of the residential real estate settlement process and to protect consumers from unnecessarily high settlement charges, including through the use of disclosures and the prohibition of kickbacks and referral fees. RESPA's disclosure requirements generally apply to ''settlement services'' for ''federally related mortgage loans,'' a term that includes virtually any purchase money or refinance loan secured by a first or subordinate lien on one-to-four family residential real property. 12 U.S.C. 2602(1). Section 5 of RESPA generally requires that lenders provide potential borrowers of federally related mortgage loans a home buying information booklet containing information about the nature and costs of real estate settlement services, a good faith estimate of charges the borrower is likely to incur during the settlement process, and, as a new requirement pursuant to the Dodd-Frank Act, a list of certified homeownership counselors. *Id.* 2604. The booklet, good faith estimate, and list of homeownership counselors must be provided not later than three business days after the lender receives an application, unless the lender denies the application for credit before the end of the three-day period. *Id.* 2604(d).

Historically, Regulation X of the Department of Housing and Urban Development (HUD), 24 CFR part 3500, has implemented RESPA. The Dodd-Frank Act transferred rulemaking authority for RESPA to the Bureau, effective July 21, 2011. See sections 1061 and 1098 of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and RESPA, as amended, the Bureau published for public comment an interim final rule establishing a new Regulation X, 12 CFR part 1024, implementing RESPA. 76 FR 78978 (Dec. 20, 2011). This rule did not impose any new substantive obligations but did make certain technical, conforming, and stylistic changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act. The Bureau's Regulation X took effect on December 30, 2011.

C. The Dodd-Frank Act

Congress enacted the Dodd-Frank Act after a cycle of unprecedented expansion and contraction in the mortgage market sparked the most severe U.S. recession since the Great Depression.[6] The Dodd-Frank Act created the Bureau and consolidated various rulemaking and supervisory authorities in the new agency, including the authority to implement HOEPA, TILA, and RESPA.[7] At the same time, Congress significantly amended the statutory requirements governing mortgage practices with the intent to restrict the practices that contributed to the crisis.

As part of these changes, sections 1431 through 1433 of the Dodd-Frank Act significantly amended HOEPA to expand the types of loans potentially subject to HOEPA coverage, to revise the triggers for HOEPA coverage, and to strengthen and expand the restrictions that HOEPA imposes on those mortgages.[8] Several provisions of the Dodd-Frank Act also require and encourage consumers to obtain homeownership counseling. Sections 1433(e) and 1414 require creditors to obtain confirmation that a borrower has obtained counseling from a federally approved counselor prior to extending a high-cost mortgage under HOEPA or (in the case of first-time borrowers) a negatively amortizing loan. The Dodd-Frank Act also amended RESPA to require distribution of a housing counselor list as part of the general mortgage application process. The Bureau is proposing this rule to implement the HOEPA and counseling requirements.[9]

D. The Market for High-Cost Mortgages

Historically, originations of high-cost mortgages have accounted for an extremely small percentage of the market. This may be due to a variety of factors, including the fact that HOEPA's assignee liability provisions make the loans relatively unattractive to secondary market investors, as well as general compliance burden and stigma. Data collected under the Home Mortgage Disclosure Act (HMDA) further indicate that the percentage share of HOEPA loans has generally been declining since 2004, the first year that HMDA reporters were required to identify HOEPA loans. Between 2004 and 2010, HOEPA loans typically comprised about 0.2 percent of originations of home-secured refinance or home-improvement loans made by lenders that report in HMDA. This percentage peaked at 0.44 percent in 2005 when, of about 8.2 million originations potentially covered by HOEPA, approximately 36,000 HOEPA loans were made. The percentage fell to 0.06 percent by 2010 when, of 5.3 million originations potentially covered by HOEPA, about 3,400 HOEPA loans were made. Similarly, the number of HMDA-reporting lenders that originate HOEPA loans is relatively small. From 2004 through 2009, about 1,000 to 2,300 (roughly 12 to 24 percent) of such lenders extended HOEPA loans. The vast majority (*i.e.,* 97 percent or more) of those lenders made fewer than ten HOEPA loans in each year between 2004 and 2009. In 2010, only about 650 lenders (roughly 8 percent of HMDA filers) reported any HOEPA loans, with just under 60 lenders accounting for about 60 percent of HOEPA lending.[10] As discussed above, the Dodd-Frank Act expanded the types of loans potentially covered by HOEPA by including purchase money mortgage loans and HELOCs. Notwithstanding this expansion, the Bureau believes that HOEPA lending will continue to constitute a small percentage of the mortgage lending market. *See* part VII, below, for a detailed discussion of the likely impact of the Dodd-Frank Act's amendments on HOEPA lending.

E. Other Rulemakings

In addition to this proposal, the Bureau currently is engaged in six other rulemakings relating to mortgage credit to implement requirements of the Dodd-Frank Act:

- *TILA–RESPA Integration:* On the same day that this proposal is released by the Bureau, the Bureau is releasing a proposed rule and forms combining the TILA mortgage loan disclosures with the Good Faith Estimate (GFE) and settlement statement required under

[6] For more discussion of the mortgage market, the financial crisis, and mortgage origination generally, *see* the Bureau's 2012 TILA–RESPA Proposal.

[7] Sections 1011 and 1021 of title X of the Dodd-Frank Act, the ''Consumer Financial Protection Act,'' Public Law 111–203, sections 1001–1100H, codified at 12 U.S.C. 5491, 5511. The Consumer Financial Protection Act is substantially codified at 12 U.S.C. 5481–5603.

[8] As amended, the HOEPA provisions of TILA will be codified at 15 U.S.C. 1602(bb) and 1639. *See* § 1100A(1)(A) of the Dodd-Frank Act.

[9] The Bureau notes that the Dodd-Frank Act renumbered existing TILA section 103(aa) concerning HOEPA's triggers as section 103(bb), 15 U.S.C. 1602(bb). *See* § 1100A(1)(A) of the Dodd-Frank Act. This proposal generally references TILA section 103(aa) to refer to the pre-Dodd-Frank provision, which is in effect until the Dodd-Frank Act's amendments take effect, and TILA section 103(bb) to refer to the provision as amended.

[10] These statistics are drawn from Federal Reserve *Bulletin* articles that summarize the HMDA data each year. For the most recent of these annual articles, see *www.federalreserve.gov/pubs/bulletin/2011/pdf/2010_HMDA_final.pdf.*

RESPA pursuant to Dodd-Frank Act section 1032(f) as well as sections 4(a) of RESPA and 105(b) of TILA, as amended by Dodd-Frank Act sections 1098 and 1100A, respectively (2012 TILA–RESPA Proposal). 12 U.S.C. 2603(a); 15 U.S.C. 1604(b).

• *Servicing:* The Bureau is in the process of developing a proposal to implement Dodd-Frank Act requirements regarding force-placed insurance, error resolution, and payment crediting, as well as forms for mortgage loan periodic statements and ''hybrid'' adjustable-rate mortgage reset disclosures, pursuant to sections 6 of RESPA and 128, 128A, 129F, and 129G of TILA, as amended or established by Dodd-Frank Act sections 1418, 1420, 1463, and 1464. The Bureau has publicly stated that in connection with the servicing rulemaking the Bureau is considering proposing rules on reasonable information management, early intervention for troubled and delinquent borrowers, and continuity of contact, pursuant to the Bureau's authority to carry out the consumer protection purposes of RESPA in section 6 of RESPA, as amended by Dodd-Frank Act section 1463. 12 U.S.C. 2605; 15 U.S.C. 1638, 1638a, 1639f, and 1639g.

• *Loan Originator Compensation:* The Bureau is in the process of developing a proposal to implement provisions of the Dodd-Frank Act requiring certain creditors and mortgage loan originators to meet duty of care qualifications and prohibiting mortgage loan originators, creditors, and the affiliates of both from receiving compensation in various forms (including based on the terms of the transaction) and from sources other than the consumer, with specified exceptions, pursuant to TILA section 129B as established by Dodd-Frank Act sections 1402 and 1403. 15 U.S.C. 1639b.

• *Appraisals:* The Bureau, jointly with Federal prudential regulators and other Federal agencies, is in the process of developing a proposal to implement Dodd-Frank Act requirements concerning appraisals for higher-risk mortgages, appraisal management companies, and automated valuation models, pursuant to TILA section 129H as established by Dodd-Frank Act section 1471, 15 U.S.C. 1639h, and sections 1124 and 1125 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) as established by Dodd-Frank Act sections 1473(f), 12 U.S.C. 3353, and 1473(q), 12 U.S.C. 3354, respectively. In addition, the Bureau is developing rules to implement section 701(e) of the Equal Credit Opportunity Act (ECOA), as amended by Dodd-Frank Act section 1474, to require that creditors provide applicants with a free copy of written appraisals and valuations developed in connection with applications for loans secured by a first lien on a dwelling (collectively, Appraisals Rulemaking). 15 U.S.C. 1691(e).

• *Ability to Repay:* The Bureau is in the process of finalizing a proposal issued by the Board to implement provisions of the Dodd-Frank Act requiring creditors to determine that a consumer can repay a mortgage loan and establishing standards for compliance, such as by making a ''qualified mortgage,'' pursuant to TILA section 129C as established by Dodd-Frank Act sections 1411 and 1412 (Ability to Repay Rulemaking). 15 U.S.C. 1639c.

• *Escrows:* The Bureau is in the process of finalizing a proposal issued by the Board to implement provisions of the Dodd-Frank Act requiring certain escrow account disclosures and exempting from the higher-priced mortgage loan escrow requirement loans made by certain small creditors, among other provisions, pursuant to TILA section 129D as established by Dodd-Frank Act sections 1461 and 1462 (Escrow Rulemaking). 15 U.S.C. 1639d.

With the exception of the requirements being implemented in the TILA–RESPA rulemaking, the Dodd-Frank Act requirements referenced above generally will take effect on January 21, 2013, unless final rules implementing those requirements are issued on or before that date and provide for a different effective date. To provide an orderly, coordinated, and efficient comment process for these rulemakings, the Bureau is setting the deadline for comments on this proposed rule 60 days after the date the proposal is issued (September 7, 2012), instead of 60 days after this notice is published in the **Federal Register**. Because the precise date of publication cannot be predicted in advance, this method will allow interested parties that intend to comment on multiple proposals to plan accordingly and will ensure that the Bureau receives comments with sufficient time remaining to issue final rules by January 21, 2013. However, consistent with the requirements of the Paperwork Reduction Act, the comment period for the proposed analysis under that Act will end 60 days after publication of this notice in the **Federal Register**.

The Bureau regards the foregoing rulemakings as components of a larger undertaking; many of them intersect with one or more of the others. Accordingly, the Bureau is coordinating carefully the development of the proposals and final rules identified above. Each rulemaking will adopt new regulatory provisions to implement the various Dodd-Frank Act mandates described above. In addition, each of them may include other provisions the Bureau considers necessary or appropriate to ensure that the overall undertaking is accomplished efficiently and that it ultimately yields a comprehensive regulatory scheme for mortgage credit that achieves the statutory purposes set forth by Congress, while avoiding unnecessary burdens on industry. Thus, many of the rulemakings listed above involve issues that extend across two or more rulemakings. In this context, each rulemaking may raise concerns that might appear unaddressed if that rulemaking were viewed in isolation. For efficiency's sake, however, the Bureau is publishing and soliciting comment on proposed answers to certain issues raised by two or more of its mortgage rulemakings in whichever rulemaking is most appropriate, in the Bureau's judgment, for addressing each specific issue. Accordingly, the Bureau urges the public to review this and the other mortgage proposals identified above, including those previously published by the Board, together. Such a review will ensure a more complete understanding of the Bureau's overall approach and will foster more comprehensive and informed public comment on the Bureau's several proposals, including provisions that may have some relation to more than one rulemaking but are being proposed for comment in only one of them.

For example, as discussed in detail in the section-by-section analysis under proposed § 1026.32(a) and (b) below, the Bureau's 2012 TILA–RESPA Proposal is proposing a simpler, more inclusive definition of the finance charge for closed-end, dwelling-secured credit transactions, similar to the definition that the Board proposed in its August 2009 proposed rulemaking concerning closed-end credit. *See* 74 FR 43232, 43241–45 (Aug. 26, 2009) (2009 Closed-End Proposal). The Board recognized at that time that the more inclusive finance charge would expand the coverage of HOEPA and similar State laws. *Id.* at 43244–45. To address that issue, among others, the Board in 2010 proposed to retain the existing treatment of third-party charges in the points and fees definition for HOEPA, notwithstanding the proposed expansion of the finance charge for disclosure purposes. *See* 75 FR 58539, 58637–38 (Sept. 24, 2010) (2010 Mortgage Proposal). Similarly, the

Board's 2010 Mortgage Proposal introduced a new metric for determining coverage of the ''higher-priced mortgage loan'' protections of Regulation Z [11] to be used in place of a transaction's APR, known as the ''transaction coverage rate'' (TCR), which does not reflect the additional charges that are reflected in the disclosed APR under the more inclusive finance charge definition. *Id.* at 58660–62.

The Bureau recognizes, as did the Board, that the proposed more inclusive finance charge could affect the coverage of higher-priced mortgage loan and HOEPA protections. The Bureau is also aware that, consequently, a more inclusive finance charge has implications for the HOEPA, Appraisals, Ability to Repay, and Escrows rulemakings identified above. Those impacts are analyzed in the 2012 TILA–RESPA Proposal, but the Bureau believes that it is also helpful to analyze potential impacts and modifications to particular regulatory triggers on a rule-by-rule basis. Accordingly, this proposal seeks comment on whether and how to account for the implications of the more inclusive finance charge on the scope of HOEPA coverage. *See* the section-by-section analysis to proposed § 1026.32(a) and (b), below.

F. The Board's Proposals

As noted above, the Bureau inherited rulemaking authority for Regulation Z from the Board in July 2011, including the authority to finalize several mortgage-related rulemakings that the Board proposed between 2009 and 2011 in part to respond to the mortgage crisis and to begin implementing new Dodd-Frank Act requirements. Several of the Board's pending mortgage-related proposals relate directly to provisions addressed in this proposal. As discussed in detail in the section-by-section analysis, below, this proposal re-publishes or otherwise incorporates certain portions of the Board's proposals.

2009 Closed-End Proposal. On August 26, 2009, the Board published proposed amendments to Regulation Z containing comprehensive changes to the disclosures for closed-end credit secured by real property or a consumer's dwelling. 74 FR 43232 (Aug. 26, 2009) (2009 Closed-End Proposal). In addition to the simpler, more inclusive definition of the finance charge discussed above, the Board's 2009 Closed-End Proposal proposed to establish a new § 1026.38(a)(5) for disclosure of prepayment penalties for closed-end mortgage loans. *See id.* at 43334, 43413. In doing so, the Board proposed several examples of prepayment penalties, including charges determined by treating the loan balance as outstanding for a period after prepayment in full and applying the interest rate to such ''balance,'' a minimum finance charge in a simple-interest transaction, and charges that a creditor waives unless the consumer prepays the obligation. The Board also proposed loan guarantee fees and fees imposed for preparing a payoff statement or other documents in connection with a prepayment as examples of charges that are not prepayment penalties.

2009 Open-End Proposal. On August 26, 2009, the Board published proposed amendments to Regulation Z containing comprehensive changes to the disclosures for HELOCs. 74 FR 43428 (Aug. 26, 2009) (2009 Open-End Proposal). Among other things, the Board's 2009 Open-End Proposal addressed the types of charges that should be disclosed as prepayment penalties for home equity lines of credit.

2010 Mortgage Proposal. On September 24, 2010, the Board proposed further amendments to Regulation Z regarding rescission rights, disclosure requirements in connection with modifications of existing mortgage loans, escrow requirements for higher-priced mortgage loans, and disclosures and requirements for reverse mortgage loans. This proposal was the second stage of the comprehensive review conducted by the Board of TILA's rules for home-secured credit. 75 FR 58539 (Sept. 24, 2010) (2010 Mortgage Proposal). As discussed above, the Board revisited in the 2010 Mortgage Proposal the effect of adopting a simpler, more inclusive definition of the finance charge for purposes of disclosing the APR to consumers. To ensure that loans would not be inappropriately classified as higher-priced mortgage loans under Regulation Z, the Board proposed to adopt the TCR. Under the proposal, the TCR would have been calculated solely to determine coverage under the Board's higher-priced mortgage rule.[12] As proposed, the TCR would have been calculated consistently with how the current APR is calculated, except that prepaid finance charges not paid to the creditor, its affiliate, or a mortgage broker would not have been included. *Id.* at 58660–62.

The Board's 2010 Mortgage Proposal also revisited the definition of prepayment penalty. The Board proposed to amend commentary to Regulation Z to clarify that, on a closed-end transaction, assessing interest for a period after the loan balance has been paid in full is a prepayment penalty, even if the charge results from the normal interest accrual amortization method used on the transaction. The amendment was intended to clarify a question that had been raised in connection with FHA loans and other lending programs, which, for purposes of allocating a consumer's payment to accrued interest and principal, treated all loan payments as being made on the scheduled due date even if payment was made prior to its scheduled due date. The amendment clarified that, in the case of a prepayment *in full* of any outstanding loan balance, such an interest accrual amortization method would be considered a prepayment penalty, even if it was the normal method for other payments on the transaction. *See id.* at 58586, 58756, 58781.

2011 Escrow Proposal. On March 2, 2011, the Board proposed to amend Regulation Z to implement amendments made by sections 1461 and 1462 of the Dodd-Frank Act to TILA relating to escrow accounts. 76 FR 11598 (March 2, 2011) (2011 Escrow Proposal). Among other things, the Board's 2011 Escrow Proposal proposed escrow-related disclosure requirements for higher-priced mortgage loans. In doing so, the Board proposed to use the TCR proposed in the 2010 Mortgage Proposal to determine whether a transaction is a higher-priced mortgage loan. The Board also proposed to use the ''average prime offer rate,'' as defined in current § 1026.35(a)(2), as the benchmark rate for higher-priced mortgage loan coverage *See id.* at 11609.

2011 ATR Proposal. On May 11, 2011, the Board proposed amendments to Regulation Z to implement section 1411 of the Dodd-Frank Act, which amended TILA to prohibit creditors from making mortgage loans without regard to the consumer's ability to repay. 76 FR 27390 (May 11, 2011) (2011 ATR Proposal). Section 1411 of the Dodd-Frank Act added section 129C to TILA, codified at 15 U.S.C. 1639c, which prohibits a creditor from making a mortgage loan unless the creditor makes a reasonable and good faith determination, based on verified and documented information, that the consumer will have a reasonable ability to repay the loan, including any mortgage-related obligations (such as property taxes). The Board's 2011 ATR Proposal also proposed to implement section 1412 of the Dodd-Frank Act, which created a new type of closed-end, dwelling-secured mortgage—a

[11] 12 CFR 1026.35.

[12] 12 CFR 1026.35.

''qualified mortgage''—to which, among other things, certain restrictions on points and fees and prepayment penalties apply. The Board's 2011 ATR Proposal also enumerated examples of prepayment penalties, drawing from both the 2009 Closed-End Proposal and the 2010 Mortgage Proposal. *See id.* at 27415–16. The proposal also proposed to implement the statutory definition of points and fees to be used in determining whether a mortgage is a qualified mortgage, which in turn incorporates the definition of points and fees in HOEPA. *Id.* at 27398–406.[13]

As discussed in detail throughout the section-by-section analysis below, the current proposal of the Bureau to implement the Dodd-Frank HOEPA amendments draws on the Board's 2009 Closed-End Proposal, 2009 Open-End Proposal, 2010 Mortgage Proposal, 2011 Escrow Proposal, and 2011 ATR Proposal.

III. Legal Authority

The Bureau is issuing this proposed rule pursuant to its authority under TILA, RESPA, and the Dodd-Frank Act. On July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau all of the HUD Secretary's consumer protection functions relating to RESPA.[14] Accordingly, effective July 21, 2011 the authority of HUD to issue regulations pursuant to RESPA transferred to the Bureau. Section 1061 of the Dodd-Frank Act also transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies, including the Board. The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.''[15] TILA, HOEPA (which is codified as part of TILA), RESPA, and title X of the Dodd-Frank Act are Federal consumer financial laws.[16] Accordingly, the Bureau has authority to issue regulations pursuant to TILA, RESPA, and title X of the Dodd-Frank Act.

A. RESPA

Section 19(a) of RESPA, 12 U.S.C. 2617(a), authorizes the Bureau to prescribe such rules and regulations and to make such interpretations and grant such reasonable exemptions for classes of transactions as may be necessary to achieve the purposes of RESPA. One purpose of RESPA is to effect certain changes in the settlement process for residential real estate that will result in more effective advance disclosure to home buyers and sellers of settlement costs. RESPA section 2(b), 12 U.S.C. 2601(b). In addition, in enacting RESPA, Congress found that consumers are entitled to be ''provided with greater and more timely information on the nature and costs of the settlement process and [to be] protected from unnecessarily high settlement charges caused by certain abusive practices * * * .'' RESPA section 2(a), 12 U.S.C. 2601(a). In the past, section 19(a) has served as a broad source of authority to prescribe disclosures and substantive requirements to carry out the purposes of RESPA.

B. TILA

As amended by the Dodd-Frank Act, TILA section 105(a), 15 U.S.C. 1604(a), directs the Bureau to prescribe regulations to carry out the purposes of the Act. Except with respect to the substantive restrictions on high-cost mortgages provided in TILA section 129, TILA section 105(a) authorizes the Bureau to prescribe regulations that may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions that the Bureau determines are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. A purpose of TILA 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.'' TILA section 102(a); 15 U.S.C. 1601(a).

Historically, TILA section 105(a) has served as a broad source of authority for rules that promote the informed use of credit through required disclosures and substantive regulation of certain practices. However, Dodd-Frank Act section 1100A clarified the Bureau's section 105(a) authority by amending that section to provide express authority to prescribe regulations that contain ''additional requirements'' that the Bureau finds are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. This amendment clarified the authority to exercise TILA section 105(a) to prescribe requirements beyond those specifically listed in the statute that meet the standards outlined in section 105(a). The Dodd-Frank Act also clarified the Bureau's rulemaking authority over high-cost mortgages pursuant to section 105(a). As amended by the Dodd-Frank Act, TILA section 105(a) authority to make adjustments and exceptions to the requirements of TILA applies to all transactions subject to TILA, except with respect to the provisions of the TILA section 129 that apply to high-cost mortgages, as noted above. For the reasons discussed in this notice, the Bureau is proposing regulations to carry out TILA's purposes and is proposing such additional requirements, adjustments, and exceptions as, in the Bureau's judgment, are necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance.

Pursuant to TILA section 103(bb)(2), 15 U.S.C. 1602(bb)(2), the Bureau may prescribe regulations to adjust the statutory percentage points for the APR threshold to determine whether a transaction is covered as a high-cost mortgage, if the Bureau determines that such an increase or decrease is consistent with the statutory consumer protections for high-cost mortgages and is warranted by the need for credit. Under TILA section 103(bb)(4), the Bureau may adjust the definition of points and fees for purposes of that threshold to include such charges that the Bureau determines to be appropriate.

With respect to the high-cost mortgage provisions of TILA section 129, TILA section 129(p), 15 U.S.C. 1639(p), as amended by the Dodd-Frank Act, grants the Bureau authority to create exemptions to the restrictions on high-cost mortgages and expand the protections that apply to high-cost mortgages. Under TILA section 129(p)(1), the Bureau may exempt specific mortgage products or categories from any or all of the prohibitions specified in subsections (c) through (i) of TILA section 129,[17] if the Bureau finds that the exemption is in the interest of the borrowing public and will

[13] 15 U.S.C. 1639c(b)(2)(C).

[14] Dodd-Frank Act section 1061(b)(7); 12 U.S.C. 5581(b)(7).

[15] 12 U.S.C. 5581(a)(1).

[16] Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws'' and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include TILA, HOEPA, and RESPA).

[17] These subsections are: § 129(c) (No prepayment penalty); § 129(d) (Limitations after default); § 129(e) (No balloon payments); § 129(f) (No negative amortization); § 129(g) (No prepaid payments); § 129(h) (Prohibition on extending credit without regard to payment ability of consumer); and § 129(i) (Requirements for payments under home improvement contracts).

apply only to products that maintain and strengthen home ownership and equity protections.

TILA section 129(p)(2) grants the Bureau the authority to prohibit acts or practices in connection with:

• Mortgage loans that the Bureau finds to be unfair, deceptive, or designed to evade the provisions of HOEPA; and

• Refinancing of mortgage loans the Bureau finds to be associated with abusive lending practices or that are otherwise not in the interest of the borrower.

The authority granted to the Bureau under TILA section 129(p)(2) is broad. The provision is not limited to acts or practices by creditors. TILA section 129(p)(2) authorizes protections against unfair or deceptive practices ''in connection with mortgage loans,'' and it authorizes protections against abusive practices ''in connection with * * * refinancing of mortgage loans.'' Thus, the Bureau's authority is not limited to regulating specific contractual terms of mortgage loan agreements; it extends to regulating loan-related practices generally, within the standards set forth in the statute. The Bureau notes that TILA does not set forth a standard for what is unfair or deceptive, but those terms have settled meanings under other Federal and State consumer protection laws. The Conference Report for HOEPA indicates that, in determining whether a practice in connection with mortgage loans is unfair or deceptive, the Bureau should look to the standards employed for interpreting State unfair and deceptive trade practices statutes and the Federal Trade Commission Act, section 5(a), 15 U.S.C. 45(a).[18]

In addition, section 1433(e) of the Dodd-Frank Act created a new TILA section 129(u)(3), which authorizes the Bureau to implement pre-loan counseling requirements mandated by the Dodd-Frank Act for high-cost mortgages. Specifically, under TILA section 129(u)(3), the Bureau may prescribe regulations as the Bureau determines to be appropriate to implement TILA section 129(u)(1), which provides the Dodd-Frank Act's pre-loan counseling requirement for high-cost mortgages.

C. The Dodd-Frank Act

Section 1405(b) of the Dodd-Frank Act provides that, ''[n]otwithstanding any other provision of [title XIV of the Dodd-Frank Act], in order to improve consumer awareness and understanding of transactions involving residential mortgage loans through the use of disclosures, the [Bureau] may, by rule, exempt from or modify disclosure requirements, in whole or in part, for any class of residential mortgage loans if the [Bureau] determines that such exemption or modification is in the interest of consumers and in the public interest.'' 15 U.S.C. 1601 note. Section 1401 of the Dodd-Frank Act, which amended TILA section 103(cc), 15 U.S.C. 1602(cc), generally defines residential mortgage loan as any consumer credit transaction that is secured by a mortgage on a dwelling or on residential real property that includes a dwelling other than an open-end credit plan or an extension of credit secured by a consumer's interest in a timeshare plan. Notably, the authority granted by section 1405(b) applies to ''disclosure requirements'' generally, and is not limited to a specific statute or statutes. Accordingly, Dodd-Frank Act section 1405(b) is a broad source of authority to modify the disclosure requirements of TILA and RESPA.

Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.'' 12 U.S.C. 5512(b)(1). Section 1022(b)(2) of the Dodd-Frank Act prescribes certain standards for rulemaking that the Bureau must follow in exercising its authority under section 1022(b)(1). 12 U.S.C. 5512(b)(2). As discussed above, TILA and RESPA are Federal consumer financial laws. Accordingly, the Bureau proposes to exercise its authority under Dodd-Frank Act section 1022(b) to prescribe rules under TILA and RESPA that carry out the purposes and prevent evasion of those laws. See part VI for a discussion of the Bureau's standards for rulemaking under Dodd-Frank Act section 1022(b)(2).

For the reasons discussed below in the section-by-section analysis, the Bureau is proposing regulations pursuant to its authority under TILA, RESPA, and title X of the Dodd-Frank Act.

IV. Compliance Issues

A. Implementation Period

The Bureau expects to issue a final rule implementing the Dodd-Frank Act amendments addressed in the Bureau's proposal by January 21, 2013. As discussed above, the Bureau is seeking comment on when a final rule should be effective.

Under section 1400(c)(1) of the Dodd-Frank Act, regulations that are *required to be issued* to implement amendments under Title XIV by the Dodd-Frank Act take effect not later than one year from the date of the issuance of the final implementing regulations. The regulations proposed in this notice, while implementing amendments under Title XIV of the Dodd-Frank Act, are *not* regulations required to be issued by the Act. Therefore, the Dodd-Frank Act does not require the final regulation to be effective within one year from issuance of that final regulation. Title XIV amendments that are not required by the Dodd-Frank Act to be implemented by regulation take effect on the effective date established by the final regulations implementing the amendments.[19]

The Bureau recognizes the importance of the changes to be made by the Bureau's final rule for consumer protection, and the need to put these changes into place for consumers. For example, including within HOEPA's definition of ''high-cost mortgage'' high cost purchase money mortgages and HELOCs, will ensure that borrowers who obtain such high-cost mortgages will have the full benefit of the protections and enhanced remedies provided by HOEPA. In addition, for consumers applying for a high-cost mortgage, having the benefit of the advice of a homeownership counselor to assist them in understanding the terms of the mortgage, and how such a mortgage will fit in with their existing budget, will help consumers in fully assessing the possible consequences of such a mortgage. The Bureau believes consumers should have the benefit of the Dodd-Frank Act additional protections and requirements as soon as possible.

The Bureau also recognizes, however, that lenders, brokers, and (where applicable) servicers will need time to make systems changes and to retrain their staff, in order to address the Dodd-Frank Act changes implemented through the Bureau's final rule. In addition, the Bureau recognizes that industry will need to make changes to address a number of other requirements relating to other Dodd-Frank Act provisions, some of which, unlike the Bureau's HOEPA rulemaking, are required by the Dodd-Frank Act to take effect within one year after issuance of final implementing rules. The Bureau believes that ensuring that industry has sufficient time to make the necessary changes will ultimately benefit

[18] H.R. Rep. 103–652, at 162 (1994) (Conf. Rep.).

[19] *See* section 1400(c)(2) of the Dodd-Frank Act. Where regulations have not been issued by January 21, 2013 (*i.e.,* the date that is 18 months after the ''designated transfer date''), the effective date of the Dodd-Frank Act amendments is generally January 21, 2013. *See id.* § 1400(c)(3).

consumers through better industry compliance.

The Bureau therefore seeks public comment on the time period that should be provided to implement the changes that will be required by the final rule, taking into account the factors discussed above. As discussed in the section-by-section analysis to proposed § 1026.32(a)(1)(i) below, the Bureau also seeks comment on potential implementation periods relating to certain changes being proposed in the 2012 TILA–RESPA Proposal to the definition of finance charge under Regulation Z, and related mitigation measures that the Bureau is proposing in this rule to address the impacts on HOEPA coverage.

B. Corrections and Unintentional Violations of HOEPA

Section 1433(f) of the Dodd-Frank Act added new section 129(v) to TILA, 15 U.S.C. 1639(v), which allows a creditor or assignee of a high-cost mortgage in certain circumstances to correct a failure to comply, when acting in good faith, with HOEPA requirements. At this time the Bureau is not proposing to issue regulatory guidance concerning this provision. The Bureau solicits comment on the extent to which creditors or assignees are likely to invoke this provision, whether regulatory guidance would be useful, and if so what issues would be most important to address.

V. Section-by-Section Analysis

A. Regulation X

Section 1024.20 List of Homeownership Counselors

The Bureau is proposing a new § 1024.20 to implement an amendment made by section 1450 of the Dodd-Frank Act to section 5 of RESPA, 12 U.S.C. 2604. The amendment requires lenders to provide a list of homeownership counselors to potential borrowers of federally related mortgage loans. Specifically, the Dodd-Frank Act amended RESPA section 5(c) to require lenders to provide potential borrowers with a ''reasonably complete or updated list of homeownership counselors who are certified pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) and located in the area of the lender.'' [20]

The list of homeownership counselors is to be included with a ''home buying information booklet'' that the Bureau is directed to prepare ''to help consumers applying for federally related mortgage loans to understand the nature and costs of real estate settlement services.'' [21] The Dodd-Frank Act amended RESPA section 5(a) to direct the Bureau to distribute the booklet to all lenders that make federally related mortgage loans. The Dodd-Frank Act also amended section 5(a) to require the Bureau to distribute lists of homeownership counselors to such lenders.

Under RESPA and its implementing regulations, a federally related mortgage loan includes purchase money mortgage loans, subordinate mortgages, refinancings, closed-end home-equity mortgage loans, home-equity lines of credit, and reverse mortgages.[22] Under RESPA section 5(b), as amended by the Dodd-Frank Act, the prescribed contents of the booklets include information specific to refinancings and home-equity lines of credit, as well as ''the costs incident to a real estate settlement or a federally related mortgage loan.''

RESPA sections 5(a) and (b), as amended, indicate that Congress intended the booklet and list of counselors to be provided to all applicants for federally related mortgage loans. However, section 5(d) of RESPA, in language that was not amended by the Dodd-Frank Act, requires lenders to provide the home buying information booklet ''to each person from whom [the lender] receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate.'' The information booklet mandated by section 5 of RESPA before its amendment by the Dodd-Frank Act is only required by current Regulation X to be provided to applicants for purchase money mortgages.[23]

Section 19(a) of RESPA provides the Bureau with the authority to ''prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of the [RESPA].'' Based on its reading of section 5 as a whole, and its understanding of the purposes of that section, the Bureau is proposing that the list of homeownership counselors be provided to all applicants for federally related mortgage loans (except for applicants for Home Equity Conversion Mortgages (HECMs), as discussed further below).

Section 5(a) as amended: (1) Specifically references helping consumers applying for federally related mortgage loans understand the nature and costs of real estate settlement services; and (2) directs the Bureau to distribute the booklet and the lists of housing counselors to lenders that make federally related mortgage loans. Moreover, the prescribed content of the booklet is not limited to information on purchase money mortgage loans. Additionally, the Bureau believes that a trained counselor can be useful to any consumer considering any type of mortgage loan. Mortgage transactions beyond purchase money transactions, such as refinancings and open-end home-secured credit transactions, can entail significant risks and costs for consumers—risks and costs that a trained homeownership counselor can assist consumers in fully understanding. Therefore, the Bureau's proposal would require the homeownership counselor list to be provided to applicants for refinancings and home-equity lines of credit, in addition to purchase money mortgages. The Bureau seeks comment from the public on the costs and benefits of the provision of the list of homeownership counselors to consumers who are applicants for refinances and home-equity lines of credit. The Bureau also solicits comment on the potential effect of the Bureau's proposal on access to homeownership counseling generally by consumers, and the effect of increased consumer demand for counseling on existing counseling resources. In particular, the Bureau solicits comment on the effect on counseling resources of providing the list beyond applicants for purchase money mortgages.

[20] Section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) requires that homeownership counseling provided under programs administered by the U.S. Department of Housing and Urban Development (HUD) can only be provided by organizations or individuals certified by HUD as competent to provide homeownership counseling. Section 106(e) also requires HUD to establish standards and procedures for testing and certifying counselors.

[21] The Dodd-Frank Act also amends RESPA section 5(b) (12 U.S.C. 2604(b)) to require that the ''home buying information booklet'' (the RESPA ''special information booklet,'' prior to the Dodd-Frank Act), include ''[i]nformation about homeownership counseling services made available pursuant to section 106(a)(4) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(a)(4)), a recommendation that the consumer use such services, and notification that a list of certified providers of homeownership counseling in the area, and their contact information, is available.''

[22] 12 U.S.C. 2602(1), 12 CFR 1024.2.

[23] Currently, under Regulation X, the ''special information booklet'' must only be provided to applicants for first-lien purchase money mortgages, and not to applicants for refinancings, closed-end subordinate and home-equity loans, reverse mortgages, or open-end lines of credit (as long as a brochure issued by the Bureau regarding home-equity lines of credit is provided to the borrower). 12 CFR 1024.2, 1024.6. For open-end credit plans, Regulation X provides that a lender or mortgage broker that provides the borrower with a copy of the brochure entitled ''When Your Home is On the Line: What You Should Know About Home Equity Lines of Credit,'' or a successor brochure issued by the Bureau, is deemed to be in compliance with the booklet requirement of Regulation X. *See id.* 1024.6(a)(2).

Proposed § 1024.20(a) requires a lender to provide to an applicant for a federally related mortgage loan a clear and conspicuous written list of five homeownership counselors or counseling organizations. The list provided by the lender pursuant to this requirement must include only homeownership counselors or counseling organizations from either the most current list of homeownership counselors or counseling organizations made available by the Bureau for use by lenders in complying with § 1024.20, or the most current list maintained by HUD of homeownership counselors or counseling organizations certified by HUD, or otherwise approved by HUD.[24]

Proposed § 1024.20(a) provides that the required list include five homeownership counselors or counseling organizations located in the zip code of the loan applicant's current address, or, if there are not the requisite five counselors or counseling organizations in that zip code, then counselors or organizations within the zip code or zip codes closest to the loan applicant's current address. The Bureau invites comment on this requirement and whether there are alternative methods of listing homeownership counselors or counseling organizations available to consumers that would serve the purposes of the statutory requirement and RESPA, in general.

To facilitate compliance with the proposed list requirement, the Bureau is expecting to develop a Web site portal that would allow lenders to type in the loan applicant's zip code to generate the requisite list, which could then be printed for distribution to the loan applicant. The Bureau believes that such an approach: (1) Could significantly mitigate any paperwork burden associated with requiring that the list be distributed to applicants for federally related mortgage loans; and (2) is consistent with the Dodd-Frank Act's amendment to section 5(a) of RESPA requiring the Bureau to distribute to lenders ''lists, organized by location, of homeownership counselors certified under section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) for use in complying with the requirement under [section 5(c)].'' The Bureau solicits comment on whether such a portal would be useful and whether there are other mechanisms through which the Bureau can help facilitate compliance and provide lists to lenders and consumers.

The Bureau also solicits comment on whether ''five'' is the appropriate number of counselors or organizations to be included on the list. The Bureau is aware that several State laws that impose requirements on creditors to provide consumers lists of housing counselors specify a list of five. *See, e.g.,* NY Real Property Actions and Proceedings Law § 1304(2); Arizona Revised Statute § 6–1703(A)(1). The Bureau is concerned that requiring a list of too few counselors or organizations would provide inadequate options to consumers and could increase the risk for steering by lenders to particular counselors. The Bureau is also concerned, however, that requiring a list of too many counselors or organizations could be overwhelming for consumers. In addition, the Bureau solicits comment on whether there should be a limitation on the number of listed counselors from the same counseling organization.

Proposed § 1024.20(a) requires that the list include: (1) each counselor's or organization's name, business address, telephone number and, if available from the Bureau or HUD, other contact information; and (2) contact information for the Bureau and HUD.

Proposed § 1024.20(a) requires the lender to provide the list no later than three business days after the lender, mortgage broker or dealer receives a loan application (or information sufficient to complete an application), but allows a mortgage broker or dealer to provide the list to those applicants from whom it receives or for whom it prepares applications. Where a mortgage broker or dealer provides the list, the lender is not required to provide an additional list but remains responsible for ensuring that the list has been provided to the loan applicant and satisfies the requirements of proposed § 1024.20. Proposed § 1024.20(a) sets out the requirements for providing the list to the loan applicant, *i.e.,* in person, by mail, or by other means of delivery. The list may be provided to the loan applicant in electronic form, subject to the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. 7001 *et seq.* The lender is not required to provide the list if, before the end of the three business day period, the lender denies the loan application or the loan applicant withdraws the application. For applications for open-end home-secured lines of credit covered under TILA, the timing and methods of delivery set out in Regulation Z, 12 CFR 1026.40, for disclosures involving such loans may be used instead of the requirements in proposed § 1024.20. Proposed § 1024.20(a) also provides flexibility in the requirements for providing the list when there are multiple lenders and multiple applicants in a mortgage loan transaction.

Proposed § 1024.20(c) would not require a lender to provide an applicant for a HECM, as that type of reverse mortgage is defined in 12 U.S.C. 1715z–20(b)(3), with the list required under proposed § 1024.20 if the lender is otherwise required by HUD to provide a list, and does provide a list, of HECM counselors or counseling agencies to the loan applicant. As discussed further in the section-by-section analysis below on the Bureau's proposed pre-loan counseling requirement for high-cost mortgages, Federal law currently requires homeowners to receive counseling before obtaining a HECM reverse mortgage insured by the Federal Housing Administration (FHA),[25] which is a part of HUD. HUD imposes various requirements related to HECM counseling, including requiring FHA-approved HECM mortgagees to provide prospective HECM borrowers with a list of HUD-approved HECM counseling agencies. The Bureau is concerned that a duplicative list requirement could cause confusion for consumers and unnecessary burden for lenders. Accordingly, the Bureau is proposing to

[24] The Bureau proposes to exercise its exemption authority under section 19(a) of RESPA and its modification authority under section 1405(b) of the Dodd-Frank Act to allow the list to include, in addition to HUD-certified homeownership counselors required by section 1450 of the Dodd-Frank Act, HUD-certified ''counseling organizations'' and counselors and counseling organizations ''otherwise approved by HUD.'' It is the Bureau's understanding that HUD, other than for its counseling program for HECMs, currently only approves housing counseling agencies and not individual counselors. However, the Bureau understands that HUD intends in the future to undertake a rulemaking to put requirements into place to certify individual counselors as competent to provide housing counseling in accordance with amendments to section 106 of the Housing and Urban Development Act of 1968 made by section 1445 of the Dodd-Frank Act. The Bureau is proposing to exercise its exemption or modification authority to provide flexibility in order to facilitate the availability of competent housing counselors for placement on the list. Permitting the list to include HUD-certified counseling organizations and homeownership counselors and counseling organizations ''otherwise approved by HUD'' may help facilitate the effective functioning of this new RESPA disclosure. It may also, therefore, help carry out the purposes of RESPA for more effective advance cost disclosure for consumers, by informing loan applicants of counseling resources available for assisting them in understanding their prospective mortgage loans and settlement costs. For the same reason, the Bureau believes this proposed modification of the types of counselors and organizations that may be included in the list is in the interests of consumers and the public. The Bureau intends to work closely with HUD to facilitate operational coordination and consistency between the counseling and certification requirements HUD puts into place and the Bureau's final rule.

[25] 12 U.S.C. 1715z–20(d)(2)(B).

exercise its exemption authority under RESPA section 19(a) to allow lenders that provide a list under HUD's HECM program to satisfy the requirements of proposed § 1024.20.

In its 2012 TILA–RESPA Proposal, the Bureau proposes to adopt a new definition of ''application'' in 12 CFR 1026.2(a)(3). The 2012 TILA–RESPA Proposal would create a new Loan Estimate to replace the RESPA Good-Faith Estimate (GFE) and the initial Truth in Lending Act disclosure. Like those disclosures and the list of homeownership counselors or counseling organizations, the Loan Estimate would be provided three business days after the lender's receipt of an application. However, to encourage lenders to provide the loan term and cost information in the Loan Estimate earlier in the loan process, the 2012 TILA–RESPA Proposal would propose to adopt a definition of application that differs from the definition of application in § 1024.2(b) of Regulation X by removing ''any other information deemed necessary by the loan originator'' from the § 1024.2(b) list of application elements. Thus, a lender would no longer be able to delay providing the statutorily required estimates by waiting to collect ''other information.'' Because consumers could benefit from receiving the list of homeownership counselors or counseling organizations at the same time as the Loan Estimate, the Bureau requests comment on whether to tie provision of the list to the definition of application in proposed § 1026.2(a)(3) instead of the definition in § 1024.2(b).

B. Regulation Z

Section 1026.1 Authority, Purpose, Coverage, Organization, Enforcement, and Liability

1(d) Organization

1(d)(5)

Section 1026.1(d)(5) describes the organization of Subpart E of Regulation Z, which contains special rules for mortgage transactions. The Bureau proposes to revise § 1026.1(d)(5) to reflect the proposed amendments to §§ 1026.32 and 1026.34, which are discussed in detail below. Specifically, the Bureau proposes to revise § 1026.1(d)(5) to include the term ''open-end credit plan'' and remove the term ''closed-end'' where appropriate. In addition, the Bureau proposes to include a reference to the new prepayment penalties trigger for high-cost mortgages added by the Dodd-Frank Act.

Section 1026.31 General Rules

31(c) Timing of Disclosure

Section 1026.31(c) provides additional disclosure requirements for high-cost mortgages. As discussed in detail below, the Dodd-Frank Act expanded the types of loans potentially subject to HOEPA coverage. Therefore, the Bureau proposes to revise § 1026.31(c) and related commentary for clarity and consistency. Specifically, the Bureau proposes to include the term ''account opening'' in addition to ''consummation'' to reflect the fact that the Dodd-Frank Act expanded the requirements for high-cost mortgages to open-end credit plans.

Section 1026.32 Requirements for High-Cost Mortgages

32(a)(1) Coverage

The Bureau proposes to revise § 1026.32(a)(1) to implement the definition of ''high-cost mortgage'' under TILA section 103(bb)(1), as amended by the Dodd-Frank Act. As discussed below, TILA section 103(bb)(1) generally provides that the term ''high-cost mortgage'' means a consumer credit transaction that is secured by the consumer's principal dwelling, other than a reverse mortgage transaction, if any of the prescribed thresholds are met.

The Dodd-Frank Act amended existing TILA section 103(aa)(1) by removing the exclusion of a residential mortgage transaction and an open-end credit plan from HOEPA coverage. Under TILA section 103(bb)(1)(A), reverse mortgage transactions remain excluded from the definition of a high-cost mortgage. Previously, the statutory protections for HOEPA loans were generally limited to closed-end refinancings and home-equity mortgage loans. The proposal, among other things, extends the statutory protections for high-cost mortgages to residential mortgage transactions, such as purchase money mortgage loans, and to open-end credit plans secured by the consumer's principal dwelling, *i.e.,* home-equity lines of credit. Accordingly, the Bureau proposes to reflect the revised scope of coverage and remaining statutory exclusion of reverse mortgage transactions in proposed § 1026.32(a)(1), to remove the list of exclusions provided in current § 1026.32(a)(2), and to amend § 1026.32(a)(2) for other purposes as discussed below.

Accordingly, proposed § 1026.32(a)(1) defines ''high-cost mortgage'' to mean any consumer credit transaction, other than a reverse mortgage transaction as defined in § 1026.33(a), that is secured by the consumer's principal dwelling and in which any one of the prescribed thresholds is met. Proposed comment 32(a)(1)–1 clarifies that a high-cost mortgage includes both a closed-end mortgage loan and an open-end credit plan secured by the consumer's principal dwelling. In particular, the comment further clarifies that with regard to determining coverage under § 1026.32, an open-end transaction is the account opening of an open-end credit plan. Under the proposal, an individual advance of funds or a draw on the credit line under an open-end credit plan subsequent to account opening does not constitute a ''transaction.'' Because HELOCs are open-end (revolving) lines of credit and the rate applicable to any advance of funds may vary under the plan, the Bureau believes this clarification is appropriate to permit creditors to determine coverage of an open-end credit plan as a high-cost mortgage at account opening.

Threshold Triggers

Prior to enactment of the Dodd-Frank Act, HOEPA coverage was triggered when a loan's annual percentage rate (APR) or its points and fees exceeded certain thresholds as prescribed by current TILA section 103(aa), which is implemented by current § 1026.32(a)(1). The Dodd-Frank Act adjusted the two existing thresholds and added a third threshold based on the inclusion of certain prepayment penalties. Under TILA section 103(bb)(1)(A), the revised thresholds generally provide that a consumer credit transaction is a high-cost mortgage if:

- The annual percentage rate at consummation of the transaction exceeds the average prime offer rate (APOR) for a comparable transaction by (1) more than 6.5 percentage points for transactions secured by a first mortgage on the consumer's principal dwelling or 8.5 percentage points, if the dwelling is personal property and the total transaction amount is less than $50,000; or (2) 8.5 percentage points for transactions secured by a subordinate mortgage on the consumer's principal dwelling;

- The total points and fees payable in connection with the transaction, other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of either, exceed: (1) In the case of a transaction for $20,000 or more, 5 percent of the total transaction amount; or (2) in the case of a loan for less than $20,000, the lesser of 8 percent of the total transaction amount or $1,000 (adjusted for inflation); or

• The transaction provides for prepayment fees and penalties that (1) may be imposed more than 36 months after consummation or account opening or (2) exceed, in the aggregate, more than 2 percent of the amount prepaid.

The Bureau proposes to revise the existing APR and points and fees thresholds in proposed § 1026.32(a)(1)(i) and (ii) and to add the new prepayment penalty threshold in proposed § 1026.32(a)(1)(iii). These amendments are discussed in detail below.

32(a)(1)(i)

Implementation of Dodd-Frank Act Amendments

Section 1431 of the Dodd-Frank Act amended the existing APR trigger in current TILA section 103(aa) by lowering the percentage point trigger and changing the APR benchmark. As noted above, amended TILA section 103(bb)(1)(A)(i) generally provides that a consumer credit transaction is a high-cost mortgage if the APR at consummation of the transaction exceeds the APOR for a comparable transaction by (1) more than 6.5 percentage points for transactions secured by a first mortgage on the consumer's principal dwelling or 8.5 percentage points, if the dwelling is personal property and the total loan amount is less than $50,000; or (2) 8.5 percentage points for transactions secured by a subordinate mortgage on the consumer's principal dwelling.

In addition to adjusting the percentage point triggers, TILA section 103(bb)(1)(A), as added by section 1431 of Dodd-Frank, also amends the benchmark for the APR trigger. The existing APR benchmark is the yield on Treasury securities having comparable periods of maturity. Under TILA section 103(bb)(1)(A)(i), the APR benchmark is the ''average prime offer rate,'' as defined in TILA section 129C(b)(2)(B). This definition essentially codifies Regulation Z's existing definition of ''average prime offer rate'' in § 1026.35(a)(2), which would become § 1026.35(a)(2)(ii) in the Bureau's rules.

The Bureau is proposing two alternatives in proposed § 1026.32(a)(1)(i) to implement the APR threshold for a high-cost mortgage under amended TILA section 103(bb)(1)(A)(i). Alternative 1 uses the APR as the rate to be compared to the APOR for determining HOEPA coverage for closed-end mortgage loans. Alternative 2 is substantially identical except that it would substitute a ''transaction coverage rate'' for the ''annual percentage rate'' as the rate to be compared to the APOR for closed-end mortgage loans. As discussed further below, the Bureau is proposing Alternative 2 in connection with its proposal to simplify and broaden the general definition of finance charge under Regulation Z. *See* 2012 TILA–RESPA Proposal. The Bureau would not adopt Alternative 2 if it does not change the definition of finance charge. As discussed below, the Bureau is seeking comment on whether to adopt Alternative 2 if it does expand the definition of finance charge. Because the proposal to broaden the definition of finance charge does not apply to open-end transactions, the Bureau proposes to retain the APR as the rate that will be compared to the APOR to determine whether an open-end credit plan is a high-cost mortgage under HOEPA.

Both alternatives otherwise generally mirror the statutory language with some exceptions for clarity, organization, or consistency with existing Regulation Z and the Bureau's other mortgage rulemakings as mandated by the Dodd-Frank Act. For example, the proposal refers to a ''first-lien'' or ''subordinate-lien'' transaction, instead of a ''first mortgage'' or ''subordinate or junior mortgage.'' Further, for the reasons stated in the section-by-section analysis to proposed § 1026.32(a)(1)(ii) below, the proposal refers to ''total loan amount'' rather than ''total transaction amount.''

TILA section 103(bb)(2)(A) and (B) provides the Bureau with authority to adjust the percentage points referenced in the APR threshold if the Bureau determines that the increase or decrease is consistent with the statutory protections for high-cost mortgages and is warranted by the need for credit. The Bureau does not propose to make such a determination at this time, either in conjunction with general implementation of the Dodd-Frank Act or, as discussed further below, in conjunction with the proposed expansion of the definition of finance charge. Therefore, both alternatives retain the numeric triggers in the statute for both closed-end and open-end credit transactions. However, the Bureau seeks comment and data on whether any adjustments to the numeric triggers generally, and in particular for open-end credit transactions, would better protect consumers from the risks associated with high-cost mortgages or are warranted by the need for credit.

In addition, the Bureau notes that the statute sets forth different threshold triggers for first-lien transactions depending on whether the transaction is secured by a dwelling that is personal property and the total loan amount is less than $50,000. The Bureau understands that first-lien transactions that are secured by a dwelling that is personal property, such as certain manufactured housing loans, often have higher APRs than other first-lien transactions secured by a dwelling that is not personal property. Accordingly, the Bureau also seeks comment or data specifically on the separate percentage point trigger for first-lien transactions that are secured by a dwelling that is personal property and for which the total loan amount is less than $50,000, and whether any adjustment to the percentage point or the total loan amount for such first-lien transactions would better protect consumers or is warranted by the need for credit.

Potential Expansion of the Definition of Finance Charge

Alternative 2 for proposed § 1026.32(a)(1)(i) would account for the changes in the calculation of the finance charge (and thus APR) that the Bureau is separately considering in the 2012 TILA–RESPA Proposal. Under that proposal, creditors would use a simpler, more inclusive definition of the finance charge for closed-end credit secured by real property or a dwelling, which is in turn used to compute the APR that is disclosed to consumers. As discussed in that proposal, the Bureau believes that the expanded definition could have significant benefits to consumers by making the APR a more useful and accurate tool for comparing the overall cost of credit. At the same time, the proposal could benefit creditors by reducing compliance burden and litigation risk because the finance charge calculation would be easier to perform. However, the Bureau recognizes that a more inclusive definition of the finance charge could expand the coverage of HOEPA because closed-end mortgage loans would have higher APRs, which would result in some additional loans being covered as high-cost mortgages.[26] The Bureau is therefore seeking comment in this proposal on whether, if it adopts the broader definition of finance charge in the TILA–RESPA rulemaking, it should compensate for that change to approximately offset the impact of a broader definition of finance charge on HOEPA coverage levels.

Currently, TILA and Regulation Z permit creditors to exclude several fees or charges from the finance charge, including most fees or charges imposed by third parties. Consumer groups,

[26] The revised definition would also affect calculation of HOEPA's threshold based on points and fees. Those effects and potential accommodations are discussed further below.

creditors, and government agencies have long been dissatisfied with the ''some fees in, some fees out'' approach to the finance charge. The Board therefore proposed expanding the definition of finance charge in its 2009 Closed-End Proposal, *see* 74 FR 43232, 43243–45 (Aug. 26, 2009), and the Bureau has after careful consideration decided to propose a similar change. Specifically, the 2012 TILA–RESPA Proposal would maintain TILA's definition of a finance charge as a fee or charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor. However, the proposal would require the finance charge to include additional creditor charges and most charges by third parties. The Bureau is proposing a revised definition of the finance charge pursuant to its authority under TILA sections 105(a) and (f), as well as other applicable statutory authority, because the Bureau believes that the simpler finance charge could effectuate the purposes of TILA and facilitate compliance by enhancing consumer understanding and reducing compliance costs.

One effect of the expansion of the definition of finance charge, however, would be to expand the number of loans exceeding HOEPA's APR trigger and other statutory and regulatory provisions that incorporate an APR threshold for coverage. As discussed in detail in the Board's 2010 Mortgage Proposal, there are currently some differences between the APR and the APOR, which is the benchmark rate under the Dodd-Frank Act for determining HOEPA coverage. The APOR is generally calculated using data that includes only contract interest rate and points, but not other origination fees. *See* 75 FR 58539, 58660–62 (Sept. 24, 2010). The current APR includes not only discount points and origination fees but also other charges the creditor retains and certain third-party charges. The proposed simpler, more inclusive finance charge, which would also include most third-party charges, would widen the disparity between the APR and the APOR and expand coverage of HOEPA.

The Bureau notes that, in response to the Board's 2009 Closed-End Proposal, most industry commenters raised significant concerns about loans being inappropriately covered by HOEPA and potential negative impacts on consumer access to credit. Consumer advocates and some other commenters, however, supported the more inclusive finance charge and the expanded coverage of HOEPA. They maintained that expanded HOEPA coverage was warranted because the more inclusive finance charge would be a more accurate measure of the cost of credit and, therefore, would render HOEPA coverage more accurate as well.

During outreach conducted in conjunction with the Bureau's 2012 TILA–RESPA Proposal, similar concerns were expressed by both industry and consumer advocates. Participants in a Small Business Review Panel and other industry stakeholders expressed concerns that one unintended consequence of a more inclusive definition of finance charge could be that more loans would qualify as high-cost loans subject to additional requirements under TILA section 129 and under similar State laws. Industry stakeholders urged that the proposed revisions to the finance charge be viewed in the context of Dodd-Frank Act rulemakings revising the thresholds for HOEPA and other statutory regimes because of the relationship between the APR and those thresholds. Specifically, they noted that those thresholds are tied to the APR, such that any changes to the APR calculation could be costly to implement and should be done in conjunction with other related changes. Consumer advocates asserted that expanded HOEPA coverage is warranted because the more inclusive definition would provide a more accurate measure of the cost of credit.

The Bureau does not currently have sufficient data to model the impact of the more expansive definition of finance charge on coverage under HOEPA or the impact of potential modifications that the Bureau could make to the triggers to more closely approximate existing coverage levels. As described in the Dodd-Frank Act section 1022 analysis below, the Bureau is working to secure data to assist in analyzing potential impacts. The Bureau seeks comment on its plans for data analysis as described below, as well as additional data and comment on the potential impacts of a broader finance charge definition on coverage under HOEPA and potential modifications to the triggers.

In conjunction with its efforts to quantify the effect of an expanded definition of finance charge, the Bureau is carefully weighing whether modifications may be warranted to approximate coverage levels under the current definition. It is not clear from the legislative history of the Dodd-Frank Act whether Congress was aware of the Board's 2009 Closed-End Proposal to expand the current definition of finance charge or whether Congress considered the interplay between an expanded definition and coverage under the high-cost mortgage provision. In light of this fact and the concerns raised by commenters on the Board's 2009 Closed-End Proposal regarding effects on access to credit, the Bureau believes that it is appropriate to explore alternatives to implementation of the expanded finance charge definition for purposes of HOEPA coverage.

As discussed below, the Bureau has considered two such modifications and is proposing one of them, the TCR, as Alternative 2 to proposed § 1026.32(a)(1)(i). The Bureau seeks comments and data on these and any other potential modifications to HOEPA's APR coverage thresholds. The Bureau also seeks comment on the timing of implementation for any change to the definition of finance charge and any related change to the HOEPA APR threshold, as discussed further below.

Adjustment to numeric APR triggers. One method of modifying the triggers to maintain approximate current coverage would be to exercise the Bureau's authority under TILA section 103(bb)(2)(A) and (B) to adjust the percentage point triggers. As discussed above, TILA section 103(bb)(2)(A) and (B) permits certain adjustments to the percentage point triggers if the Bureau determines that the increase or decrease is consistent with the statutory protections for high-cost mortgages and is warranted by the need for credit. In determining whether to increase or decrease the number of percentage points in the high-cost mortgage trigger, the Bureau must consult with representatives of consumers, including low-income consumers, and lenders.

Due to data limitations, however, the Bureau does not currently have sufficient information to propose a specific numeric adjustment to the percentage point triggers as a means of approximating current coverage levels in the event that the Bureau adopts the broader definition of finance charge. The Bureau also notes that the Board previously proposed and sought comment on use of the TCR, rather than adjustments to numeric thresholds.[27] The Bureau therefore seeks comment on the advisability and grounds for using the percentage point mechanism to adjust for the adoption of a broader definition of finance charge, particularly if different types of modifications were adopted for other mortgage rulemakings involving APR thresholds.

Transaction coverage rate. As discussed above, another alternative method of compensating for the broader definition of finance charge would be to replace the APR benchmark for closed-end mortgage loans with the transaction

[27] *See, e.g.,* 75 FR 58660–62 and 76 FR 11609.

coverage rate (TCR). The Bureau has proposed this as Alternative 2 for proposed § 1026.32(a)(1)(i), for substantially the same reasons that the Board proposed adopting the TCR to address the impact of the expanded definition of finance charge upon other regulatory triggers.[28] Specifically, the ''transaction coverage rate'' would be defined as the rate used to determine whether a closed-end mortgage loan is a high-cost mortgage subject to § 1026.32. (As discussed below, the Bureau does not propose to change the coverage metric for open-end credit plans.) As previously proposed by the Board in § 226.45(a)(2)(i) under the 2011 Escrow Proposal (which would become § 1026.35(a)(2)(i) in the Bureau's rules), the TCR would be determined in accordance with the applicable rules of Regulation Z for the calculation of the APR for a closed-end transaction, except that the prepaid finance charge would include only charges that will be retained by the creditor, a mortgage broker, or any affiliate of either.[29]

The TCR would not reflect certain costs paid to third parties that would be disclosed to consumers as part of the finance charge under the current and proposed definitions. For example, the current finance charge reflects mandatory credit life insurance, and the proposed more inclusive finance charge would reflect such additional third-party charges as title insurance premiums. However, the TCR would not include either amount. *See* 75 FR 58539, 58661 (Sept. 24, 2010); 76 FR 11598, 11626 (Mar. 2, 2011). Thus, the TCR might result in some loans not being classified as high-cost mortgages that would otherwise qualify under an APR threshold.

The Bureau is considering ways to supplement the data analysis described below to better assess this issue, and specifically seeks comment and data on the potential effect of the TCR relative to the APR calculated using both the current and proposed definitions of finance charge. While the Bureau is seeking data to assist it in evaluating alternatives, the Bureau expects that the margin of difference between the TCR and the current APR would be significantly smaller than the margin between the current APR and the APR calculated using the expanded finance charge definition. This expectation is due to the fact that the expanded finance charge definition would add in such large third-party charges as lender's title insurance, whereas relatively few third-party fees would be excluded by the TCR approach that are not already excluded under current rules; mandatory credit life and disability insurance premiums would be in this category, for example, but such insurance typically is offered as voluntary coverage, which is already excluded under current rules. The Bureau consequently expects that, relative to current rules, the TCR would remove from HOEPA coverage fewer overall transactions than the expanded finance charge would add.

Thus, the Bureau believes that the TCR may maintain the primary benefits of HOEPA while also offering other significant benefits. First, the Bureau believes that the TCR would be easier to calculate than the current APR, and could therefore result in reduced compliance burden and litigation costs for creditors. Second, the TCR has been proposed in two prior proposals of the Board relating to higher-priced mortgage loans. Thus, the TCR could provide an efficacious way of achieving a common framework for application of various regulatory thresholds.

At the same time, the Bureau also seeks comment on the potential advantages and disadvantages to both consumers and creditors of using different metrics for purposes of disclosures and for purposes of determining coverage of various regulatory regimes. As discussed above, the Bureau believes that the potential compliance burden is mitigated with regard to TCR because both TCR and APR under the expanded definition of finance charge would be easier to compute than the APR today using the current definition. However, the Bureau seeks comment on the issue generally and in particular on whether use of the TCR or other modifications should be optional, so that creditors could use the broader definition of finance charge to calculate the APR and points and fees triggers if they would prefer. The Board's 2010 Mortgage Proposal structured the TCR as a mandatory requirement out of concern that identical transactions extended by two different creditors could have inconsistent coverage under regulations governing higher-priced mortgage loans, but similarly sought comment on the issue.

The Bureau has authority to modify the APR test in § 1026.32(a)(1)(i) under TILA section 105(a) to carry out the purposes of TILA. In its 2012 TILA–RESPA Proposal, the Bureau is proposing to amend the definition of finance charge to promote the informed use of credit and to facilitate creditors' compliance with disclosure requirements under TILA. Should the Bureau finalize that aspect of the proposal, adoption of the TCR may ensure that the special protections provided under HOEPA are not expanded in a manner that Congress may not have intended or that could impair access to credit.

Furthermore, the Bureau has authority pursuant to TILA section 105(a) to provide additional requirements, classifications, differentiations, or other provisions, and to provide for such adjustments and exceptions for all or any class of transactions as are necessary, in the Bureau's judgment, to effectuate the purposes of TILA and facilitate compliance.[30] The Bureau understands that most lenders currently do not make HOEPA loans, and previous comments received on the Board's proposal suggest that some lenders may cease making loans that are defined as high-cost mortgages solely as a result of the proposed more inclusive finance charge. The Bureau is therefore evaluating whether the proposed use of the TCR could maintain the special protections for consumers of high-cost mortgages while ensuring that the effects of a more inclusive finance charge would not restrict the availability of credit. In addition, the Bureau believes that the proposal to use the TCR would facilitate compliance by substituting a simpler calculation for the finance charge for purposes of determining whether a transaction is a high-cost mortgage. Creditors would therefore have more certainty about the calculation for purposes of determining coverage of closed-end mortgage loans. Therefore, the Bureau believes that the proposed adjustment may effectuate the

[28] The Board proposed the TCR in the 2010 Mortgage Proposal, *see* 75 FR 58660–62, and the 2011 Escrow Proposal, *see* 76 FR 11609. The Board's proposals would substitute the TCR for the APR for purposes of determining thresholds for higher-priced mortgage loans.

[29] The wording of the Board's proposed definition of ''transaction coverage rate'' varied slightly between the 2010 Mortgage Proposal and the 2011 Escrow Proposal as to treatment of charges retained by mortgage broker affiliates. The Bureau proposes to use the 2011 Escrow Proposal version, which would apply to charges that will be retained by the creditor, a mortgage broker, or any affiliate of either. The Bureau believes that this approach is consistent with the rationale articulated by the Board in its earlier proposals and with certain other parts of the Dodd-Frank Act that distinguish between charges retained by the creditor, mortgage broker, or affiliates of either company. *See, e.g.,* Dodd-Frank Act section 1403.

[30] The Bureau's authority under section 105(a) does not extend to the substantive protections contained in TILA section 129 that apply to high-cost mortgages, but applies to all other provisions of TILA including the section that defines high-cost mortgages and APR. The Bureau is striving to develop a coverage framework across various rulemakings that is consistent with Congress' intent in identifying specific, limited categories of covered transactions that are subject to various substantive protections, including the protections for high-cost mortgages.

purposes of TILA, as amended by HOEPA, and facilitate compliance without undermining consumer protections against abusive practices, the availability of credit, or the interest of the borrowing public.

Open-end transactions. The proposal for a more inclusive finance charge applies only to closed-end transactions. Therefore, for purposes of the coverage trigger in § 1026.32(a)(1)(i), the Bureau proposes to use the TCR for closed-end transactions only. The Bureau believes that an adjustment for open-end transactions would not be necessary or appropriate because the APR for open-end credit plans solely includes interest and not other fees or charges. Accordingly, the annual percentage rate would be used for open-end transactions.

Effective dates. In addition to seeking comment on the issues raised above concerning potential modifications to the HOEPA APR triggers if the Bureau adopts a broader definition of finance charge, the Bureau seeks comment on the timing of implementation. As discussed above, the Bureau has proposed to expand the definition of finance charge as part of the 2012 TILA–RESPA Proposal, which has no statutory deadline for final rules. The Bureau expects that it may take some time to finalize the disclosures proposed in that rule, since it anticipates conducting quantitative testing of the forms. The Bureau does not necessarily have to wait until the disclosures are finalized to issue a final rule about whether to expand the definition of finance charge, and is specifically seeking comment in connection with that proposal about whether it should decide the finance charge issue (and finalize that aspect of the proposal) earlier in light of the potential impact on other rulemakings.

The Bureau also seeks comment on effective dates as part of this rulemaking. The Bureau expects to issue a final rule regarding implementation of the Dodd-Frank Act amendments to HOEPA by January 21, 2013, since the statute will otherwise automatically take effect on that date. The Bureau also expects to issue several other final rules by January 21, 2013, to implement other provisions of title XIV of the Dodd-Frank Act that set similar thresholds for compliance based on mortgage loans' APRs or points and fees. The Bureau is seeking comment on an appropriate implementation period for the final rules.

The Bureau believes that it would be preferable for any change to the definition of finance charge and any related changes to regulatory thresholds to take effect at the same time, in order to provide for consistency and efficient systems modification. The Bureau also believes that it may be advantageous to consumers and creditors for these changes to occur at the same time that creditors are implementing new title XIV requirements involving APR and points and fees thresholds, rather than waiting until the Bureau finalizes other aspects of the 2012 TILA-RESPA final rule relating to disclosures. If the Bureau expands the definition of finance charge, this approach would likely provide the benefits to consumers of the final rule at an earlier date as well as avoid requiring creditors to make two sets of systems and procedures changes focused on determining which loans trigger particular regulatory requirements (*e.g.,* one set of changes to implement amendments to the HOEPA triggers generally and another set of changes associated with any modifications related to the more inclusive finance charge). However, given that implementation of the disclosure-related elements of the 2012 TILA-RESPA Proposal will also require systems and procedures changes, there may be advantages to delaying any change in the definition of finance charge and related adjustments to regulatory triggers until those changes occur. The Bureau therefore seeks comment on the benefits and costs to both consumers and industry of both approaches.

Related commentary. Under Alternative 2, as discussed above, proposed comment 32(a)(1)(i)–1 clarifies the determination of the TCR for closed-end mortgage loans. For consistency within Regulation Z regarding the determination of the TCR, the proposal cross-references guidance proposed under § 226.45(a)(2)(i) in the 2011 Escrow Proposal, which would be renumbered as § 1026.35(a)(2)(i) for organizational purposes. Under Alternative 1, the Bureau notes that this proposed comment would be removed and proposed comments 32(a)(1)(i)–2 and –3 below would be renumbered as comments 32(a)(1)(i)–1 and –2.

Proposed comment 32(a)(1)(i)–2 clarifies the determination of the average prime offer rate for closed-end mortgage loans. For consistency within Regulation Z regarding the determination of the average prime offer rate for closed-end credit, the proposal cross-references the guidance in current comments 35(a)(2)–1 through –4, which would be renumbered as comments 35(a)(2)(ii)–1 through –4 for organizational purposes.

Proposed comment 32(a)(1)(i)–3 provides guidance on the determination of the average prime offer rate for open-end credit plans by clarifying that creditors use the average prime offer rate for the most closely comparable closed-end mortgage loan based on applicable loan characteristics and other loan pricing terms. The proposal also provides illustrative examples to facilitate compliance.

The Bureau believes this approach is consistent with TILA section 103(bb)(1)(A)(i), which requires a comparison of mortgage transactions' APRs to the average prime offer rate without distinguishing between closed-end and open-end credit. The APOR is currently calculated only for closed-end mortgage products, and the Bureau is unaware of any publicly-available surveys of pricing data for open-end credit plans on which to calculate a separate APOR for open-end credit.[31]

Home-equity lines of credit with a variable rate feature reference an index to determine the interest rate, such as the average prime rate from a consensus of certain lenders as published by the Wall Street Journal (the ''prime rate''). Based on historical data, the Bureau understands that the average prime offer rate for one-year adjustable rate mortgages and the prime rate generally have been comparable. The Bureau further understands that many lenders use the prime rate as a reference index. Therefore, the Bureau believes that reliance on the APOR for the most closely comparable closed-end mortgage loan will provide a reasonable benchmark and facilitate compliance, since the tables for average prime offer rates are readily available and any rate spread calculators developed for closed-end mortgages may be adapted to open-end transactions as well. However, the Bureau solicits data or comment on any aspect of determining the average prime offer rate for open-end credit plans. In particular, the Bureau solicits comment on whether an alternative reference rate would better meet the objectives of the APR trigger for open-end credit and would facilitate compliance.

As noted above, proposed § 1026.32(a)(1)(i)(B) provides that the annual percentage rate threshold trigger is 8.5 percentage points over average prime offer rate for first-lien mortgages if the dwelling is personal property and the total loan amount is less than $50,000. Proposed comment 32(a)(1)(i)–

[31] The methodology for deriving the APOR is based on Freddie Mac's Primary Mortgage Market Survey, which does not provide any data on open-end mortgage products, such as home-equity lines of credit. More detailed discussions of the determination of the APOR are provided in the Board's 2008 HOEPA Final Rule, *see* 73 FR at 44533–44536, and other publicly-available sources, *see, e.g., http://www.ffiec.gov/ratespread/default.aspx.*

4 clarifies that the guidance for total loan amount under proposed § 1026.32(a)(1)(i)(B) is consistent with the guidance addressing total loan amount that is provided in proposed § 1026.32(b)(6) and comment 32(b)(6)–1.

32(a)(1)(ii)

Existing TILA section 103(aa)(1)(B) provides that a mortgage is subject to the restrictions and requirements of HOEPA if the total points and fees payable by the consumer at or before loan closing exceed the greater of eight percent of the total loan amount or $400. *See* 15 U.S.C. 1602(aa)(1)(B); § 1026.32(a)(1)(ii). Prior to the transfer date under the Dodd-Frank Act, the Board adjusted the $400 figure annually for inflation since 1996. TILA section 103(aa)(3), 15 U.S.C. 1602(aa)(3). For 2012, the Board adjusted the $400 figure to $611 from $592, where it had been set for 2011. *See* 76 FR 35723, 35723–24 (June 20, 2011); comment 32(a)(1)(ii)–2.xvii.

Section 1431(a) of the Dodd-Frank Act amended TILA section 103(aa)(1)(B) to provide that a mortgage is a high-cost mortgage subject to HOEPA if the total points and fees payable in connection with the transaction exceed either five percent or eight percent of the total transaction amount, depending on the transaction. Specifically, under TILA section 103(bb)(1)(A)(ii)(I), a transaction with a total transaction amount of $20,000 or more is a high-cost mortgage if the total points and fees payable in connection with the transaction exceed five percent of the total transaction amount. Under TILA section 103(bb)(1)(A)(ii)(II), a transaction with a total transaction amount of less than $20,000 is a high-cost mortgage if the total points and fees payable in connection with the transaction exceed eight percent of the total transaction amount or $1,000, whichever is less. The proposal implements the Dodd-Frank Act's amendments to TILA's points and fees trigger for high-cost mortgages in proposed § 1026.32(a)(1)(ii)(A)–(B).

Payable in Connection With the Transaction

Section 1431(a) of the Dodd-Frank Act amended the high-cost mortgage points and fees trigger in TILA section 103(aa)(1)(B), 15 U.S.C. 1602(aa)(1)(B), by providing for the inclusion in points and fees of ''the total points and fees payable *in connection with the transaction,*'' as opposed to ''the total points and fees payable by the consumer *at or before closing''* (emphases added). The proposal implements this statutory change in proposed § 1026.32(a)(1)(ii). The Bureau notes that the practical result of this change is that any item listed in the points and fees definition under proposed § 1026.32(b)(1) and (3) must, unless otherwise specified, be counted toward the points and fees threshold for high-cost mortgages even if it is payable after consummation or account opening.[32] *See* the section-by-section analysis to proposed § 1026.32(b)(1) and (3), below, for further details concerning the definition of points and fees for high-cost mortgages.

Total Transaction Amount

Section 1431(a) of the Dodd-Frank Act amended TILA section 103(aa)(1)(B), 15 U.S.C. 1602(aa)(1)(B), to provide that a mortgage is a high-cost mortgage if its total points and fees exceed a certain percentage of the ''total transaction amount,'' rather than the ''total loan amount.'' TILA section 103(bb)(1)(A)(ii). The Dodd-Frank Act did not define the term ''total transaction amount.'' However, the Bureau believes that the phrase reflects the fact that HOEPA, as amended, applies to both closed- and open-end credit transactions secured by a consumer's principal dwelling.[33] Notwithstanding the statutory change, for consistency with existing Regulation Z terminology, proposed § 1026.32(a)(1)(ii) provides that a high-cost mortgage is one for which the total points and fees exceed a certain percentage of the ''total loan amount.'' For organizational purposes, the Bureau proposes to move the definition of ''total loan amount'' in existing comment 32(a)(1)(ii)–1 into proposed § 1026.32(b)(6) and comment 32(b)(6)(i)–1. As discussed below in the section-by-section analysis to proposed § 1026.32(b)(6), the Bureau also proposes to amend the definition of ''total loan amount'' for closed-end mortgage loans and to clarify the meaning of ''total loan amount'' for open-end credit plans.

Annual Adjustment of $1,000 Amount

The Bureau proposes to re-number existing comment 32(a)(1)(ii)–2 as proposed comment 32(a)(1)(ii)–1 for organizational purposes, as well as to revise it in several respects to reflect proposed revisions to § 1026.32(a)(1)(ii). First, proposed comment 32(a)(1)(ii)–1 replaces references to the pre-Dodd-Frank statutory figure of $400 with references to the new statutory figure of $1,000.[34] In addition, consistent with the Dodd-Frank Act's transfer of rulemaking authority for HOEPA from the Board to the Bureau, proposed comment 32(a)(1)(ii)–1 states that the Bureau will publish and incorporate into commentary the required annual adjustments to the $1,000 figure after the June figures become available each year. Finally, the proposal retains in proposed comment 32(a)(1)(ii)–2 the paragraphs in existing comment 32(a)(1)(ii)–2 enumerating the $400 figure as adjusted for inflation from 1996 through 2012. The Bureau believes that it is useful to retain the list of historical adjustments to the $400 figure for reference, notwithstanding that TILA section 103(bb)(1)(A)(ii)(II) increases the dollar figure from $400 to $1,000.

32(a)(1)(iii)

Existing TILA section 103(aa)(1), 15 U.S.C. 1602(aa)(1), provides that a mortgage is a high-cost mortgage if either its APR or its total points and fees exceed certain statutorily prescribed thresholds. Section 1431(a) of the Dodd-Frank Act amended TILA to add that a transaction is also a high-cost mortgage if the credit transaction documents permit the creditor to charge or collect prepayment fees or penalties more than 36 months after the transaction closing, or if such fees or penalties exceed, in the aggregate, more than two percent of the amount prepaid. TILA section 103(bb)(1)(A)(iii). Proposed § 1026.32(a)(1)(iii) implements TILA section 103(bb)(1)(A)(iii) with several minor clarifications.

First, proposed § 1026.32(a)(1)(iii) provides that the determination as to whether the creditor can charge the specified prepayment penalty is to be made under the ''terms of the loan contract or open-end credit agreement,'' rather than under the ''credit transaction documents.'' This phrasing is proposed to reflect the application of proposed § 1026.32(a)(1)(iii) to both closed- and

[32] The Bureau's proposed inclusion in points and fees for high-cost mortgages of ''the total points and fees payable in connection with the transaction'' is consistent with the proposed inclusion in points and fees for qualified mortgages of ''the total points and fees * * * payable in connection with the loan'' in the Board's 2011 ATR Proposal. *See* 76 FR 27390, 27456 (May 11, 2011) (implementing TILA section 129C(b)(2)(A)(vii)).

[33] In this regard, the Bureau notes that section 1412 of the Dodd-Frank Act retained the phrase ''total loan amount'' for purposes of determining whether a closed-end mortgage complies with the points and fees restrictions applicable to qualified mortgages. *See* TILA section 129C(b)(2)(A)(vii).

[34] The Dodd-Frank Act renumbered TILA section 103(aa)(1)(B)(i)–(ii) concerning points and fees for high-cost mortgages as 103(bb)(1)(A)(ii)(I)–(II). However, the Dodd-Frank Act did not amend TILA section 103(aa)(3) (the provision that directs the points and fees dollar figure to be adjusted annually for inflation) to reflect this new numbering. To give meaning to the statute as amended, the Bureau interprets the authority provided to it in amended TILA section 103(bb)(3) as authority to adjust annually for inflation the dollar figure prescribed in amended TILA section 103(bb)(1)(A)(ii)(II).

open-end transactions, and for consistency with Regulation Z. Proposed § 1026.32(a)(1)(iii) also cross-references the definition of prepayment penalty in proposed § 1026.32(b)(8). Finally, proposed § 1026.32(a)(1)(iii) clarifies that the creditor must include any prepayment penalty that is permitted to be charged more than 36 months ''after consummation or account opening,'' rather than after ''transaction closing.'' For consistency and clarity, the Bureau proposes using the terms ''consummation'' and ''account opening'' instead of ''transaction closing'' for closed- and open-end transactions, respectively.

Proposed comment 32(a)(1)(iii)–1 explains how the prepayment penalty trigger for high-cost mortgages in proposed § 1026.32(a)(1)(iii) interacts with the ban on prepayment penalties for high-cost mortgages in amended TILA section 129(c), 15 U.S.C. 1639(c), which the Bureau proposes to implement in § 1026.32(d)(6). Specifically, proposed comment 32(a)(1)(iii)–1 explains that § 1026.32 implicates prepayment penalties in two main ways. First, under proposed § 1026.32(a)(1)(iii), a closed- or open-end transaction is a high-cost mortgage if, under the terms of the loan contract or credit agreement, a creditor can charge either (i) a prepayment penalty more than 36 months after consummation or account opening, or (ii) total prepayment penalties that exceed two percent of any amount prepaid. Second, if a transaction is a high-cost mortgage by operation of any of the triggers in proposed § 1026.32(a)(1) (*i.e.,* the APR, points and fees, or prepayment penalty triggers), then under proposed § 1026.32(d)(6), the transaction may not include a prepayment penalty. Proposed comment 32(a)(1)(iii)–1 clarifies that proposed § 1026.32(a)(1)(iii) thus effectively establishes a maximum period during which a prepayment penalty may be imposed, and a maximum prepayment penalty amount that may be imposed, on a transaction that may be subject to HOEPA coverage (*i.e.,* a closed- or open-end transaction secured by a consumer's principal dwelling, other than a reverse mortgage transaction).

Proposed comment 32(a)(1)(iii)–1 also cross-references proposed § 1026.43(g) (proposed § 226.43(g) in the Board's 2011 ATR Proposal), which proposes to implement new TILA section 129C(c) by (1) prohibiting prepayment penalties for most closed-end mortgages unless the transaction is a fixed-rate, qualified mortgage with an annual percentage rate that meets certain statutorily prescribed thresholds, and (2) restricting prepayment penalties even for such qualified mortgages to three percent, two percent and one percent of the amount prepaid during the first, second, and third years following consummation, respectively. *See* 76 FR 27390, 27472–78 (May 11, 2011). As discussed further below in the section-by-section analysis to proposed § 1026.32(b)(8), the Bureau believes that the cumulative effect of the Dodd-Frank Act's amendments to TILA concerning prepayment penalties may be to limit the amount of prepayment penalties that may be charged in connection with most closed-end mortgage loans to amounts that would be unlikely to reach the high-cost mortgage prepayment penalty trigger.[35] The Bureau nonetheless requests comment on whether additional guidance concerning the calculation of prepayment penalties for purposes of proposed § 1026.32(b)(1)(iii) is needed.

Proposed comment 32(a)(1)(iii)–2 illustrates how to apply proposed § 1026.32(a)(1)(iii) in the case of an open-end credit plan. To begin, proposed comment 32(a)(1)(iii)–2 clarifies that, if the terms of an open-end credit agreement allow for a prepayment penalty that exceeds two percent of the initial credit limit for the plan, the agreement will be deemed to permit a creditor to charge a prepayment penalty that exceeds two percent of the ''amount prepaid'' within the meaning of proposed § 1026.32(a)(1)(iii). The comment provides three examples to illustrate the rule.

Proposed comment 32(a)(1)(iii)–2.i explains that a home-equity line of credit with an initial credit limit of $10,000 is a high-cost mortgage under proposed § 1026.32(a)(1)(iii) if the terms of the plan permit the creditor to charge the consumer a flat fee of $500 if the consumer terminates the plan sooner than three years after opening the account. The $500 flat fee is a prepayment penalty (*see* proposed § 1026.32(b)(8)(ii), below) that exceeds two percent of the total amount of the initial credit limit of $10,000, which is $200.

Proposed comment 32(a)(1)(iii)–3.ii sets forth a second example. This example assumes a home-equity line of credit with an initial credit limit of $10,000 and a ten-year term. The terms of the plan permit the creditor to charge the consumer a $200 fee if the consumer terminates the plan prior to the expiration of the ten-year term. Even though the $200 prepayment penalty is less than two percent of the initial $10,000 credit limit, the home-equity line of credit is a high-cost mortgage under proposed § 1026.32(a)(1)(iii) because the terms of the plan permit the creditor to charge the penalty longer than three years after the consumer opens the account.

Finally, proposed comment 32(a)(1)(iii)–3.iii assumes that the terms of an open-end credit plan with an initial credit limit of $150,000 permit the creditor to charge the consumer for any closing costs paid by the creditor if the consumer terminates the plan less than 36 months after account opening. In the example, the creditor pays $1,000 in closing costs. Of the $1,000, the creditor pays $800 to cover bona fide third-party charges and $200 to cover origination costs incurred by the creditor or its affiliates. Under proposed § 1026.32(b)(8)(ii), the ability to charge the consumer $800 upon early termination to cover bona fide third-party charges is not a prepayment penalty, but the ability to charge $200 for the creditor's or its affiliate's origination costs is a prepayment penalty. The total prepayment penalty of $200 is less than two percent of the plan's initial $150,000 credit limit, and under the terms of the plan the penalty does not apply if the consumer terminates the plan more than 36 months after account opening. Thus, the plan is not a high-cost mortgage under § 1026.32(a)(1)(iii).

32(a)(2) Determination of Transaction Coverage Rate or Annual Percentage Rate

TILA section 103(bb)(1)(B) specifies the interest rate used to determine the annual percentage rate for purposes of the APR threshold under TILA section 103(bb)(1)(A)(i). TILA section 103(bb)(1)(B) requires that: (1) In connection with a fixed-rate transaction, the annual percentage rate must be based on the interest rate in effect on the date of consummation; (2) in connection with a transaction with a rate that varies solely in accordance with an index, the annual percentage rate must be based on the interest rate determined by adding the maximum margin permitted at any time during the loan agreement to the index rate in effect on the date of consummation; and (3) in connection with any other transaction in which the

[35] The Dodd-Frank Act's amendments include adding a prepayment penalty trigger for high-cost mortgages and prohibiting prepayment penalties for such mortgages (TILA sections 103(bb)(1)(A)(iii) and 129(c)), restricting or prohibiting prepayment penalties for most closed-end mortgage loans (TILA section 129C(c)), and including prepayment penalties in the points and fees calculations for high-cost mortgages and qualified mortgages (TILA sections 103(bb)(4) and 129C(b)(2)(C), respectively). *See also* the section-by-section analysis to proposed § 1026.32(b)(1) and (3) and proposed § 1026.32(b)(8), below.

rate may vary at any time during the term of the loan for any reason, the annual percentage rate must be based on the maximum interest rate that may be charged during the term of the loan.

The Bureau proposes to implement these provisions in proposed § 1026.32(a)(2). Specifically, proposed § 1026.32(a)(2)(i) requires that for purposes of the APR trigger, the calculation of the transaction coverage rate or annual percentage rate, as applicable, for a fixed-rate transaction must be based on the interest rate in effect on the date of consummation or account opening. Proposed § 1026.32(a)(2)(ii) requires that for a variable-rate transaction in which the interest rate may vary during the term of the loan or plan in accordance with an index outside the creditor's control, the transaction coverage rate or annual percentage rate, as applicable, must be based on an interest rate that is determined by adding the maximum margin permitted at any time during the term of the loan or plan to the index rate in effect on the date of consummation or account opening. Proposed § 1026.32(a)(2)(iii) requires that for a loan in which the interest rate may vary during the term of the loan, other than a loan as described in § 1026.32(a)(2)(ii), the transaction coverage rate or annual percentage rate, as applicable, must be based on the maximum interest rate that may be imposed during the term of the loan.

As noted above, the Bureau proposes to reference in proposed § 1026.32(a)(2) the ''transaction coverage rate'' for consistency with Alternative 2 to proposed § 1026.32(a)(1)(i). The Bureau also notes that if the Bureau does not adopt Alternative 2, the references to ''transaction coverage rate'' in proposed § 1026.32(a)(2) would be removed accordingly. In addition, the Bureau proposes to incorporate references to ''account opening'' in proposed § 1026.32(a)(2) to clarify that the requirement is also applicable to open-end credit plans. Furthermore, the Bureau proposes to clarify in proposed § 1026.32(a)(2)(ii) that if an interest rate varies in accordance with an index, the index must be outside the creditor's control. The Bureau believes this clarification is necessary and appropriate to effectuate the statutory distinction in treatment between rates that vary with an index and those that ''may vary at any time during the term of the loan for any reason.'' Additionally, the Bureau is proposing to adopt this clarification pursuant to its authority under TILA 105(a) to prevent circumvention of coverage under HOEPA. The Bureau notes that if the index were in the creditor's control, such as the creditor's own prime lending rate, a creditor could set a low index rate for purposes of § 1026.32(a)(2)(ii), which would not trigger coverage as a high-cost mortgage. However, subsequent to consummation, the creditor could set a higher index rate, at any time, which would have triggered coverage as a high-cost mortgage under § 1026.32(a)(2)(ii). Accordingly, the Bureau notes that if the interest rate varies in accordance with an index that is under the creditor's control, the creditor would determine the annual percentage rate under § 1026.32(a)(2)(iii), not § 1026.32(a)(2)(ii).

Proposed comment 32(a)(2)–1 clarifies that, notwithstanding the existing guidance in comment 17(c)–1 regarding the calculation of the annual percentage rate for discounted and premium variable-rate loans, § 1026.32(a)(2) requires a different calculation of the transaction coverage rate or annual percentage rate, as applicable, for purposes of the high-cost mortgage APR threshold.

Proposed comment 32(a)(2)–2 clarifies that for purposes of § 1026.32(a)(2), the annual percentage rate for an open-end transaction must be determined in accordance with § 1026.32(a)(2), regardless of whether there is an advance of funds at account opening. Proposed comment 32(a)(2)–2 further clarifies that § 1026.32(a)(2) does not require the determination of the annual percentage rate for any extensions of credit subsequent to account opening. In other words, any draw on the credit line subsequent to account opening is not considered to be a separate open-end ''transaction'' for purposes of determining annual percentage rate threshold coverage.

Proposed comment 32(a)(2)–3 provides additional guidance on the application of § 1026.32(a)(2)(ii) and (iii) to mortgage transactions with interest rates that vary. Specifically, proposed comment 32(a)(2)–3.i provides that § 1026.32(a)(2)(ii) applies when the interest rate is determined by an index that is outside the creditor's control. In addition, proposed comment 32(a)(2)–3.i clarifies that even if the transaction has a fixed-rate discounted introductory or initial interest rate, § 1026.32(a)(2)(ii) requires adding the contractual maximum margin to the fully indexed interest rate, and not the introductory rate. Furthermore, for purposes of determining the maximum margin, proposed comment 32(a)(2)–3.i clarifies that margins that might apply if a preferred rate is terminated must be used, such as where a specified higher margin will apply if the borrower's employment with the creditor ends.

Proposed comment 32(a)(2)–3.ii clarifies that § 1026.32(a)(2)(iii) applies when the interest rates applicable to a transaction may vary, except as described in § 1026.32(a)(2)(ii). Proposed comment 32(a)(2)–3.ii thus specifies that § 1026.32(a)(2)(iii) applies, for example, to a closed-end mortgage loan when interest rate changes are at the creditor's discretion, or where multiple fixed rates apply to a transaction, such as a stepped-rate mortgage.

Proposed comment 32(a)(2)–4 clarifies the application of § 1026.32(a)(2) for home-equity plans that offer fixed-rate and term payment options. The Bureau understands that some variable-rate HELOC plans may permit borrowers to repay a portion or all of the balance at a fixed-rate and over a specified period of time. Proposed comment 32(a)(2)–4 thus provides that, if a HELOC has only a fixed rate during the draw period, a creditor must use that fixed rate to determine the plan's APR, as required by proposed § 1026.32(a)(2)(i). If during the draw period, however, a HELOC has a variable rate but also offers a fixed-rate and -term payment option, a creditor must use the terms applicable to the variable-rate feature to determine the plan's APR, as described in proposed § 1026.32(a)(2)(ii).

The Bureau seeks comment on its proposed rules for determining the APR for HOEPA coverage, including on whether any aspect of the proposal could result in unwarranted, over-inclusive HOEPA coverage of HELOCs. In particular, the Bureau notes that § 1026.40(f) and its commentary generally prohibit creditors from changing the APR on a HELOC unless the change is based on a publicly-available index outside the creditor's control or unless the rate change is specifically set forth in the agreement, such as stepped-rate plans, in which specified fixed rates are imposed for specified periods. Therefore, the Bureau understands that these HELOC restrictions effectively limit the application of proposed § 1026.32(a)(2)(iii) primarily to certain types of closed-end mortgage loans. The Bureau notes that applying proposed § 1026.32(a)(2)(iii) to determine the APR for a variable-rate HELOC could result in over-inclusive coverage of HELOCs under HOEPA because the maximum possible interest rate for many variable-rate HELOCs is pegged to the maximum interest rate permissible under State law. That interest rate, in turn, likely would cause the plan's APR to exceed HOEPA's APR threshold. Therefore, the

Bureau solicits comment on whether there are any circumstances pursuant to which the terms of a variable-rate HELOC might warrant application of proposed § 1026.32(a)(2)(iii) and, if so, whether additional clarification is necessary to avoid unwarranted coverage of HELOCs under HOEPA.

32(b) Definitions

32(b)(1)

Background

Existing TILA section 103(aa)(4), 15 U.S.C. 1602(aa)(4), defines the charges that must be included in points and fees for purposes of determining whether a transaction exceeds the HOEPA points and fees threshold. Section 1431(c)(1) of the Dodd-Frank Act revised and added certain items to this definition. *See* TILA section 103(bb)(4).[36] At the same time, as noted above in part I.E, section 1412 of the Dodd-Frank Act amended TILA to require creditors to consider consumers' ability to repay and to create a new type of closed-end mortgage—a ''qualified mortgage.'' Among other requirements, in order to be considered a qualified mortgage, points and fees payable in connection with the loan may not exceed 3 percent of the total loan amount.[37] In turn, ''points and fees'' for purposes of qualified mortgages means ''points and fees'' as defined by HOEPA in existing TILA section 103(aa)(4). *See* TILA section 129C(b)(2)(A)(vii) and (C)(i).[38]

As part of its 2011 ATR Proposal to implement new TILA section 129C(b)(2)(C)(i) defining points and fees for qualified mortgages, the Board also proposed to implement the Dodd-Frank Act's amendments to the definition of points and fees in existing TILA section 103(aa)(4). Specifically, the Board proposed to amend § 226.32(b)(1) and (2) and to revise and add corresponding commentary. *See* 76 FR 27390, 27398–06, 27481–82, 27487–27489 (May 11, 2011).[39]

The Board's 2011 ATR Proposal transferred to the Bureau on July 21, 2011 and its comment period closed on July 22, 2011. As noted above in part I.E, ''Other Rulemakings,'' the Bureau is in the process of finalizing the Board's 2011 ATR Proposal, including evaluating comments received concerning the Board's proposed amendments to § 226.32(b)(1) and (2). The Bureau believes that issuing multiple, concurrent proposals to implement the Dodd-Frank Act's amendments to existing TILA section 103(aa)(4) concerning the definition of points and fees for high-cost mortgages and qualified mortgages has the potential to cause confusion. In order to minimize such confusion and for ease of reference, the Bureau republishes in this proposal the Board's proposed amendments to § 226.32(b)(1) and (2) substantially as set forth in the Board's 2011 ATR Proposal, with adjustments only to reflect the application of the proposed provisions to high-cost mortgages, to coordinate this proposal with the other mortgage-related rulemakings currently underway at the Bureau, and to conform terminology to existing Regulation Z provisions. These adjustments are noted in the section-by-section analysis to proposed § 1026.32(b)(1) and (2), below. The Bureau is particularly interested in comments concerning newly-proposed language and the application of the definitions in proposed § 1026.32(b)(1) and (2) to the high-cost mortgage context.

Limitation to Closed-End Mortgage Loans

The proposal proposes to amend existing § 1026.32(b)(1) to clarify that the charges listed in proposed § 1026.32(b)(1)(i) through (vi) are the charges that must be included in the points and fees calculation for closed-end mortgage loans. Proposed § 1026.32(b)(3) sets forth a separate definition of points and fees for home equity lines of credit. *See* the section-by-section analysis to proposed § 1026.32(b)(3), below.

32(b)(1)(i)

Existing TILA section 103(aa)(4)(A), 15 U.S.C. 1602(aa)(4)(A), provides that points and fees include all items included in the finance charge, except interest or the time-price differential. Existing TILA section 103(aa)(4)(A) is implemented in § 1026.32(b)(1)(i). The Dodd-Frank Act did not amend TILA section 103(aa)(4)(A), but the Board nevertheless proposed certain clarifying revisions to § 226.32(b)(1)(i) in its 2011 ATR Proposal. *See* 76 FR 27390, 27400, 27481, 27487–88 (May 11, 2011). In addition, the Board proposed to implement in new § 226.32(b)(1)(i)(B) new TILA section 103(bb)(1)(C), which excludes from the calculation of points and fees certain types and amounts of third-party insurance premiums. *Id.* at 27400–02, 27481, 27487–88. The Bureau's proposed § 1026.32(b)(1)(i) and comments 32(b)(1)(i)–1 through –4 republish the Board's proposed revisions and additions, with the changes discussed below.

Changes To Accommodate the Bureau's Proposed Simpler, More Inclusive Finance Charge

As noted above in part I.E, ''Other Rulemakings,'' and the section-by-section analysis to proposed § 1026.32(a)(1)(i), the Bureau's 2012 TILA–RESPA Proposal proposes to adopt a simpler, more inclusive definition of the finance charge for closed-end transactions secured by real property or a dwelling, similar to what the Board proposed in its 2009 Closed-End Proposal. *See* 74 FR 43232, 43241–45 (Aug. 26, 2009). Under the Bureau's 2012 TILA–RESPA Proposal, the following fees that currently are specifically excluded from the finance charge would be included for closed-end credit transactions secured by real property or a dwelling: Closing agent charges, application fees charged to all applicants for credit (whether or not credit was extended), taxes or fees required by law and paid to public officials relating to security interests, premiums for insurance obtained in lieu of perfecting a security interest, taxes imposed as a condition of recording the instruments securing the evidence of indebtedness, and various real-estate related fees. Because the definition of

[36] The Dodd-Frank Act renumbered TILA section 103(aa)(1)(B) concerning points and fees for high-cost mortgages as 103(bb)(1)(A)(ii). However, the Dodd-Frank Act did not amend existing TILA section 103(aa)(4) (the provision that defines points and fees) to reflect this new numbering. Thus, as amended, TILA section 103(bb)(4) provides that ''[f]or purposes of paragraph (1)(B), points and fees shall include * * *'' Amended TILA section 103(bb)(1)(B), however, concerns the calculation of the annual percentage rate. To give meaning to the statute as amended, the Bureau interprets amended TILA section 103(bb)(4) as cross-referencing the points and fees trigger in amended TILA section 103(bb)(1)(A)(ii)(II).

[37] TILA section 129C(b)(2)(A)(vii).

[38] More specifically, TILA section 129C(b)(2)(C)(i) cross-references the definition of points and fees in 15 U.S.C. 1602(aa)(4), which the Dodd-Frank Act renumbered as TILA section 103(bb)(4), 15 U.S.C. 1602(bb)(4).

[39] The Board noted that its proposed amendments to § 1026.32(b)(1) and (2) were limited to the definition of points and fees and that the 2011 ATR Proposal was not proposing to implement any of the other high-cost mortgage amendments in TILA. *See id.* at 27398. Thus, the Board noted that, if its ATR Proposal were finalized prior to the rule on high-cost mortgages, the calculation of the points and fees threshold for qualified mortgages and high-cost mortgages would be different, but the baseline definition of points and fees would be the same. *See id.* at 27399. For example, the Board's 2011 ATR Proposal did not propose to implement the statutory changes to the points and fees threshold for high-cost mortgages that exclude from the threshold calculation ''bona fide third-party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator'' and that permit creditors to exclude certain ''bona fide discount points,'' even though the Board proposed to implement identical provisions in the Dodd-Frank Act defining the points and fees threshold for qualified mortgages. *See* 76 FR 27390, 27398–99.

points and fees includes, as its starting point, all items included in the finance charge, a potential consequence of adopting the more inclusive test for determining the finance charge is that more loans might exceed HOEPA's points and fees threshold. *See* the Board's 2009 Closed-End Proposal, 74 FR 43232, 43241–45 (Aug. 26, 2009).[40]

In its 2010 Mortgage Proposal, 75 FR 58539 (Sept. 24, 2010), the Board analyzed the potential impact that a more inclusive definition of finance charge might have on, among other things, the number of loans meeting HOEPA's thresholds. After having reviewed comments received and other market data obtained following publication of the 2009 Closed-End Proposal, the Board in its 2010 Mortgage Proposal proposed to preserve existing HOEPA coverage, notwithstanding the proposed use of the more inclusive finance charge for disclosure purposes. *See id.* at 58637–38. For example, the Board proposed to retain the existing exclusion of certain reasonable third-party charges in the points and fees definition for purposes of determining HOEPA coverage, even though such fees would be included in the expanded finance charge for disclosure purposes. *See id.*

For the reasons set forth in the Board's 2010 Mortgage Proposal, the Bureau acknowledges that the more inclusive finance charge proposed in the Bureau's 2012 TILA–RESPA Proposal could expand the number of closed-end transactions subject to HOEPA because of points and fees. As noted above, very few HOEPA loans are made, in part because assignees of HOEPA loans are subject to all claims and defenses a consumer could bring against the original creditor. The Bureau therefore seeks comment on whether to amend § 1026.32(b)(1)(i) and comment 32(b)(1)(i)–1 as proposed to prevent expansion of the types of charges included within the definition of points and fees for HOEPA coverage in the event that the Bureau adopts the more inclusive finance charge.

Accordingly, as a starting point, proposed § 1026.32(b)(1)(i) includes in points and fees for closed-end mortgage loans all items included in the finance charge under § 1026.4(a) and (b). However, proposed § 1026.32(b)(1)(i) then expressly excludes from closed-end points and fees the charges that would be brought into points and fees solely by operation of the more inclusive finance charge. Specifically, proposed § 1026.32(b)(1)(i) expressly excludes from points and fees the items described in § 1026.4(c) through (e), except to the extent that other paragraphs of § 1026.32(b)(1) specifically require those items to be included in points and fees. Proposed § 1026.32(b)(1)(i)(A) and (B) retain the statutory exclusion from points and fees of interest or the time-price differential and premiums or other charges for certain mortgage insurance. Proposed comment 32(b)(1)(i)–1 clarifies that charges must be included in points and fees only if they are included in the finance charge under § 1026.4(a) and (b), without reference to any other provision of § 1026.4.

The Bureau does not believe that this proposed amendment to the definition of points and fees for closed-end mortgage loans constitutes an adjustment or exemption requiring the Bureau to invoke its statutory authority under TILA section 105(a). Rather, it is the more inclusive finance charge proposal itself that amounts to an adjustment to TILA. Preserving Regulation Z's existing treatment of points and fees for HOEPA coverage purposes would merely keep the regulation consistent with TILA in that regard, in spite of the adjustment to the finance charge that would be made for disclosure purposes. Indeed, the Bureau notes that the proposed amendment is consistent with the Dodd-Frank Act, which amended TILA section 103(aa)(1) to exclude ''bona fide third party charges'' from the points and fees calculation. The Bureau seeks comment on its proposed approach. The Bureau is considering and seeks comment on whether, if the proposed amendment were not adopted, the general exclusion of bona fide third-party charges from points and fees (*see* the section-by-section analysis to proposed § 1026.32(b)(5), below) would be sufficient to retain the current scope of points and fees coverage for high-cost mortgages notwithstanding the Bureau's proposed more inclusive finance charge.

Proposed Amendments for Clarity and Consistency

The Bureau proposes several additional changes to § 1026.32(b)(1)(i) and comments 32(b)(1)(i)–1 through –4 for clarity and consistency. Among other non-substantive changes, the Bureau replaces a reference to loan ''closing'' with a reference to ''consummation'' in proposed § 1026.32(b)(1)(i)(B)(*3*) for consistency with Regulation Z. In addition, proposed comment 32(b)(1)(i)–3.iii, which sets forth an example to clarify the types and amounts of upfront private mortgage insurance premiums that are excluded from points and fees under § 1026.32(b)(1)(i)(B), is amended to replace a reference to ''covered transaction'' proposed in the Board's 2011 ATR Proposal with a reference to ''closed-end mortgage loan.'' This change reflects the fact that the phrase ''covered transaction'' refers to those categories of closed-end transactions covered by the Board's 2011 ATR Proposal, and it is not a defined term for purposes of § 1026.32.[41]

32(b)(1)(ii)

Section 1431(c) of the Dodd-Frank Act amended TILA section 103(aa)(4)(B), 15 U.S.C. 1602(aa)(4)(B), to provide that points and fees includes ''all compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction.'' This language replaced the phrase ''all compensation paid to mortgage brokers.'' The Board's 2011 ATR Proposal proposed to implement this statutory change by revising existing § 226.32(b)(1)(ii) and comment 32(b)(1)(ii)–1 and by adding new comments 32(b)(1)(ii)–2 and –3. *See* 76 FR 27390, 27402–04, 27481, 27488–89 (May 11, 2011). The Bureau republishes the Board's proposed revisions and additions substantially as proposed in the Board's 2011 ATR Proposal. However, the Bureau's proposed comment 32(b)(1)(ii)–2 replaces references to ''covered transaction(s)'' with references to ''closed-end mortgage loan(s)'' for the reasons discussed in the section-by-section analysis to proposed § 1026.32(b)(1)(i), above. The Bureau's proposal makes certain other, non-substantive edits for clarity and consistency.

32(b)(1)(iii)

TILA section 103(aa)(4)(C), 15 U.S.C. 1602(aa)(4)(C), provides that points and fees include certain real estate-related charges listed in TILA section 106(e), 15 U.S.C. 1605(e). TILA section 103(aa)(4)(C) is implemented in existing § 1026.32(b)(1)(iii). The Dodd-Frank Act did not amend TILA section 103(aa)(4)(C), but the Board nevertheless proposed certain clarifying revisions to

[40] Voluntary credit insurance premiums and voluntary debt cancellation charges or premiums are additional charges that are not currently included in the finance charge, but that would be included for closed-end credit transactions secured by real property or a dwelling under the more inclusive finance charge. Such premiums, however, are already expressly included in points and fees pursuant to § 1026.32(b)(1)(iv).

[41] As discussed in the section-by-section analysis to proposed § 1026.32(b)(3), below, the Bureau does not propose to incorporate the exclusion of mortgage insurance premiums into the definition of points and fees for open-end credit plans.

§ 226.32(b)(1)(iii) in its 2011 ATR Proposal. *See* 76 FR 27390, 27404, 27481, 27489 (May 11, 2011). The Bureau's proposed § 1026.32(b)(1)(iii) and comment 32(b)(1)(iii)–1 republish the Board's proposed revisions and make two other, minor changes. First, proposed § 1026.32(b)(1)(iii) replaces the term ''closing'' as proposed in the Board's 2011 ATR Proposal with the term ''consummation'' for consistency with Regulation Z. Second, proposed comment 32(b)(1)(iii)–1 clarifies that a fee paid by the consumer for an appraisal performed by the creditor must be included in points and fees, but removes the phrase ''even though the fee may be excludable from the finance charge if it is bona fide and reasonable in amount'' to conform with the Bureau's proposed simpler, more inclusive definition of the finance charge. A charge for an appraisal conducted by the creditor would be included in the simpler, more inclusive finance charge even if it is bona fide and reasonable in amount. *See* the section-by-section analysis to proposed § 1026.32(b)(1)(i), above.

32(b)(1)(iv)

Section 1431(c) of the Dodd-Frank Act amended TILA section 103(aa)(4), 15 U.S.C. 1602(aa)(4), to provide that points and fees include certain credit insurance and debt cancellation or suspension coverage premiums payable at or before closing. *See* TILA section 103(bb)(4)(D). In its 2011 ATR Proposal, the Board proposed to amend § 226.32(b)(1)(iv), which already requires certain such charges to be included in points and fees, to reflect the statutory changes under the Dodd-Frank Act. *See* 76 FR 27390, 27404–05, 27481, 27489 (May 11, 2011). The Bureau republishes the Board's proposed revisions and additions to § 226.32(b)(1)(iv) and comment 32(b)(1)(iv)–1, as well as the Board's new proposed comment 32(b)(1)(iv)–2, substantially as proposed in the Board's 2011 ATR Proposal.[42] The Bureau's proposed § 1026.32(b)(1)(iv) and proposed comment 32(b)(1)(iv)–1, however, replace the term ''closing'' with the term ''consummation'' for consistency with existing provisions of Regulation Z. In addition, proposed comment 32(b)(1)(iv)–1 clarifies that credit insurance premiums must be included in points and fees if they are paid at consummation, whether they are paid in cash or, if permitted by applicable law, financed. The Bureau believes the clarifying phrase ''if permitted by applicable law'' is necessary because section 1414 of the Dodd-Frank Act added to TILA new section 129C(d) prohibiting the financing of most types of credit insurance. *See also* the section-by-section analysis to proposed § 1026.32(b)(6), below.

32(b)(1)(v)

Section 1431(c) of the Dodd-Frank Act amended TILA section 103(aa)(4), 15 U.S.C. 1602(aa)(4), to require the inclusion in points and fees of the maximum prepayment fees and penalties which may be charged or collected under the terms of the credit transaction. *See* TILA section 103(bb)(4)(E). The Board's 2011 ATR Proposal proposed to implement this statutory change in new § 226.32(b)(1)(v). *See* 76 FR 27390, 27405, 27481 (May 11, 2011). The Bureau's proposed § 1026.32(b)(1)(v) republishes the Board's proposed § 226.32(b)(1)(v), except that it replaces a cross-reference to the Board's proposed definition of prepayment penalty for qualified mortgages (*i.e.,* the Board's proposed § 226.43(b)(10)) with a cross-reference to the definition of prepayment penalty for closed-end mortgage loans in proposed § 1026.32(b)(8)(i). *See* the section-by-section analysis to proposed § 1026.32(b)(8)(i), below.

32(b)(1)(vi)

Section 1431(c) of the Dodd-Frank Act amended TILA section 103(aa)(4), 15 U.S.C. 1602(aa)(4), to require the inclusion in points and fees of all prepayment fees or penalties that are incurred by the consumer if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor. *See* TILA section 103(bb)(4)(F). The Board's 2011 ATR Proposal proposed to implement this statutory change in new § 226.32(b)(1)(vi). *See* 76 FR 27390, 27405, 27481 (May 11, 2011). The Bureau's proposed § 1026.32(b)(1)(vi) republishes the Board's proposed § 226.32(b)(1)(vi), except that it replaces a cross-reference to the Board's proposed definition of prepayment penalty for qualified mortgages (*i.e.,* the Board's proposed § 226.43(b)(10)) with a cross-reference to the definition of prepayment penalty for closed-end mortgage loans in proposed § 1026.32(b)(8)(i). *See* the section-by-section analysis for proposed § 1026.32(b)(8)(i), below.

32(b)(2)

As noted in the section-by-section analysis to proposed § 1026.32(b)(1)(ii), above, section 1431(c) of the Dodd-Frank Act amended TILA section 103(aa)(4)(B) to replace the term ''mortgage brokers'' with ''mortgage originators.'' *See* TILA section 103(bb)(4)(B). The Board's 2011 ATR Proposal proposed to implement this statutory change in proposed § 226.32(b)(1)(ii) utilizing the term ''loan originator,'' as defined in existing § 1026.36(a)(1), rather than the statutory term ''mortgage originator.'' *See* 76 FR 27390, 27402–04, 27481, 27488–89 (May 11, 2011). In turn, the Board proposed new § 226.32(b)(2) to exclude from points and fees compensation paid to certain categories of persons specifically excluded from the definition of ''mortgage originator'' in amended TILA section 103. *See id.* at 27405–06, 27481. The Bureau's proposed § 1026.32(b)(2) republishes the Board's proposed § 226.32(b)(2), except that the Bureau replaces a reference to ''covered transaction'' with a reference to ''closed-end mortgage loan'' for the reasons set forth in the section-by-section analysis to proposed § 1026.32(b)(1)(i), above.

32(b)(3)

Points and Fees; Open-End Credit Plans

As discussed above in the section-by-section analysis to proposed § 1026.32(a), section 1431(a) of the Dodd-Frank Act amended TILA to provide that a ''high-cost mortgage'' may include an open-end credit plan secured by a consumer's principal dwelling. *See* TILA section 103(bb)(1)(A). Section 1431(c) of the Dodd-Frank Act, in turn, amended TILA by adding new section 103(bb)(5), which specifies how to calculate points and fees for open-end credit plans. Unlike TILA's pre-existing points and fees definition for closed-end mortgage loans, which enumerates six specific categories of items that creditors must include in points and fees, the new open-end points and fees provision simply provides that points and fees for open-end credit plans are calculated by adding ''the total points and fees known at or before closing, including the maximum prepayment penalties that may be charged or collected under the terms of the credit transaction, plus the minimum additional fees the consumer would be required to pay to draw down an

[42] In its 2011 ATR Proposal, the Board did not propose to implement in the definition of points and fees the provision in section 1431(c) of the Dodd-Frank Act that specifies that ''insurance premiums or debt cancellation or suspension fees calculated and paid in full on a monthly basis shall not be considered financed by the creditor.'' The Bureau proposes to implement this provision in proposed § 1026.34(a)(10) prohibiting the financing of points and fees for high-cost mortgages. *See* the section-by-section analysis to proposed § 1026.34(a)(10), below.

amount equal to the total credit line.'' Thus, apart from identifying (1) maximum prepayment penalties and (2) fees to draw down an amount equal to the total credit line, the Dodd-Frank Act did not enumerate the specific items that should be included in ''total points and fees'' for open-end credit plans. For clarity and to facilitate compliance, the Bureau proposes to implement TILA section 103(bb)(5) in § 1026.32(b)(3) by defining points and fees for open-end credit plans to include the following categories of charges: (1) Each item required to be included in points and fees for closed-end mortgages under § 1026.32(b)(1), to the extent applicable in the open-end credit context; (2) certain participation fees that the creditor may impose on a consumer in connection with an open-end credit plan; and (3) the minimum fee the creditor would require the consumer to pay to draw down an amount equal to the total credit line. Each of these items is discussed further below.

32(b)(3)(i)

Proposed § 1026.32(b)(3)(i) provides that all items included in the finance charge under § 1026.4(a) and (b), except interest or the time-price differential, must be included in points and fees for open-end credit plans, to the extent such items are payable at or before account opening. This provision generally mirrors proposed § 1026.32(b)(1)(i) by providing for the inclusion of such charges in points and fees for closed-end mortgage loans, with the following differences.

First, proposed § 1026.32(b)(3)(i) specifies that the items included in the finance charge under § 1026.4(a) and (b) must be included in points and fees only if they are payable at or before account opening. Proposed comment 32(b)(3)(i)–1 clarifies this provision, which is intended to address the potential confusion that could arise from the fact that certain charges included in the finance charge under § 1026.4(a) and (b) are transaction costs unique to open-end credit plans that often may not be known at account opening. Proposed comment 32(b)(3)(i)–1 thus explains that charges payable after the opening of an open-end credit plan, for example minimum monthly finance charges and service charges based either on account activity or inactivity, need not be included in points and fees for open-end credit plans, even if they are included in the finance charge under § 1026.4(a) and (b). Transaction fees generally are also not included in points and fees for open-end credit plans, except as provided in proposed § 1026.32(b)(3)(vi).

Second, in contrast to proposed § 1026.32(b)(1)(i) for closed-end mortgage loans, proposed § 1026.32(b)(3)(i) for open-end credit plans does not include any language to accommodate the simpler, more inclusive definition of the finance charge proposed in the Board's 2009 Closed-End Proposal. *See* the section-by-section analysis to proposed § 1026.32(b)(1)(i), above. Such language currently is unnecessary in the open-end credit context, because the Bureau's 2012 TILA–RESPA Proposal proposes the more inclusive finance charge only for closed-end mortgage loans.

Finally, the Bureau omits from proposed § 1026.32(b)(3)(i) as unnecessary the exclusion from points and fees set forth in amended TILA section 103(bb)(C) for premiums or guaranties for government-provided or certain private mortgage insurance. The statute provides that the specified charges shall be excluded from total points and fees ''under paragraph (4)'' (*i.e.,* TILA section 103(bb)(4), not TILA section 103(bb)(5) concerning open-end points and fees), and the Bureau understands that such insurance products, which are designed to protect creditors originating high loan-to-value ratio loans, are inapplicable in the context of open-end credit plans.

32(b)(3)(ii)

Proposed § 1026.32(b)(3)(ii) provides for the inclusion in points and fees for open-end credit plans of all items listed in § 1026.4(c)(7) (other than amounts held for future payment of taxes) payable at or before account opening. However, any such charge may be excluded from points and fees if it is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor. Proposed § 1026.32(b)(3)(ii) mirrors proposed § 1026.32(b)(1)(iii) concerning the inclusion of such charges in points and fees for closed-end mortgage loans. Proposed comment 32(b)(3)(ii)–1 cross-references proposed comment 32(b)(1)(iii)–1 for guidance concerning the inclusion in points and fees of items listed in § 1026.4(c)(7).

32(b)(3)(iii)

Proposed § 1026.32(b)(3)(iii) provides for the inclusion in points and fees for open-end credit plans of premiums or other charges payable at or before account opening for any credit life, credit disability, credit unemployment, or credit property insurance, or any other life, accident, health, or loss-of-income insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract. Proposed § 1026.32(b)(3)(iii) mirrors proposed § 1026.32(b)(1)(iv) concerning the inclusion of such charges for closed-end mortgage loans. Proposed comment 32(b)(3)(iii)–1 cross-references proposed comments 32(b)(1)(iv)–1 and –2 for guidance concerning the inclusion in points and fees of premiums for credit insurance and debt cancellation or suspension coverage.

32(b)(3)(iv)

Proposed § 1026.32(b)(3)(iv) provides for the inclusion in points and fees for open-end credit plans of the maximum prepayment penalty that may be charged or collected under the terms of the plan. This provision mirrors proposed § 1026.32(b)(1)(v) concerning the inclusion of maximum prepayment penalties for closed-end mortgage loans, except that proposed § 1026.32(b)(3)(iv) cross-references the definition of prepayment penalty provided for open-end credit plans in proposed § 1026.32(b)(8)(ii).

32(b)(3)(v)

Proposed § 1026.32(b)(3)(v) provides for the inclusion in points and fees for open-end credit plans of ''any fees charged for participation in an open-end credit plan, as described in § 1026.4(c)(4), whether assessed on an annual or other periodic basis.'' The Bureau notes that the fees described in § 1026.4(c)(4) (*i.e.,* fees charged for participation in a credit plan) are excluded from the finance charge, and thus are not otherwise included in points and fees under proposed § 1026.32(b)(3)(i). The Bureau believes, however, that such fees should be included in points and fees for open-end credit plans because creditors extending open-end credit plans may commonly impose such fees on consumers as a pre-condition to maintaining access to their plans, and because creditors can calculate at account opening the amount of participation charges that the consumer will be required to pay to maintain access for the life of the plan.

Proposed comment 32(b)(3)(v)–1 thus clarifies that proposed § 1026.32(b)(3)(v) requires the inclusion in points and fees of annual fees or other periodic maintenance fees that the consumer must pay to retain access to the open-end credit plan. The comment clarifies that, for purposes of the points and fees test, a creditor should assume that any annual fee is charged each year for the original term of the plan. Thus, for example, if the terms of a home-equity line of credit with a ten-year term require the consumer to pay an annual fee of $50, the creditor must include $500 in participation fees in its calculation of points and fees.

The Bureau requests comment on the inclusion of fees described in § 1026.4(c)(4) in points and fees for open-end credit plans, including on whether additional guidance is needed concerning how to calculate such fees for plans that do not have a definite plan length.

32(b)(3)(vi)

As noted above, new TILA section 103(bb)(5) specifies, in part, that the calculation of points and fees for open-end credit plans must include ''the minimum additional fees the consumer would be required to pay to draw down an amount equal to the total credit line.'' The Bureau proposes to implement this requirement in § 1026.32(b)(3)(vi). Specifically, proposed § 1026.32(b)(3)(vi) provides for inclusion in the calculation of points and fees for open-end credit plans of any transaction fee, including any minimum fee or per-transaction fee, that will be charged for a draw on the credit line. Proposed § 1026.32(b)(3)(vi) clarifies that a transaction fee that is assessed when a consumer draws on the credit line must be included in points and fees whether or not the consumer draws the entire credit line. The Bureau believes that any transaction fee that would be charged for a draw on the credit line would include any transaction fee that would be charged to draw down an amount equal to the total credit line.

The Bureau interprets the requirement in amended TILA section 103(bb)(5) to include the ''minimum additional fees'' that will be imposed on the consumer to draw an amount of credit equal to the total credit line as requiring creditors to assume that a consumer will make at least one such draw during the term of the credit plan. The Bureau recognizes that creditors will not know at account opening how many times (if ever) a consumer will draw the entire amount of the credit line. For clarity and ease of compliance, the Bureau interprets the statute to require the creditor to assume one such draw. Proposed comment 32(b)(3)(vi)–1 clarifies this requirement by providing the following example: if the terms of the open-end credit plan permit the creditor to charge a $10 transaction fee each time the consumer draws on the credit line, the creditor must include one $10 charge in the points and fees calculation. The Bureau solicits comment on the requirement to include in points and fees the charge assessed for one draw of the total credit line and on whether additional guidance is needed in the case of an open-end credit plan that sets a maximum amount per draw.

Proposed comment 32(b)(3)(vi)–2 clarifies that, if the terms of the open-end credit plan permit a consumer to draw on the credit line using either a variable-rate feature or a fixed-rate feature, proposed § 1026.32(b)(3)(vi) requires the creditor to use the terms applicable to the variable-rate feature for determining the transaction fee that must be included in the points and fees calculation.

Compensation Paid to Originators of Open-End Credit Plans

The Bureau does not at this time propose to include in the calculation of points and fees for open-end credit plans compensation paid to originators of open-end plans.

As discussed above in the section-by-section analysis to proposed § 1026.32(b)(1)(ii), section 1431(c) of the Dodd-Frank Act amended TILA section 103(aa)(4)(B) to require mortgage originator compensation to be included in the existing calculation of points and fees. At the same time, however, section 1401 of the Dodd-Frank Act amended TILA section 103 to define a ''mortgage originator'' as a person who undertakes specified actions with respect to a ''residential mortgage loan application'' or in connection with a ''residential mortgage loan.'' Section 1401 further defined the term ''residential mortgage loan'' to exclude a consumer credit transaction under an open-end credit plan.

Given that the Dodd-Frank Act does not specify in amended TILA section 103(bb)(5) concerning open-end points and fees that compensation paid to originators of open-end credit plans be included in the calculation of points and fees, the Bureau believes that it is reasonable to conclude that Congress did not intend for such compensation to be included. Accordingly, the Bureau is not proposing at this time to include in the calculation of points and fees for open-end credit plans compensation paid to originators of open-end credit plans. The Bureau believes that any incentive to evade the closed-end, high-cost mortgage points and fees threshold by structuring a transaction as an open-end credit plan can be addressed through the prohibition in TILA against structuring a transaction as an open-end credit plan to evade HOEPA. *See* TILA section 129(r). *See also* the section-by-section analysis to proposed § 1026.34(b), below.

The Bureau notes that amended TILA section 103(bb)(4)(G) grants the Bureau authority to include in points and fees such other charges that it determines to be appropriate. The Bureau thus requests comment on the proposed definition of points and fees for open-end credit plans, including on whether any additional fees should be included in the definition. In particular, the Bureau requests comment on whether compensation paid to originators should be included in the calculation of points and fees from open-end credit plans. The Bureau recognizes that neither TILA nor Regulation Z currently addresses compensation paid to originators of open-end credit plans and accordingly requests comment on the operational issues that would be entailed in tracking such compensation for inclusion in the points and fees calculation. The Bureau also requests comment on whether the guidance and examples set forth in proposed § 1026.32(b)(1)(ii) and comments 32(b)(1)(ii)–1 and –2 concerning closed-end loan originator compensation would provide sufficient guidance to creditors in open-end credit plans, or whether additional or different guidance would be of assistance in the open-end context.

32(b)(4)

Proposed § 1026.32(b)(4) excludes from points and fees for open-end credit plans any charge that would otherwise be included if the creditor waives the charge at or before account opening, unless the creditor may assess the charge after account opening. Proposed comment 32(b)(4)–1 provides an example of the rule. The example explains that a creditor that waives a $300 processing fee at the opening of an open-end credit plan with a ten-year term must include the $300 fee in points and fees if the terms of the open-end credit plan provide that the consumer must repay the fee if the consumer terminates the plan, *e.g.,* within three years after account opening. The waived processing fee is a prepayment penalty as defined in proposed § 1026.32(b)(8)(ii), because it is a fee that the creditor may impose and retain if the consumer terminates the plan prior to the expiration of its term. Proposed § 1026.32(b)(4) thus provides that the creditor must include the waived processing fee in points and fees under § 1026.32(b)(3)(iv).

Proposed § 1026.32(b)(5)(i)–(ii) implements amended TILA section 103(bb)(1)(A)(ii) and (ee), which excludes two categories of charges from points and fees for purposes of determining whether a transaction is a high-cost mortgage. The charges, discussed in turn below, are: (1) any bona fide third-party charge not retained by the creditor, loan originator, or an affiliate of either, subject to the limitation that premiums for private mortgage insurance must sometimes be included in points and fees for closed-end mortgage loans pursuant to proposed § 1026.32(b)(1)(i)(B); and (2) up to one or two bona fide discount points paid by the consumer in connection with the transaction, but only if certain conditions are met. As noted below, the bona fide third-party charge and bona fide discount point exclusions from points and fees for high-cost mortgages under TILA section 103(bb)(1)(A)(ii) and (ee) are nearly identical to the exclusion of such charges from points and fees for qualified mortgages under TILA section 129C(b)(2)(C)(i) through (iv). For consistency and to ease compliance, proposed § 1026.32(b)(5)(i)–(ii) thus largely mirrors proposed § 226.43(e)(3)(ii)(A) through (C) concerning bona fide third-party charges and bona fide discount points as set forth in the Board's 2011 ATR Proposal. As discussed above in the section-by-section analysis to proposed § 1026.32(b)(1) and (2), the Bureau currently is reviewing comments received in connection with the Board's 2011 ATR Proposal. In response to such comments, the Bureau may revise and provide further guidance concerning certain aspects of the Board's proposed § 226.43(e)(3)(ii)(A) through (C).

32(b)(5)(i) Bona Fide Third-Party Charges

Proposed § 1026.32(b)(5)(i) excludes from the points and fees calculation any bona fide third-party charge not retained by the creditor, loan originator, or an affiliate of either, unless the charge is a premium for private mortgage insurance that is required to be included in points and fees for closed-end mortgage loans under proposed § 1026.32(b)(1)(i)(B). Proposed § 1026.32(b)(5)(i) implements TILA section 103(bb)(1)(A)(ii), which specifically excludes from the high-cost mortgage points and fees calculation any bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator. 15 U.S.C. 1602(bb)(1)(A)(ii).

For consistency and to facilitate compliance, proposed § 1026.32(b)(5)(i) mirrors, with one exception, proposed § 226.43(e)(3)(ii)(A) as set forth in the Board's 2011 ATR Proposal. The Board's proposed § 226.43(e)(3)(ii)(A) would implement TILA section 129C(b)(2)(C), which excludes the same categories of bona fide third party charges from points and fees for qualified mortgages that TILA section 103(bb)(1)(A)(ii) excludes from points and fees for high-cost mortgages. *See* 76 FR 27390, 27465 (May 11, 2011). *See also* 15 U.S.C. 1602(bb) and 15 U.S.C. 1639c(b)(2)(C) (providing for the exclusion of identical bona fide third-party charges from total points and fees in the high-cost mortgage and qualified mortgage contexts).

Proposed § 1026.32(b)(5)(i) differs from the Board's proposed § 226.43(e)(3)(ii)(A) in one minor respect to address the application of HOEPA to open-end credit plans. Specifically, amended TILA section 103(bb)(1)(A)(ii) excludes from points and fees for high-cost mortgages bona fide third-party charges ''not retained by the creditor, mortgage originator,'' or an affiliate of either. However, as discussed above in the section-by-section analysis to proposed § 1026.32(b)(3), originators of open-end credit plans are not ''mortgage originators'' as that term is defined in amended TILA section 103. Thus, TILA section 103(bb)(1)(A)(ii) does not by its terms exclude from points and fees bona fide third-party charges not retained by an originator of an open-end credit plan. The Bureau believes bona fide third-party charges not retained by a loan originator should be excluded from points and fees whether the originator is originating a closed-end mortgage or an open-end credit plan. Accordingly, proposed § 1026.32(b)(5)(i) states that, for purposes of § 1026.32(b)(5)(i), the term ''loan originator'' means a loan originator as that term is defined in § 1026.36(a)(1) (*i.e.,* in general, an originator of any consumer credit transaction) and notwithstanding § 1026.36(f), which otherwise limits the term ''loan originator'' to closed-end transactions.[43]

Proposed comment 32(b)(5)(i)–1 clarifies that § 1026.36(a)(1) and comment 36(a)–1 provide additional guidance concerning the meaning of the term ''loan originator'' for purposes of § 1026.32(b)(5)(i). Proposed comment 32(b)(5)(i)–2 provides an example for purposes of determining whether a charge may be excluded from points and fees as a bona fide third-party charge. Proposed comment 32(b)(5)(i)–2 assumes that, prior to loan consummation, a creditor pays $400 for an appraisal conducted by a third-party not affiliated with the creditor. At consummation, the creditor charges the consumer $400 and retains that amount as reimbursement for the fee that the creditor paid to the third-party appraiser. For purposes of determining whether the transaction is a high-cost mortgage, the creditor need not include in points and fees the $400 that it retains as reimbursement.

Private Mortgage Insurance Premiums

As discussed above in the section-by-section analysis to proposed § 1026.32(b)(1)(i)(B), the Dodd-Frank Act amended TILA to add section 103(bb)(1)(C)(ii), which excludes private mortgage insurance premiums that meet certain conditions from the closed-end points and fees calculation for high-cost mortgages. For consistency with TILA section 103(bb)(1)(C)(ii), as implemented by proposed § 1026.32(b)(1)(i)(B), the Bureau proposes to implement TILA's general exclusion of bona fide third-party charges from the points and fees calculation for high-cost mortgages in proposed § 1026.32(b)(5)(i) with the caveat that certain private mortgage insurance premiums must be included in points and fees for closed-end mortgage loans as set forth in proposed § 1026.32(b)(1)(i)(B). *See also* the Board's 2011 ATR Proposal, 76 FR 27390, 27465 (May 11, 2011) (proposing the same caveat to bona fide third-party charges for qualified mortgages).

Proposed comment 32(b)(5)(i)–3 addressing private mortgage insurance premiums mirrors proposed comment 43(e)(3)(ii)–2 in the Board's 2011 ATR Proposal, except that proposed comment 32(b)(5)(i)–3 states that it applies for purposes of determining whether a mortgage is a high-cost mortgage, rather than a qualified mortgage. Proposed comment 32(b)(5)(i)–3 also specifies that this approach to private mortgage insurance premiums is relevant only for closed-end transactions, for the reasons discussed in the section-by-section analysis to proposed § 1026.32(b)(1)(i)(B), above.

32(b)(5)(ii) Bona Fide Discount Points

Section 1431(d) of the Dodd-Frank Act added new section 103(dd) to TILA, which permits a creditor to exclude, under certain circumstances, up to two bona fide discount points from the calculation of points and fees for purposes of determining whether a transaction is a high-cost mortgage. Proposed § 1026.32(b)(5)(ii)(A) through (C) implement TILA section 103(dd), with certain clarifications discussed below. The Bureau notes that new TILA section 103(dd) is substantially similar to new TILA section 129C(b)(2)(C)(ii)–(iv), which provides for the exclusion of

[43] Like the Board's proposed § 1026.43(e)(3)(ii), 76 FR 27390, 27465, 27485 (May 11, 2011), the Bureau's proposed § 1026.32(b)(5)(i) uses the term ''loan originator'' rather than ''mortgage originator'' for consistency with Regulation Z.

certain bona fide discount points from points and fees for qualified mortgages, and which the Board's 2011 ATR Proposal proposed to implement in § 226.43(e)(3)(ii)(B) and (C) and § 226.43(e)(3)(iv). *See* 76 FR 27465–67, 27485. Generally, except for the differences noted below, proposed § 1026.32(b)(5)(ii)(A) and (B) concerning the exclusion of up to one or two discount points for high-cost mortgages are consistent with the Board's proposed § 226.43(e)(3)(ii)(B) and (C) for qualified mortgages. Likewise, proposed § 1026.32(b)(5)(ii)(C), which describes how to determine whether a discount point is ''bona fide,'' cross-references proposed § 1026.43(e)(3)(iv) (*i.e.,* the Board's proposed § 226.43(e)(3)(iv)), which describes the same term for qualified mortgages.

Exclusion of Up to Two Bona Fide Discount Points

Proposed § 1026.32(b)(5)(ii)(A)(*1*) and (*2*) implements TILA section 103(dd)(1), which permits a creditor to exclude from the high-cost mortgage points and fees calculation up to two bona fide discount points payable by the consumer in connection with the transaction.

Under proposed § 1026.32(b)(5)(ii)(A)(*1*), a creditor generally may exclude from points and fees up to two bona fide discount points payable by the consumer, provided that the interest rate for the mortgage loan or open-end credit plan without such discount points does not exceed by more than one percentage point the ''average prime offer rate,'' as defined in § 1026.35(a)(2)(ii). Proposed § 1026.32(b)(5)(ii)(A)(*1*) mirrors proposed § 226.43(e)(3)(ii)(B) for qualified mortgages as set forth in the Board's 2011 ATR Proposal. *See* 76 FR at 27465–66, 27485, 27504.

Under proposed § 1026.32(b)(5)(ii)(A)(*2*), a creditor extending a mortgage loan or open-end credit plan secured by personal property may exclude from points and fees up to two bona fide discount points payable by the consumer, provided that the interest rate for the mortgage loan or open-end credit plan without such discount points does not exceed by more than one percentage point the average rate on loans insured under Title I of the National Housing Act (12 U.S.C. 1702 *et seq.*). The Bureau requests comment on whether additional guidance is needed concerning the calculation of the average rate for loans insured under Title I of the National Housing Act.

Exclusion of Up to One Bona Fide Discount Point

Proposed § 1026.32(b)(5)(ii)(B) implements TILA section 103(dd)(2), which permits a creditor to exclude from the high-cost mortgage points and fees calculation up to one bona fide discount point payable by the consumer in connection with the transaction.

Under proposed § 1026.32(b)(5)(ii)(B)(*1*), a creditor generally may exclude from points and fees up to one bona fide discount point payable by the consumer, provided that interest rate for the mortgage loan or open-end credit plan without such discount points does not exceed by more than two percentage points the average prime offer rate, as defined in § 1026.35(a)(2)(ii). Proposed § 1026.32(b)(5)(ii)(B)(*1*) mirrors proposed § 226.43(e)(3)(ii)(C) for qualified mortgages as set forth in the Board's 2011 ATR Proposal. *See* 76 FR at 27465–66, 27485, 27504.

Under proposed § 1026.32(b)(5)(ii)(B)(*2*), a creditor extending a mortgage loan or open-end credit plan secured by personal property may exclude from points and fees up to one bona fide discount point payable by the consumer, provided that interest rate for the mortgage loan or open-end credit plan without such discount points does not exceed by more than two percentage points the average rate on loans insured under Title I of the National Housing Act (12 U.S.C. 1702 *et seq.*). As for proposed § 1026.32(b)(5)(ii)(A)(*2*), the Bureau requests comment on whether additional guidance is needed concerning the calculation of the average rate for loans insured under Title I of the National Housing Act.

Average Prime Offer Rate

Proposed comment 32(b)(5)(ii)–1 clarifies how to determine, for purposes of the bona fide discount point exclusion in proposed § 1026.32(b)(5)(ii)(A)(*1*) and (B)(*1*), whether a transaction's interest rate meets the requirement not to exceed the average prime offer rate by more than one or two percentage points, respectively. Specifically, proposed comment 32(b)(5)(ii)–1 provides that the average prime offer rate for proposed § 1026.32(b)(5)(ii)(A)(*1*) and (B)(*1*) is the average prime offer rate that applies to a comparable transaction as of the date the interest rate for the transaction is set. Proposed comment 32(b)(5)(ii)–1 cross-references proposed comments 32(a)(1)(i)–1 and –2 for closed- and open-end transactions, respectively, for guidance as to determining the applicable average prime offer rate. *See also* the section-by-section analysis to proposed § 1026.32(a)(1)(i), above.

''Bona Fide'' Discount Point

Proposed § 1026.32(b)(5)(ii)(C) cross-references proposed § 1026.43(e)(3)(iv) (proposed § 1026.43(e)(3)(iv) as set forth in the Board's 2011 ATR Proposal) for purposes of determining whether a discount point is ''bona fide'' and excludable from the high-cost mortgage points and fees calculation. *See* 76 FR 27390, 27485 (May 11, 2011). Amended TILA sections 103(dd)(3) and (4) and 129C(b)(2)(C)(iii) and (iv) provide the same methodology for high-cost mortgages and qualified mortgages, respectively, for determining whether a discount point is ''bona fide.'' Thus, under both the Board's proposed § 226.43(e)(3)(iv) for qualified mortgages and the Bureau's proposed § 1026.32(b)(5)(ii) for high-cost mortgages, a discount point is ''bona fide'' if it both (1) reduces the interest rate or time-price differential applicable to transaction based on a calculation that is consistent with established industry practices for determining the amount of reduction in the interest rate or time-price differential appropriate for the amount of discount points paid by the consumer and (2) accounts for the amount of compensation that the creditor can reasonably expect to receive from secondary market investors in return for the transaction. As noted above, the Bureau currently is developing a final rule to implement the Dodd-Frank Act's provisions concerning qualified mortgages, including the provisions relating to bona fide discount points. The Bureau expects to provide further clarification concerning the exclusion of bona fide discount points from points and fees for qualified mortgages when it finalizes the Board's 2011 ATR Proposal. The Bureau will coordinate any such clarification appropriately across the ATR (qualified mortgage) and high-cost mortgage rulemakings.

32(b)(6)

As noted above in the section-by-section analysis to proposed § 1026.32(a)(1)(ii), the Bureau proposes for organizational purposes (1) to move the existing definition of ''total loan amount'' for closed-end mortgage loans from comment 32(a)(1)(ii)–1 to proposed § 1026.32(b)(6)(i), and (2) to move the examples showing how to calculate the total loan amount for closed-end mortgage loans from existing comment 32(a)(1)(ii)–1 to proposed comment 32(b)(6)(i)–1. The Bureau also proposes certain changes to the total loan amount definition and commentary for closed-end mortgage loans, below. Finally, the Bureau proposes to define ''total loan amount'' for open-end credit plans in proposed § 1026.32(b)(6)(ii).

32(b)(6)(i) Closed-End Mortgage Loans

The Bureau proposes to move existing comment 32(a)(1)(ii)–1 concerning calculation of the ''total loan amount'' to proposed § 1026.32(b)(6)(i) and comment 32(b)(6)(i)–1 and to specify that the calculation applies to closed-end mortgage loans. The Bureau also proposes to amend the definition of ''total loan amount'' so that the ''amount financed,'' as calculated pursuant to § 1026.18(b), is no longer the starting point for the total loan amount calculation. The Bureau believes this amendment both streamlines the total loan amount calculation to facilitate compliance and is sensible in light of the more inclusive definition of the finance charge proposed in the Bureau's 2012 TILA–RESPA Proposal. One effect of the proposed more inclusive finance charge generally could be to reduce the ''amount financed'' for many transactions. The Bureau thus proposes no longer to rely on the ''amount financed'' calculation as the starting point for the ''total loan amount'' in HOEPA. The Bureau instead proposes to define ''total loan amount'' as the amount of credit extended at consummation that the consumer is legally obligated to repay, as reflected in the loan contract, less any cost that is both included in points and fees under § 1026.32(b)(1) and financed by the creditor. Proposed comment 32(b)(6)(i)–1 provides an example of the Bureau's proposed ''total loan amount'' calculation.

The Bureau requests comment on the appropriateness of its revised definition of ''total loan amount,'' particularly on whether additional guidance is needed in light of the prohibition against financing of points and fees for high-cost mortgages. Specifically, the Bureau notes that, under this proposal, financed points are relevant for two purposes. First, financed points and fees must be excluded from the total loan amount for purposes of determining whether the closed-end mortgage loan is covered by HOEPA under the points and fees trigger. Second, if a mortgage loan is a high-cost mortgage through operation of any of the HOEPA triggers, the creditor is prohibited from financing points and fees by, for example, including points and fees in the note amount or financing them through a separate note. *See* the section-by-section analysis to proposed § 1026.34(a)(10), below.

Notwithstanding that the proposal bans the financing of points and fees for high-cost mortgages, the Bureau believes that, for purposes of determining HOEPA coverage (and thus whether the ban applies) creditors should be required to deduct from the amount of credit extended to the consumer any points and fees that the creditor would finance if the transaction were not subject to HOEPA.[44] In this way, the percent limit on points and fees for determining HOEPA coverage will be based on the amount of credit extended to the borrower without taking into account any points and fees that would (if permitted) be financed.

The following example illustrates how the provisions concerning financed points and fees in proposed §§ 1026.32(b)(6)(i) and 1026.34(a)(10) would work together. First, assume that, under the terms of the mortgage loan contract, the consumer is legally obligated to repay $50,000. A portion of that amount, $2,450, represents the total amount of points and fees (as defined under proposed § 1026.32(b)(1)) payable in connection with the transaction. If the $2,450 in financed points and fees were not excluded from the total loan amount, then the transaction would fall below the five percent points and fees threshold for high-cost mortgages ($2,450 divided by $50,000 equals 4.9 percent of the total loan amount) and none of HOEPA's protections, including the ban on financing of points and fees, would apply. In contrast, under the Bureau's proposal, the $2,450 in points and fees is deducted from the total amount of credit extended to the consumer to arrive at a total loan amount of $47,550, and the transaction is a high-cost mortgage pursuant to proposed § 1026.32(a)(1)(ii) ($2,450 divided by $47,550 equals 5.15 percent of the total loan amount). Pursuant to proposed § 1026.34(a)(10), then, the creditor would be prohibited from including the points and fees in the note amount, or financing them through a separate note. *See also* proposed comment 34(a)(10)–2.

32(b)(6)(ii) Open-End Credit Plans

Proposed § 1026.32(b)(6)(ii) provides that the ''total loan amount'' for an open-end credit plan is the credit limit for the plan when the account is opened. The Bureau requests comment as to whether additional guidance is needed concerning the ''total loan amount'' for open-end credit plans.

32(b)(7)

The proposal re-numbers existing § 1026.32(b)(2) defining the term ''affiliate'' as proposed § 1026.32(b)(7) for organizational purposes.

32(b)(8)

HOEPA's Current Approach to Prepayment Penalties

Section 1026.32 currently addresses prepayment penalties in § 1026.32(d)(6) and (7). Existing § 1026.32(d)(6) implements existing TILA section 129(c)(1) by defining the term ''prepayment penalty'' for high-cost mortgages as a penalty for paying all or part of the principal before the date on which the principal is due, including by computing a refund of unearned scheduled interest in a manner less favorable than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992. 15 U.S.C. 1639(c)(1). Existing § 1026.32(d)(7) implements TILA section 129(c)(2), 15 U.S.C. 1639(c)(2), by specifying when a creditor may impose a prepayment penalty in connection with a high-cost mortgage. Prior to the Dodd-Frank Act, the substantive limitations on prepayment penalties in TILA section 129(c)(1) and (2) were the only statutorily-prescribed limitations on prepayment penalties, other than certain disclosure requirements set forth in TILA section 128(a)(11) and (12).[45]

The Dodd-Frank Act's Amendments to TILA Relating to Prepayment Penalties

Sections 1431 and 1432 of the Dodd-Frank Act (relating to high-cost mortgages) and section 1414 of the Dodd-Frank Act (relating to qualified mortgages) amended TILA to further restrict and, in many cases, prohibit the imposition of prepayment penalties in dwelling-secured credit transactions. The Dodd-Frank Act restricted prepayment penalties in three main ways.

Qualified Mortgages. First, as the Board discussed in its 2011 ATR Proposal, the Dodd-Frank Act added new TILA section 129C(c)(1) relating to qualified mortgages, which generally provides that a covered transaction (*i.e.,* in general, a closed-end, dwelling-secured credit transaction) may include a prepayment penalty only if it: (1) Is a qualified mortgage (as the Board defined that term in its proposed § 226.43(e)(2) or (f)), (2) has an APR that cannot increase after consummation, and (3) is

[44] Calculating the total loan amount by deducting financed points and fees from the amount of credit extended to the consumer is consistent with the existing total loan amount calculation in current comment 32(a)(1)(ii)–1.

[45] Current § 1026.35(b)(2) restricts prepayment penalties for ''higher-priced'' mortgage loans in much the same way that current § 1026.32(d)(6) and (7) restricts such penalties for HOEPA loans.

not a higher-priced mortgage loan as defined in § 1026.35(a). The Board proposed to implement TILA section 129C(c)(1) in § 226.43(g)(1). *See* 76 FR 27390, 27486 (May 11, 2011). Under new TILA section 129C(c)(3), moreover, even loans that meet the statutorily prescribed criteria (*i.e.,* fixed-rate, non-higher-priced qualified mortgages) may not include prepayment penalties that exceed three percent, two percent, and one percent of the amount prepaid during the first, second, and third years following consummation, respectively (or any prepayment penalty after the third year following consummation). The Board proposed to implement TILA section 129C(c)(3) in § 226.43(g)(2). *See id.*

High-Cost Mortgage Prepayment Penalty Trigger and Prohibition. Second, as discussed above in the section-by-section analysis to proposed § 1026.32(a)(1)(iii), amended TILA section 103(bb)(1)(A)(iii) provides that any closed- or open-end consumer credit transaction secured by a consumer's principal dwelling (other than a reverse mortgage transaction) with a prepayment penalty in excess of two percent of the amount prepaid or payable more than 36 months after consummation or account opening is a high-cost mortgage subject to §§ 1026.32 and 1026.34. Under amended TILA section 129(c)(1), in turn, high-cost mortgages are prohibited from having a prepayment penalty.

Prepayment Penalty Inclusion in Points and Fees. Third, both qualified mortgages and most closed-end mortgage loans and open-end credit plans secured by a consumer's principal dwelling are subject to additional limitations on prepayment penalties through the inclusion of prepayment penalties in the definition of points and fees for qualified mortgages and high-cost mortgages. *See* the section-by-section analysis to proposed § 1026.32(b)(1)(v)–(vi) and (3)(iv) above. *See also* 76 FR 27390, 27474–75 (May 11, 2011) (discussing the inclusion of prepayment penalties in the points and fees calculation for qualified mortgages pursuant to TILA section 129C(b)(2)(A)(vii) and noting that most qualified mortgage transactions may not have total points and fees that exceed three percent of the total loan amount).

Taken together, the Dodd-Frank Act's amendments to TILA relating to prepayment penalties mean that most closed-end, dwelling-secured transactions (1) May provide for a prepayment penalty only if they are fixed-rate, qualified mortgages that are neither high-cost nor higher-priced under §§ 1026.32 and 1026.35; (2) may not, even if permitted to provide for a prepayment penalty, charge the penalty more than three years following consummation or in an amount that exceeds two percent of the amount prepaid;[46] and (3) may be required to limit any penalty even further to comply with the points and fees limitations for qualified mortgages, or to stay below the points and fees trigger for high-cost mortgages. In the open-end credit context, no open-end credit plan secured by a consumer's principal dwelling may provide for a prepayment penalty more than 3 years following account opening or in an amount that exceeds two percent of the initial credit limit under the plan.

The Board's Proposals Relating to Prepayment Penalties

In its 2009 Closed-End Proposal, the Board proposed to establish a new § 226.38(a)(5) for disclosure of prepayment penalties for closed-end mortgage transactions. *See* 74 FR 43232, 43334, 43413 (Aug. 26, 2009). In proposed comment 38(a)(5)–2, the Board stated that examples of prepayment penalties include charges determined by treating the loan balance as outstanding for a period after prepayment in full and applying the interest rate to such ''balance,'' a minimum finance charge in a simple-interest transaction, and charges that a creditor waives unless the consumer prepays the obligation. In addition, the Board's proposed comment 38(a)(5)–3 listed loan guarantee fees and fees imposed for preparing a payoff statement or other documents in connection with the prepayment as examples of charges that are not prepayment penalties. The Board's 2010 Mortgage Proposal included amendments to existing comment 18(k)(1)–1 and proposed comment 38(a)(5)–2 stating that prepayment penalties include ''interest'' charges after prepayment in full even if the charge results from interest accrual amortization used for other payments in the transaction. *See* 75 FR 58539, 58756, 58781 (Sept. 24, 2010).[47]

The Board's 2011 ATR Proposal proposed to implement the Dodd-Frank Act's prepayment penalty-related amendments to TILA for qualified mortgages by defining ''prepayment penalty'' for most closed-end, dwelling-secured transactions in new § 226.43(b)(10), and by cross-referencing proposed § 226.43(b)(10) in the proposed joint definition of points and fees for qualified and high-cost mortgages in § 226.32(b)(1)(v) and (vi). *See* 76 FR 27390, 27481–82 (May 11, 2011). The definition of prepayment penalty proposed in the Board's 2011 ATR Proposal differed from the Board's prior proposals and current guidance in the following respects: (1) Proposed § 226.43(b)(10) defined prepayment penalty with reference to a payment of ''all or part of'' the principal in a transaction covered by the provision, while § 1026.18(k) and associated commentary and the Board's 2009 Closed-End Proposal and 2010 Mortgage Proposal referred to payment ''in full,'' (2) the examples provided omitted reference to a minimum finance charge and loan guarantee fees,[48] and (3) proposed § 226.43(b)(10) did not incorporate, and the Board's 2011 ATR Proposal did not otherwise address, the language in § 1026.18(k)(2) and associated commentary regarding disclosure of a rebate of a precomputed finance charge, or the language in § 1026.32(b)(6) and associated commentary concerning prepayment penalties for high-cost mortgages.

[46] New TILA section 129C(c)(3) limits prepayment penalties for fixed-rate, non-higher-priced qualified mortgages to three percent, two percent, and one percent of the amount prepaid during the first, second, and third years following consummation, respectively. However, amended TILA sections 103(bb)(1)(A)(iii) and 129(c)(1) for high-cost mortgages effectively prohibit prepayment penalties in excess of two percent of the amount prepaid at any time following consummation for most credit transactions secured by a consumer's principal dwelling by providing that HOEPA protections (including a ban on prepayment penalties) apply to mortgage loans with prepayment penalties that exceed two percent of the amount prepaid. In order to comply with both the high-cost mortgage provisions and the qualified mortgage provisions, creditors originating most closed-end mortgage loans secured by a consumer's principal dwelling would need to limit the prepayment penalty on the transaction to (1) No more than two percent of the amount prepaid during the first and second years following consummation, (2) no more than one percent of the amount prepaid during the third year following consummation, and (3) zero thereafter.

[47] The preamble to the Board's 2010 Mortgage Proposal explained that the proposed revisions to current Regulation Z commentary and the proposed comment 38(a)(5) from the Board's 2009 Closed-End Proposal regarding interest accrual amortization were in response to concerns about the application of prepayment penalties to certain Federal Housing Administration (FHA) and other loans (*i.e.,* when a consumer prepays an FHA loan in full, the consumer must pay interest through the end of the month in which prepayment is made).

[48] The preamble to the Board's 2011 ATR Proposal addressed why the Board chose to omit these two items. The Board reasoned that a minimum finance charge need not be included as an example of a prepayment penalty because such a charge typically is imposed with open-end, rather than closed-end, transactions. The Board stated that loan guarantee fees are not prepayment penalties because they are not charges imposed for paying all or part of a loan's principal before the date on which the principal is due. *See* 76 FR 27390, 27416 (May 11, 2011).

The Bureau's Proposal

To provide guidance as to the meaning of ''prepayment penalty'' for § 1026.32 that is consistent with the definition proposed in the Bureau's 2012 TILA–RESPA Proposal (which itself draws from the definitions proposed in the Board's 2009 Closed-End Proposal, 2010 Mortgage Proposal, and 2011 ATR Proposal), as well as to provide guidance in the context of open-end credit plans, the Bureau proposes new § 1026.32(b)(8) to define the term ''prepayment penalty'' for purposes of § 1026.32.

32(b)(8)(i)

Prepayment Penalty; Closed-End Mortgage Loans

Consistent with TILA section 129(c)(1), existing § 1026.32(d)(6), and the Board's proposed § 226.43(b)(10) for qualified mortgages, proposed § 1026.32(b)(8)(i) provides that, for a closed-end mortgage loan, a ''prepayment penalty'' means a charge imposed for paying all or part of the transaction's principal before the date on which the principal is due.

Proposed comment 32(b)(8)–1.i through –1.iv gives the following examples of prepayment penalties: (1) A charge determined by treating the loan balance as outstanding for a period of time after prepayment in full and applying the interest rate to such ''balance,'' even if the charge results from interest accrual amortization used for other payments in the transaction under the terms of the loan contract; (2) a fee, such as an origination or other loan closing cost, that is waived by the creditor on the condition that the consumer does not prepay the loan; (3) a minimum finance charge in a simple interest transaction; and (4) computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d). Proposed comment 32(b)(8)–1.i further clarifies that ''interest accrual amortization'' refers to the method by which the amount of interest due for each period (*e.g.,* month) in a transaction's term is determined and notes, for example, that ''monthly interest accrual amortization'' treats each payment as made on the scheduled, monthly due date even if it is actually paid early or late (until the expiration of any grace period). The proposed comment also provides an example where a prepayment penalty of $1,000 is imposed because a full month's interest of $3,000 is charged even though only $2,000 in interest was earned in the month during which the consumer prepaid.

Proposed comment 32(b)(8)–3.i through –3.ii clarifies that a prepayment penalty does not include: (1) Fees imposed for preparing and providing documents when a loan is paid in full, or when an open-end credit plan is terminated, if the fees apply whether or not the loan is prepaid or the plan is terminated prior to the expiration of its term, such as a loan payoff statement, a reconveyance document, or another document releasing the creditor's security interest in the dwelling that secures the loan; or (2) loan guarantee fees.

The definition of prepayment penalty in proposed § 1026.32(b)(8)(i) and comments 32(b)(8)–1 and 32(b)(8)–3.i and .ii substantially incorporates the definitions of and guidance on prepayment penalties from the Board's 2009 Closed-End Proposal, 2010 Mortgage Proposal, and 2011 ATR Proposal and, as necessary, reconciles their differences. For example, the Bureau is proposing to incorporate the language from the Board's 2009 Closed-End Proposal and 2010 Mortgage Proposal but omitted in the Board's 2011 ATR Proposal listing a minimum finance charge as an example of a prepayment penalty and stating that loan guarantee fees are not prepayment penalties, because similar language is found in longstanding Regulation Z commentary. Based on the differing approaches taken by the Board in its recent mortgage proposals, however, the Bureau seeks comment on whether a minimum finance charge should be listed as an example of a prepayment penalty and whether loan guarantee fees should be excluded from the definition of prepayment penalty.

The Bureau expects to coordinate the definition of prepayment penalty in proposed § 1026.32(b)(8)(i) with the definitions in the Bureau's other pending rulemakings mandated by the Dodd-Frank Act concerning ability-to-repay, TILA–RESPA mortgage disclosure integration, and mortgage servicing. To the extent consistent with consumer protection objectives, the Bureau believes that adopting a consistent definition of ''prepayment penalty'' across its various pending rulemakings affecting closed-end mortgages will facilitate compliance.

32(b)(8)(ii)

Prepayment Penalties; Open-End Credit Plans

Proposed § 1026.32(b)(8)(ii) defines the term ''prepayment penalty'' for open-end credit plans. Specifically, proposed § 1026.32(b)(8)(ii) provides that, in connection with an open-end credit plan, the term ''prepayment penalty'' means any fee that may be imposed by the creditor if the consumer terminates the plan prior to the expiration of its term.

Proposed comment 32(b)(8)–2 clarifies that, for an open-end credit plan, the term ''prepayment penalty'' includes any charge imposed if the consumer terminates the plan prior to the expiration of its term, including, for example, if the consumer terminates the plan in connection with obtaining a new loan or plan with the current holder of the existing plan, a servicer acting on behalf of the current holder, or an affiliate of either. Proposed comment 32(b)(8)–2 further clarifies that the term ''prepayment penalty'' includes a waived closing cost that must be repaid if the consumer terminates the plan prior to the end of its term, except that the repayment of waived bona fide third-party charges if the consumer terminates the credit plan within 36 months after account opening is not considered a prepayment penalty. The Bureau's proposal provides for a threshold of 36 months to clarify that, if the terms of an open-end credit plan permit a creditor to charge a consumer for waived third-part closing costs when, for example, the consumer terminates the plan in year nine of a ten-year plan, such charges would be considered prepayment penalties and would cause the open-end credit plan to be classified as a high-cost mortgage. The Bureau believes that the 36-month time limit is consistent both with the prepayment penalty trigger and with industry practice in the open-end credit context.

The Bureau notes that the proposal distinguishes the inclusion of waived closing costs in the open- and closed-end credit contexts. In the open-end credit context, the Bureau's proposal provides that waived third-party closing costs that must be repaid if the consumer terminates the open-end credit plan sooner than three years after account opening are not considered prepayment penalties for purposes of triggering HOEPA coverage, whereas such charges would be considered prepayment penalties for closed-end mortgage loans. The Bureau believes that a different treatment of such charges is an appropriate use of its authority under TILA section 105(a) to prescribe regulations that contain such differentiations as are necessary to facilitate compliance with the regulation. Specifically, the Bureau understands that, unlike for closed-end mortgage loans, waived closing costs are a common feature of open-end credit plans and, in addition, that such plans with waived closing costs are beneficial to consumers because they lower the cost of opening an account. The Bureau also understands that, in the case of an open-end credit plan, a waived third-party closing cost would only be recouped by the creditor if the consumer terminated the plan in its entirety within three years after account opening. This is in contrast to a closed-end mortgage loan, where a creditor potentially could provide that even a partial prepayment of the principal balance triggers a requirement to repay waived closing costs.

Proposed comment 32(b)(8)–3.iii specifies that, in the case of an open-end transaction, the term ''prepayment penalty'' does not include fees that the creditor may impose on the consumer to maintain the open-end credit plan, when an event has occurred that otherwise would permit the creditor to terminate and accelerate the plan. The exclusion from prepayment penalties of fees that a creditor in an open-end transaction may impose in lieu of terminating and accelerating a plan mirrors the exclusion of such fees as prepayment penalties required to be disclosed to the consumer as proposed in the Board's 2009 Open-End Proposal. *See* 74 FR 43428, 43481 (Aug. 26, 2009).

The Bureau requests comment on its proposed definition of ''prepayment penalty'' for open-end credit plans and on whether any additional charges should be included in or excluded from the definition.

32(c) Disclosures

TILA section 129(a) requires additional disclosures for high-cost mortgages, and these requirements are implemented in § 1026.32(c). The Bureau proposes to amend § 1026.32(c) to provide clarification and further guidance on the application of these disclosure requirements to open-end credit plans.

The Bureau proposes comment 32(c)(2)–1 to clarify how to disclose the annual percentage rate for an open-end high-cost mortgage. Specifically, proposed comment 32(c)(2)–1 clarifies that creditors must comply with § 1026.6(a)(1). In addition, the proposed comment states that if the transaction offers a fixed-rate for a period of time, such as a discounted initial interest rate, § 1026.32(c)(2) requires a creditor to disclose the annual percentage rate of the fixed-rate discounted initial interest rate, and the rate that would apply when the feature expires.

The Bureau proposes to clarify § 1026.32(c)(3), which requires disclosure of the regular payment and the amount of any balloon payment. Balloon payments generally are no longer permitted for high-cost mortgages, except in certain narrow circumstances, as discussed below. Proposed § 1026.32(c)(3)(i) incorporates the requirement in current § 1026.32(c)(3) for closed-end mortgage loans and clarifies that the balloon payment disclosure is required to the extent a balloon payment is specifically permitted under § 1026.32(d)(1).

For open-end credit plans, a creditor may not be able to provide a disclosure on the ''regular'' payment applicable to the plan because the regular monthly (or other periodic) payment will depend on factors that will not be known at the time the disclosure is required, such as the amount of the extension(s) of credit on the line and the rate applicable at the time of the draw or the time of the payment. In order to facilitate compliance and to provide consumers with meaningful disclosures, the Bureau proposes § 1026.32(c)(3)(ii) to require creditors to disclose an example of a minimum periodic payment for open-end high-cost mortgages. Accordingly, proposed § 1026.32(c)(3)(ii)(A) provides that for open-end credit plans, a creditor must disclose payment examples showing the first minimum periodic payment for the draw period, and if applicable, any repayment period and the balance outstanding at the beginning of any repayment period. Furthermore, this example must be must be based on the following assumptions: (1) The consumer borrows the full credit line, as disclosed in § 1026.32(c)(5)(B) at account opening and does not obtain any additional extensions of credit; (2) the consumer makes only minimum periodic payments during the draw period and any repayment period; and (3) the annual percentage rate used to calculate the sample payments will remain the same during the draw period and any repayment period. Proposed § 1026.32(c)(3)(ii)(A)(3) further requires that the creditor provide the minimum periodic payment example based on the annual percentage rate for the plan, as described in § 1026.32(c)(2), except that if an introductory annual percentage rate applies, the creditor must use the rate that would otherwise apply to the plan after the introductory rate expires.

As discussed in detail below, the Bureau is proposing § 1026.32(d)(1)(iii) to provide an exemption to the prohibition on balloon payments for certain open-end credit plans. Accordingly, to the extent permitted under § 1026.32(d)(1), proposed § 1026.32(c)(3)(ii)(B) requires disclosure of that fact and the amount of the balloon payment based on the assumptions described in § 1026.32(c)(3)(ii)(A).

To reduce potential consumer confusion, proposed § 1026.32(c)(3)(ii)(C) requires that a creditor provide a statement explaining the assumptions upon which the § 1026.32(c)(3)(ii)(A) payment examples are based. Furthermore, for the same reason, proposed § 1026.32(c)(3)(ii)(D) requires a statement that the examples are not the consumer's actual payments and that the consumer's actual periodic payments will depend on the amount the consumer has borrowed and interest rate applicable to that period. The Bureau believes that without such statements, consumers could misunderstand the minimum payment examples. However, the Bureau solicits comment on these proposed statements and whether other language would be appropriate and beneficial to consumer.

The Bureau proposes to revise comment 32(c)(3)–1 to reflect the expanded statutory restriction on balloon payments and to clarify that to the extent a balloon payment is permitted under § 1026.32(d)(1), the balloon payment must be disclosed under § 1026.32(c)(3)(i). In addition, the Bureau proposes to renumber current comment 32(c)(3)–1 as proposed comment 32(c)(3)(i)–1 for organizational purposes.

In order to provide additional guidance on the application of § 1026.32(c)(4) to open-end credit plans, the Bureau proposes to revise comment 32(c)(4)–1. For an open-end credit plan, proposed comment 32(c)(4)–1 provides that the disclosure of the maximum monthly payment, as required under § 1026.32(c)(4), must be based on the following assumptions: (1) The consumer borrows the full credit line at account opening with no additional extensions of credit; (2) the consumer makes only minimum periodic payments during the draw period and any repayment period; and (3) the maximum annual percentage rate that may apply under the payment plan, as required by § 1026.30, applies to the plan at account opening. Although actual payments on the plan may depend on various factors, such as the amount of the draw and the rate applicable at that time, the Bureau believes this approach is consistent with existing guidance to calculate the ''worst-case'' payment example.

The Bureau proposes to amend § 1026.32(c)(5) to clarify the disclosure requirements for open-end credit plans. The Bureau notes that the amount borrowed can be ascertained in a closed-end mortgage loan but typically is not known at account opening for an open-end credit plan. Specifically, proposed § 1026.32(c)(5)(ii) provides that for open-end transactions, a creditor must disclose the credit limit applicable to the plan. Because HELOCs are open-end (revolving) lines of credit, the amount borrowed depends on the amount drawn on the plan at any time. Thus, the Bureau believes that disclosing the credit limit is a more appropriate and meaningful disclosure to the consumer than the total amount borrowed. The Bureau also proposes technical revisions to the existing requirements for closed-end mortgage loans under § 1026.32(c)(5) and to the guidance under comment 32(c)(5)–1.

32(d) Limitations

32(d)(1)

The Dodd-Frank Act amended the restrictions on balloon payments under TILA section 129(e). Specifically, amended TILA section 129(e) provides that no high-cost mortgage may contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments, except when the payment schedule is adjusted to the seasonal or irregular income of the consumer. The Bureau is proposing two alternatives in proposed § 1026.32(d)(1)(i) to implement the balloon payment restriction under amended TILA section 129(e). Under Alternative 1, proposed § 1026.32(d)(1)(i) incorporates the statutory language and defines balloon payment as a scheduled payment that is more than twice as large as the average of regular periodic payments. Under Alternative 2, the Bureau mirrors Regulation Z's existing definition of ''balloon payment'' in § 1026.18(s)(5)(i). Accordingly, proposed § 1026.32(d)(1)(i) provides that a balloon payment is ''a payment schedule that is more than two times a regular periodic payment.'' This definition is similar to the statutory definition under the Dodd-Frank Act, except that it uses as its benchmark any regular periodic payment, rather than the average of earlier scheduled payments.

Because the existing regulatory definition is narrower than the statutory definition, the Bureau believes that a payment that is twice any one regular periodic payment would be equal to or less than a payment that is twice the average of earlier scheduled payments. The Bureau notes that the range of scheduled payment amounts under Alternative 2 is more limited and defined. For example, if the regular periodic payment on a high-cost mortgage is $200, a payment of greater than $400 would constitute a balloon payment. Under Alternative 1, however, the balloon payment amount could be greater than $400 if, for example, the regular periodic payments were increased by $100 each year. Under Alternative 1, the amount constituting a balloon payment could increase with the incremental increase of the average of earlier scheduled payments.

The Bureau proposes Alternative 2 pursuant to its authority under TILA section 129(p)(1). The Bureau may exempt specific mortgage products or categories of mortgages from certain prohibitions under TILA section 129 if the Bureau finds that the exemption is in the interest of the borrowing public and will apply only to products that maintain and strengthen home ownership and equity protection. The Bureau believes that under Alternative 2, consumers would have a better understanding of the highest possible regular periodic payment in a repayment schedule and may experience less ''payment shock'' as a result. Therefore, the Bureau believes that Alternative 2 would better protect consumers and be in their interest. In addition, the Bureau believes that the definition of balloon payment under Alternative 2 would facilitate and simplify compliance by providing creditors with a single definition within Regulation Z and alleviating the need to average earlier scheduled payments. The Bureau notes that a similar adjustment is proposed in the 2012 TILA–RESPA Proposal.

The Bureau solicits comment on both alternatives. Under either alternative, a high-cost mortgage generally must provide for fully amortizing payments. Therefore, for similar reasons as stated in the Board's 2011 ATR Proposal, *see* 76 FR 27390, 27455–56 (May 11, 2011), the Bureau solicits comment on whether the difference in wording between the statutory definition and the existing regulatory definition, as a practical matter, would yield a significant difference in what constitutes a ''balloon payment'' in the high-cost mortgage context.

Proposed comment 32(d)(1)(i)–1 provides further guidance on the application of § 1026.32(d)(1)(i) under both proposed alternatives. Specifically, the Bureau proposes clarifying that for purposes of open-end transactions, the term ''regular periodic payment'' or ''periodic payment'' means the required minimum periodic payment.

The Bureau proposes to revise § 1026.32(d)(1)(ii) consistent with the statutory exception under amended TILA section 129(e). Accordingly, proposed § 1026.32(d)(1)(ii) provides an exception to the balloon payment restrictions under § 1026.32(d)(1)(i) if the payment schedule is adjusted to the seasonal or irregular income of the consumer.

The Bureau is proposing to exercise its authority pursuant to TILA section 129(p)(1) to provide an exception to the balloon payment restrictions for HELOCs with a repayment period. The Bureau understands that HELOC plans may have a draw period, or borrowing period, during which a consumer may obtain funds and a repayment period during which no further draws may be taken and the consumer is required to pay the balance on the account. Depending on the payment terms applicable to the draw period and the repayment period, an increase in scheduled payments that occurs as a result of the transition to the repayment period could be considered a balloon payment under a literal reading of TILA section 129(e). In most cases, the balloon payment restrictions would generally require that the payment schedule during the draw period be fully amortizing in order to avoid a balloon payment. However, the Bureau understands that some HELOC plans offer flexible payment features during the draw period. For example, some HELOC plans offer a payment plan where a consumer would only be required to pay interest during the draw period or offer a fixed-rate or -term feature. Therefore, pursuant to TILA section 129(p)(1), the Bureau believes that it is appropriate to provide creditors and consumers with flexibility during the draw period of a high-cost HELOC plan and that the continued availability of certain product features would be beneficial to consumers.

Accordingly, the Bureau is proposing § 1026.32(d)(1)(iii) to provide that if the terms of an open-end transaction provide for any repayment period during which no further draws may be taken, the balloon payment limitations in § 1026.32(d)(1)(i) apply only to the payment features within the repayment period. Proposed § 1026.32(d)(1)(iii) also provides that if the terms of an open-end transaction do not provide for any repayment period, the balloon payment limitations apply to the draw period. Proposed comment 32(d)(1)(i)–2 clarifies that if the terms of a high-cost HELOC plan do not provide for any repayment period, then the repayment schedule must fully amortize any outstanding principal balance in the draw period through regular periodic payments. However, the limitation on balloon payments in § 1026.32(d)(1)(i) does not preclude increases in regular periodic payments that result solely from the initial or additional draws on the credit line during the draw period.

Under the Bureau's proposal, a creditor would have to fully amortize the outstanding balance during the draw period if there is no repayment period in order to satisfy the requirements of proposed § 1026.32(d)(1)(i). The Bureau believes that this restriction on a high-cost HELOC plan may curtail the flexibility or availability of products without a fully-amortizing repayment period. For example, a creditor may no longer be able to offer flexible payment features for a plan. The Bureau solicits comment on this aspect of the proposal.

32(d)(6) Prepayment Penalties

As discussed in the section-by-section analysis to proposed § 1026.32(b)(8), above, TILA currently permits prepayment penalties for high-cost mortgages in certain circumstances. In particular, under section TILA 129(c)(2), which is implemented in existing § 1026.32(d)(7), a high-cost mortgage may provide for a prepayment penalty so long as the penalty otherwise is permitted by law and, under the terms of the loan, the penalty does not apply: (1) To a prepayment made more than 24 months after consummation, (2) if the source of the prepayment is a refinancing of the current mortgage by the creditor or an affiliate of the creditor, (3) if the consumer's debt-to-income ratio exceeds fifty percent, or (4) if the amount of the periodic payment of principal or interest (or both) can change during the first four years after consummation of the loan.

Section 1432(a) of the Dodd-Frank Act repealed TILA section 129(c)(2). Thus, prepayment penalties are no longer permitted for high-cost mortgages. The proposal implements this change consistent with the statute by removing and reserving existing § 1026.32(d)(7) and comment 32(d)(7). The proposal also amends existing § 1026.32(d)(6) to clarify that prepayment penalties are a prohibited term for high-cost mortgages. As already discussed, the proposal retains in proposed § 1026.32(b)(8)(i) and proposed comment 32(b)(8)–1.iv the definition of prepayment penalty contained in existing § 1026.32(d)(6) and comment 32(d)(6)–1. *See* the section-by-section analysis to proposed § 1026.32(b)(8)(i), above.

32(d)(8) Acceleration of Debt

The Bureau is proposing a new § 1026.32(d)(8) to implement the prohibition in new section 129(l) of TILA added by section 1433(a) of the Dodd-Frank Act. New section 129(l) of TILA prohibits a high-cost mortgage from containing a provision which permits the creditor to accelerate the loan debt, except when repayment has been accelerated: (1) In response to a default in payment; (2) ''pursuant to a due-on-sale provision''; or (3) ''pursuant to a material violation of some other provision of the loan document unrelated to payment schedule.''

Proposed § 1026.32(d)(8) replaces current § 1026.32(d)(8) which similarly prohibited due-on-demand clauses for high-cost mortgages except in cases of fraud or material misrepresentation in connection with the loan, a consumer's failure to meet the repayment terms of the loan agreement for any outstanding balance, or a consumer's action or inaction that adversely affects the creditor's security for the loan or any right of the creditor in such security.

Proposed § 1026.32(d)(8) prohibits an acceleration feature in the loan or open-end credit agreement for a high-cost mortgage unless there is a default in payment under the agreement; the acceleration is pursuant to a due-on-sale clause; or there is a material violation of a provision of the agreement unrelated to the payment schedule. Proposed comments 32(d)(8)(i) and (iii), are similar to the commentary for current § 1026.32(d)(8) and provide examples of when acceleration under proposed § 1026.32(d)(8) is permitted. For example, proposed comment 32(d)(8)(i) makes clear that a creditor can accelerate the debt for a default in payment only if the consumer actually fails to make payments that result in a default under the agreement, and not where the consumer fails to make payments in error, such as sending the payment to the wrong office of the creditor. Proposed comment 32(d)(8)(iii) provides examples where the creditor may accelerate the debt based on a material violation, by the consumer, of some other provision of the agreement unrelated to the payment schedule, for example where: (1) The consumer's action or inaction adversely affects the creditor's security for the loan or open-end credit plan, or any right of the creditor in the security; or (2) the consumer violates the agreement through fraud or material misrepresentation in connection with the loan or open-end credit plan. The Bureau seeks comment from the public on possible additional examples where a consumer's material violation of the loan or open-end credit agreement, unrelated to the payment schedule, may warrant acceleration of the debt, and examples of when a consumer's action or inaction does not warrant acceleration.

Section 1026.34 Prohibited Acts or Practices in Connection With High-Cost Mortgages

34(a) Prohibited Acts or Practices for High-Cost Mortgages

The Bureau generally proposes clarifying revisions in proposed § 1026.34(a)(1) through (3) and comment 34(a)(3)–2 for consistency and clarity.

34(a)(4) Repayment Ability for High-Cost Mortgages

TILA section 129(h) generally prohibits a creditor from engaging in a pattern or practice of extending credit to consumers under high-cost mortgages based on the consumers' collateral without regard to the consumers' repayment ability, including the consumers' current and expected income, current obligations, and employment. TILA section 129(h) is implemented in current § 1026.34(a)(4).

The Dodd-Frank Act did not amend TILA section 129(h); however, sections 1411, 1412, and 1414 of Dodd-Frank, among other things, established new ability-to-repay requirements for any residential mortgage loan under new TILA section 129C. Specifically, TILA section 129C expands coverage of the ability-to-repay requirements to any consumer credit transaction secured by a dwelling, except an open-end credit plan, timeshare plan, reverse mortgage, or temporary loan. Residential mortgage loans that are high-cost mortgages, as defined in TILA section 103(bb), will be subject to the ability-to-repay requirements pursuant to TILA section 129C and the Bureau's forthcoming implementing regulations. Therefore, the existing requirements under § 1026.34(a)(4) will no longer be necessary for closed-end mortgage loans. For consistency with TILA section 129C, proposed § 1026.34(a)(4) requires that, in connection with a closed-end high-cost mortgage, a creditor must comply with the repayment ability requirements to be set forth in § 1026.43. The Bureau, however, solicits comment on this aspect of the proposal.

Because open-end credit plans are excluded from coverage of TILA section 129C, the existing ability-to-repay requirements of TILA section 129(h) would still apply to open-end credit plans that are high-cost mortgages. To facilitate compliance, the Bureau proposes to implement TILA section 129(h) as it applies to open-end credit plans in proposed § 1026.34(a)(4) by amending the existing mortgage repayment ability requirements in current § 1026.34(a)(4) to apply specifically to high-cost open-end credit plans. The Bureau notes that in the 2008 Higher-Priced Mortgage Rule, 73 FR 44522 (July 30, 2008), the Board adopted a rule prohibiting individual HOEPA loans or higher-priced mortgage loans from being extended based on the collateral without regard to repayment ability, rather than simply prohibiting a pattern or practice of making extensions based on the collateral without regard to ability to repay. The existing requirements further create a presumption of compliance under certain conditions to provide creditors with more certainty about compliance and to mitigate potential increased litigation risk.

The Board concluded that this regulatory structure was warranted based on the comments the Board received and additional information. Specifically, the Board exercised its authority under TILA section 129(l)(2) (renumbered as TILA section 129(p)(2) by the Dodd-Frank Act) to revise HOEPA's restrictions on HOEPA loans based on a conclusion that the revisions were necessary to prevent unfair and deceptive acts or practices in connection with mortgage loans. *See* 73 FR 44545 (July 30, 2008). In particular, the Board concluded a prohibition on making individual loans without regard for repayment ability was necessary to ensure a remedy for consumers who are given unaffordable loans and to deter irresponsible lending, which injures individual borrowers. The Board determined that imposing the burden to prove ''pattern or practice'' on an individual borrower would leave many borrowers with a lesser remedy, such as those provided under some State laws, or without any remedy, for loans made without regard to repayment ability. The Board further determined that removing this burden would not only improve remedies for individual borrowers, it would also increase deterrence of irresponsible lending. The Board concluded that the structure of its rule would also have advantages for creditors over a ''pattern or practice'' standard, which can create substantial uncertainty and litigation risk. In contrast, the Board rule provided a presumption of compliance where creditors follow the specified requirements for individual loans.

For substantially the same reasons detailed in the 2008 Higher-Priced Mortgage Rule, the Bureau believes that it is necessary and proper to use its authority under TILA section 129(p)(2), as amended, to retain the existing § 1026.34(a)(4) repayment ability requirements with respect to individual open-end credit plans that are high-cost mortgages, with a presumption of compliance as specified in the regulation, rather than merely prohibiting a ''pattern or practice'' of engaging in such transactions without regard for consumers' ability to repay the loans. The Bureau believes that the concerns discussed in the 2008 Higher-Priced Mortgage Rule, such as preventing unfair practices, providing remedies for individual borrowers, and providing more certainty to creditors, are equally applicable to open-end transactions that are high-cost mortgages. Furthermore, in light of the Board's prior determination, the Bureau believes it would not be in creditors' and borrowers' interest if the proposal inserted the ''pattern or practice'' language or removed the presumption of compliance in existing § 1026.34(a)(4). Therefore, the Bureau believes that applying the existing repayment ability requirement in current § 1026.34(a)(4) to open-end high-cost mortgages is necessary to prevent unfair or deceptive acts or practices in connection with mortgage loans. *See* TILA section 129(p)(2).

Accordingly, the Bureau proposes to revise § 1026.34(a)(4) to provide that in connection with an open-end credit plan subject to § 1026.32, a creditor shall not open a plan for a consumer where credit is or will be extended based on the value of the consumer's collateral without regard to the consumer's repayment ability as of account opening, including the consumer's current and reasonably expected income, employment, assets other than the collateral, current obligations, and mortgage-related obligations. In addition, the Bureau generally proposes additional clarifying revisions in proposed § 1026.32(a)(4) and its associated commentary for consistency, clarity, or organizational purposes. The Bureau discusses specific proposed revisions below.

34(a)(4)(iii)(B)

The Bureau proposes to revise current § 1026.34(a)(4)(iii) to clarify the criteria that a creditor must satisfy in order to obtain a presumption of compliance with the repayment ability requirements for high-cost mortgages that are open-end credit plans. In particular, current § 1026.34(a)(4)(iii)(B) requires that a creditor determine the consumer's repayment ability using the largest payment of principal and interest scheduled in the first seven years following consummation and taking into account current obligations and mortgage-related obligations. The Bureau believes that it is appropriate to determine the consumer's repayment ability based on the largest periodic payment amount a consumer would be required to pay under the payment schedule. However, applying this requirement to open-end credit plans requires additional assumptions because a creditor may not know certain factors required to determine the largest required minimum periodic payment, such as the amount a consumer will borrow and the applicable annual percentage rate. Accordingly, the Bureau proposes revised § 1026.34(a)(4)(iii)(B) to require a creditor to determine the consumer's repayment ability taking into account current obligations and mortgage-related obligations as defined in § 1026.34(a)(4)(i), and using the largest required minimum periodic payment. Furthermore, proposed § 1026.34(a)(4)(iii)(B) requires a creditor to determine the largest required minimum periodic payment based on the following assumptions: (1) The consumer borrows the full credit line at account opening with no additional extensions of credit; (2) the consumer makes only required minimum periodic payments during the draw period and any repayment period; and (3) the maximum annual percentage rate that may apply under the payment plan, as required by § 1026.30, applies to the plan at account opening and will apply during the draw period and any repayment period.

The proposal generally incorporates guidance in current comment 34(a)(4), with revisions for clarity and consistency. In addition, the proposal provides revisions for clarification, as discussed in detail below.

Proposed comment 34(a)(4)–1 clarifies that the repayment ability requirement under § 1026.34(a)(4) applies to open-end credit plans subject to § 1026.32; however, the repayment ability provisions of § 1026.43 apply to closed-end credit transactions subject to § 1026.32. Proposed comment 34(a)(4)–3 clarifies the current commentary to conform with proposed revisions and removes the current example. Proposed comment 34(a)(4)(iii)(B)–1 removes the examples in current comment 34(a)(4)(iii)(B) as unnecessary or inapplicable.

34(a)(5) Pre-Loan Counseling

Section 1433(e) of the Dodd-Frank Act added new TILA section 129(u), which creates a counseling requirement for high-cost mortgages. Prior to extending a high-cost mortgage, TILA section 129(u)(1) requires that a creditor receive certification that a consumer has obtained counseling on the advisability of the mortgage from a HUD-approved counselor, or at the discretion of HUD's

Secretary, a State housing finance authority. TILA section 129(u)(3) specifically authorizes the Bureau to prescribe regulations that it determines are appropriate to implement the counseling requirement. In addition to the counseling requirement, TILA section 129(u)(2) requires that a counselor verify prior to certifying that a consumer has received counseling on the advisability of the high-cost mortgage that the consumer has received each statement required by TILA section 129 (implemented in § 1026.32(c)) or each statement required by RESPA with respect to the transaction.[49] The Bureau is exercising its authority under TILA section 129(u)(3) to implement the counseling requirement in a way that ensures that borrowers will receive meaningful counseling, and at the same time that the required counseling can be provided in a manner that minimizes operational challenges.

Background

HUD's housing counseling program is authorized by section 106 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701w and 1701x) and the regulations for the program are found in 24 CFR part 214. This program provides counseling to consumers on a broad array of topics, including seeking, financing, maintaining, renting, and owning a home. According to HUD, the purpose of the program is to provide a broad range of housing counseling services to homeowners and tenants to assist them in improving their housing conditions and in meeting the responsibilities of tenancy or homeownership. Counselors can also help borrowers evaluate whether interest rates may be unreasonably high or repayment terms unaffordable, and thus may help reduce the risk of defaults and foreclosures.

HUD historically has implemented its housing counseling program by approving nonprofit agencies and monitoring and funding government agencies that provide counseling services. HUD has required counseling agencies to meet various program requirements and comply with program policies and regulations to participate in HUD's housing counseling program.[50] While HUD' regulations establish training and experience requirements for the individual counselors employed by the counseling agency, to date, HUD has not approved individual counselors. Pursuant to amendments made to the housing counseling statute by section 1445 of the Dodd-Frank Act, HUD must provide for the certification of individual housing counselors. Section 106(e) of the housing counseling statute (12 U.S.C. 1701x(e)) provides that the standards and procedures for testing and certifying counselors must be established by regulation. The Bureau understands that HUD is undertaking a rulemaking to put these standards and procedures in place for individual counselors.

Pre-loan housing counseling is available generally to prospective borrowers planning to purchase or refinance a home, but Federal and State laws specifically require that it be provided prior to origination of certain types of loans. For example, Federal law requires homeowners to receive counseling before obtaining a reverse mortgage insured by the Federal Housing Administration (FHA), known as a Home Equity Conversion Mortgage (HECM).[51] HUD imposes various requirements related to HECM counseling, including, for example: requiring FHA-approved HECM mortgagees to provide prospective HECM borrowers with contact information for HUD-approved counseling agencies; delineating particular topics that need to be addressed through HECM counseling; and preventing HECM lenders from steering a prospective borrower to a particular counseling agency.[52] The Dodd-Frank Act added similar counseling requirements prior to origination of high-cost mortgages and loans involving negative amortization.

The Bureau's Proposal

The Bureau is proposing to implement the counseling requirement for high-cost mortgages contained in new TILA section 129(u) in proposed § 1026.34(a)(5). Specifically, proposed § 1026.34(a)(5)(i) requires certification of counseling, proposed § 1026.34(a)(5)(ii) addresses the timing of counseling, and proposed § 1026(a)(5)(iv) sets forth requirements for the content of certification. The Bureau's proposal also sets forth several provisions concerning potential conflicts of interest. Proposed § 1026(a)(5)(iii) prohibits the affiliation of the counselor with the creditor, proposed § 1026(a)(5)(v) addresses the payment of counseling fees, and proposed § 1026(a)(5)(vi) prohibits a creditor from steering a consumer to a particular counselor or counseling organization. Finally, proposed § 1026(a)(5)(vii) requires creditors to provide a list of counselors to consumers for whom counseling is required.

34(a)(5)(i) Certification of Counseling Required

The Bureau proposes to implement the requirement of new TILA section 129(u)(1) for certification of counseling in proposed § 1026.34(a)(5)(i). Specifically, proposed § 1026.34(a)(5)(i) provides that a creditor shall not extend a high-cost mortgage unless the creditor receives written certification that the consumer has obtained counseling on the advisability of the mortgage from a HUD-approved counselor, or a State housing finance authority, if permitted by HUD. The Bureau is proposing commentary related to proposed § 1026.34(a)(5)(i) to provide creditors additional compliance guidance.

State Housing Finance Authority

Proposed comment 34(a)(5)–1 clarifies that for the purposes of this section, a State housing finance authority has the same meaning as a ''State housing finance agency'' provided in 24 CFR 214.3 of HUD's regulations implementing the housing counseling program. The Bureau is aware that similar definitions of ''State housing finance authority'' are referenced in new section 128 of TILA and in section 1448 of the Dodd-Frank Act. The Bureau does not believe that the minor differences among these three definitions are substantive, but in order to provide clarity, the Bureau is proposing to use the definition contained in 24 CFR 214.3 because it specifically addresses the ability of State housing finance authorities to provide or fund counseling, either directly or through an affiliate. However, the Bureau requests comment on whether either of the other definitions of a State housing finance authority would be more appropriate in this context.

HUD-Approved Counselor

The Bureau understands that other than for its HECM counseling program,

[49] In addition to the housing counseling requirement for high-cost mortgages, the Dodd-Frank Act now requires housing counseling for first-time borrowers of negative amortization loans. Section 1414(a) of the Dodd-Frank Act requires creditors to receive documentation from a first-time borrower demonstrating that the borrower has received homeownership counseling prior to extending a mortgage to the borrower that may result in negative amortization. This requirement is further discussed in the section-by-section analysis for proposed § 1026.36(k) below.

[50] In addition to the regulations in 24 CFR part 214, HUD's Housing Counseling Program is governed by the provisions of the HUD Housing Counseling Program Handbook 7610.1 and applicable Mortgagee letters.

[51] 12 U.S.C. 1715z–20(d)(2)(B).

[52] *See* HUD Housing Counseling Handbook 7610.1 (05/2010), Chapter 4, *available at http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/7610.1/76101HSGH.pdf* (visited June 16, 2012) (HUD Handbook).

HUD currently approves housing counseling agencies and not individual housing counselors, but will be certifying housing counselors in the future to implement section 1445 of the Dodd-Frank Act. Proposed comment 34(a)(5)(i)–1 clarifies that counselors approved by the Secretary of HUD are homeownership counselors that are certified pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)), or as otherwise determined by the Secretary of HUD. Although the Bureau believes that it is unclear whether any counselors currently would be considered as certified to provide counseling pursuant to section 106(e), the Bureau has alerted HUD to this requirement and continues to consult with HUD to address it. The proposed comment is intended to ensure that the Bureau's regulations do not impede HUD from determining which counselors qualify as HUD-approved and to account for future decisions of HUD with respect to the approval of counselors.[53]

Processing Applications

Proposed comment 34(a)(5)(i)–2 addresses when a creditor may begin to process an application that will result in the extension of a high-cost mortgage. The proposed comment states that prior to receiving certification of counseling, a creditor may not extend a high-cost mortgage, but may engage in other activities, such as processing an application that will result in the extension of a high-cost mortgage (by, for example, ordering an appraisal or title search). The Bureau notes that nothing in the statutory requirement restricts a creditor from processing an application that will result in the extension of a high-cost mortgage prior to obtaining certification of counseling. Moreover, the Bureau believes this interpretation is consistent with the HOEPA counseling requirements as a whole.[54] As discussed in greater detail below in the section-by section analysis addressing the timing of counseling, new TILA section 129(u)(2) requires a counselor to verify the consumer's receipt of *each* statement required by either TILA section 129 (which sets forth the requirement for additional disclosures for high-cost mortgages and is implemented in § 1026.32(c)) or by RESPA prior to issuing certification of counseling. The additional disclosures for high-cost mortgages required under § 1026.32(c) may be provided by the creditor up to three business days prior to consummation of the mortgage. RESPA requires lenders to provide borrowers several disclosures over the course of the mortgage transaction, such as the good faith estimate and the HUD–1. Currently, the HUD–1 may be provided by the creditor at settlement.[55] The Bureau believes that proposed comment 34(a)(5)(i)–2 is necessary to address both the ability of a creditor to provide the required disclosures to the consumer to permit certification of counseling, and to address the likelihood that a creditor may receive the required certification of counseling only days before the consummation of the loan, at the earliest.

The Bureau recognizes that some creditors may wish to receive an indication that a consumer has obtained counseling prior to taking certain steps to continue processing an application. As discussed in the section-by-section analysis for proposed § 1026.34(a)(5)(ii), the Bureau proposes that counseling on the advisability of the loan may occur separately from and prior to the verification of the required disclosures and issuance of the certification of counseling. The Bureau notes that nothing in the proposed regulation or commentary precludes a creditor from requesting evidence from a counselor or consumer that the consumer has received counseling on the advisability of the mortgage before the consumer receives the required high-cost mortgage disclosure or the disclosures required under RESPA and before the counselor has issued certification of the counseling, if the creditor prefers to receive such information prior to taking certain steps to process the high-cost mortgage.

Form of Certification

Proposed comment 34(a)(5)(i)–3 sets forth the methods whereby a certification form may be received by the creditor. The proposed comment clarifies that the written certification of counseling may be received by any method, such as mail, email, or facsimile, so long as the certification is in a retainable form. This would permit creditors to comply with the existing record retention requirements of § 1026.25.

34(a)(5)(ii) Timing of Counseling

Proposed § 1026.34(a)(5)(ii) provides that the required counseling must occur after the consumer receives either the good faith estimate required under RESPA, or the disclosures required under § 1026.40 for open-end credit. The Bureau believes that permitting counseling to occur as early as possible allows consumers more time to consider whether to proceed with a high-cost mortgage and to shop for different mortgage terms. However, the Bureau believes that it is also important that counseling on a high-cost mortgage address the specific loan terms being offered to a consumer. Therefore, requiring the receipt of either of these transaction-specific documents prior to the consumer's receipt of counseling on the advisability of the high-cost mortgage will best ensure that the counseling session can address the specific features of the high-cost mortgage, and that consumers will have an opportunity to ask questions about the loan terms offered. At the same time, given that these documents are provided to the consumer within a few days following application, the Bureau believes that the proposal permits counseling to occur early enough to give consumers sufficient time after counseling to consider whether to proceed with the high-cost mortgage transaction and to consider alternative options.[56]

Despite the verification requirement, the Bureau does not believe that it would make sense to wait until receipt of all disclosures referenced in the statute to permit counseling to occur. Accordingly, nothing in proposed § 1026.34(a)(5)(ii) requires a counselor to wait for the receipt of either the § 1026.32(c) or RESPA disclosures that must be verified prior to certification to provide counseling. As noted above, the § 1026.32(c) high-cost mortgage disclosure is generally required to be provided to the consumer no later than three business days prior to

[53] HUD has stated that it ''may require specialized training or certifications prior to approving certain housing counseling services, such as HECM counseling.'' HUD Handbook at 3–2.

[54] The HECM program requires counseling to occur before a HECM lender may ''process'' an application, meaning that the creditor may accept an application, but ''may not order an appraisal, title search, or an FHA case number or in any other way begin the process of originating a HECM loan'' before the consumer has received counseling. HUD Mortgagee Letter 2004–25 (June 23, 2004). However, the Bureau notes that HECM counselors are not required to verify the receipt of transaction-specific disclosures prior to issuing a certification of counseling.

[55] The Bureau notes that as part of its 2012 TILA–RESPA Proposal, the Bureau is proposing requiring that a settlement disclosure combining the HUD–1 and the final TILA disclosure be provided to a consumer prior to settlement. However, any such requirement likely would not take effect until after the effective date for the requirements for high-cost mortgages.

[56] The Bureau notes that as part of its 2012 TILA–RESPA Proposal, the Bureau is proposing that the good faith estimate required by RESPA be combined with the early TILA disclosure. Proposed § 1026.34(a)(5)(ii) is intended to permit both the current good faith estimate or a future combined disclosure to satisfy the requirement in order to trigger counseling.

consummation of the loan, and one of the disclosures required under RESPA, the HUD–1, currently may be provided to the consumer at settlement. As a practical matter, this means that certification would not happen until right before closing. The Bureau does not believe that delaying counseling pending receipt of all disclosure would benefit consumers, because consumers may not be able to walk away from the transaction or seek better loan terms so late in the process. Accordingly, the Bureau believes that the best approach is a two stage process in which counseling would occur prior to and separately from the receipt of the high-cost mortgage disclosures, after which the counselor would confirm receipt of the disclosures, answer any additional questions from the consumer, and issue the certification. Under these circumstances, a consumer obtaining a high-cost mortgage would have at least two separate contacts with his housing counselor, the first to receive counseling on the advisability of the high-cost mortgage, and the second to verify with the counselor that the consumer has received the applicable disclosure. The Bureau believes that a second contact may be beneficial to consumers because it gives consumers an opportunity to request that the counselor explain the disclosure, and to raise any additional questions or concerns they have, just prior to consummation. The Bureau solicits comment on this aspect of the proposal and whether a second contact helps facilitate compliance with the requirement for certification of counseling.

Proposed comment 34(a)(5)(ii)–1 clarifies that for open-end credit plans subject to § 1026.32, proposed § 1026.34(a)(5)(ii) permits receipt of either the good faith estimate required by RESPA or the disclosures required under § 1026.40 to allow counseling to occur, because 12 CFR 1024.7(h) permits the disclosures required by § 1026.40 to be provided in lieu of a good faith estimate, in the case of an open-end credit plan. The Bureau requests comment on whether it is appropriate to trigger the counseling period based on receipt of the disclosure under § 1026.40 for open-end credit plans.

Proposed comment 34(a)(5)(ii)–2 clarifies that counseling may occur after the consumer receives either an initial good faith estimate or a disclosure under § 1026.40, regardless of whether a revised disclosure is subsequently provided to the consumer.

34(a)(5)(iii) Affiliation Prohibited

Proposed § 1026.34(a)(5)(iii)(A) implements the general prohibition in new TILA section 129(u) that the counseling required for a high-cost mortgage shall not be provided by a counselor who is employed by or affiliated [57] with the creditor extending the high-cost mortgage.

Pursuant to the Bureau's authority under TILA 129(u)(3), proposed § 1026.34(a)(5)(iii)(B) creates an exception from this general prohibition for a State housing finance authority that both extends a high-cost mortgage and provides counseling to a consumer, either itself or through an affiliate, for the same high-cost mortgage transaction. The Bureau understands that State housing finance authorities may make mortgage funds directly available to consumers for purposes such as emergency home repairs through programs for which counseling is required, and that such loans could be classified as high-cost mortgages based on their fees. At the same time, State housing finance authorities may provide direct counseling services or distribute housing counseling funds to affiliated counseling agencies.[58] These programs can provide benefits to consumers, and the Bureau does not believe that allowing a State housing finance authority to both extend such mortgages and counsel the recipients of such mortgages, either itself or through an affiliate, should be prohibited. Accordingly, the Bureau is proposing to allow State housing finance authorities to continue lending activities including extending credit that may be classified as a high-cost mortgage without requiring consumers to obtain counseling from an unaffiliated counseling agency. The Bureau requests comment on the proposed general affiliation prohibition, and the exception provided for State housing finance authorities. The Bureau also requests comment on whether it should consider any other exceptions from the general affiliation prohibition, and specifically on whether nonprofit counseling agencies extend mortgages to consumers that could be classified as high-cost, either themselves or through nonprofit affiliates.

34(a)(5)(iv) Content of Certification

Proposed § 1026.34(a)(5)(iv) sets forth requirements for the certification form that is provided to the creditor. Specifically, proposed § 1026.34(a)(5)(iv) provides that the certification form must include the name(s) of the consumer(s) who obtained counseling; the date(s) of counseling; the name and address of the counselor; a statement that the consumer(s) received counseling on the advisability of the high-cost mortgage based on the terms provided in either the good faith estimate or the disclosures required by § 1026.40; and a statement that the counselor has verified that the consumer(s) received the § 1026.32(c) disclosures or the disclosures required by RESPA with respect to the transaction.

In new comment 34(a)(5)(iv)–1, the Bureau proposes guidance addressing the meaning of the statement that a consumer has received counseling on the advisability of the high-cost mortgage. Specifically, the comment provides that a statement that a consumer has received counseling on the advisability of a high-cost mortgage means that the consumer has received counseling about key terms of the mortgage transaction, as set out in the disclosures provided to the consumer pursuant to RESPA or § 1026.40; the consumer's budget, including the consumer's income, assets, financial obligations, and expenses; and the affordability of the loan for the consumer. The comment further provides some examples of such key terms of the mortgage transaction that are included in the good faith estimate or the disclosures required under § 1026.40 are provided to the consumer. The Bureau believes that requiring counseling on the high-cost mortgage to address terms of the specific high-cost mortgage transaction is consistent with both the language and purpose of the statute. The Bureau also believes that a requirement that counseling address the consumer's budget and the affordability of the loan is appropriate, since these are factors that are relevant to the advisability of a mortgage transaction for the consumer. Moreover, HUD already requires counselors to analyze the financial situation of their clients and establish a household budget for their clients when providing housing counseling.[59]

New comment 34(a)(5)(iv)–1 further explains, however, that a statement that a consumer has received counseling on the advisability of the high-cost

[57] ''Affiliate'' is defined in § 1026.32(b)(2) to mean ''any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*).''

[58] State housing finance agencies ''may provide direct counseling services or subgrant housing counseling funds, or both, to affiliated housing counseling agencies within the SHFA's state.'' 24 CFR 214.3.

[59] HUD Handbook at 3–5.

mortgage does not require the counselor to have made a judgment or determination as to the appropriateness of the loan for the consumer. The proposal provides that such a statement means the counseling has addressed the affordability of the high-cost mortgage for the consumer, not that the counselor is required to have determined whether a specific loan is appropriate for a consumer or whether a consumer is able to repay the loan.[60]

Proposed comment 34(a)(5)(iv)–2 clarifies that a counselor's verification of either the § 1026.32(c) disclosures or the disclosures required by RESPA means that a counselor has confirmed, orally, in writing, or by some other means, receipt of such disclosures with the consumer. The Bureau notes that a counselor's verification of receipt of the applicable disclosures would not indicate that the applicable disclosures provided to the consumer with respect to the transaction were complete, accurate, or properly provided by the creditor.

34(a)(5)(v) Counseling Fees

The Bureau notes that HUD generally permits housing counselors to charge reasonable fees to consumers for counseling services, if the fees do not create a financial hardship for the consumer.[61] For most of its counseling programs, HUD also permits creditors to pay for counseling services, either through a lump sum or on a per case basis, but imposes certain requirements on this funding to minimize potential conflicts of interest. For example, HUD requires that the payment be commensurate with the services provided and be reasonable and customary for the area, the payment not violate the requirements of RESPA, and the payment and the funding relationship be disclosed to the consumer.[62] In the HECM program, however, creditor funding of counseling is prohibited. Due to concerns that counselors may not be independent of creditors and may present biased information to consumers, section 255(d)(2)(B) of the National Housing Act, as amended by section 2122 of the Housing and Economic Recovery Act of 2008, prohibits mortgagees from paying for HECM counseling on behalf of mortgagors.

The Bureau believes that counselor impartiality is essential to ensuring that counseling affords meaningful consumer protection. Without counselor impartiality, the counseling a consumer receives on the advisability of a high-cost mortgage could be of limited value. However, the Bureau is also aware of concerns that housing counseling resources are limited, and that funding for counseling may not be adequate.[63] Prohibiting creditor funding of counseling may make it more difficult for counseling agencies to maintain their programs and provide services so that consumers may meet the legal requirement to receive counseling prior to obtaining a high-cost mortgage. It may also create financial hardships for borrowers of high-cost mortgages who would otherwise be obligated to pay the counseling fee upfront or finance the counseling fee.

Proposed § 1026.34(a)(5)(v) addresses the funding of counseling fees by permitting a creditor to pay the fees of a counselor or counseling organization for high-cost mortgage counseling. However, to address potential conflicts of interest, the Bureau is also proposing that a creditor may not condition the payment of these fees on the consummation of the high-cost mortgage. Moreover, the Bureau is proposing that if the consumer withdraws the application that would result in the extension of a high-cost mortgage after receiving counseling, a creditor may not condition payment of counseling fees on the receipt of certification from the counselor required by proposed § 1026.34(a)(5)(i). If a counseling agency's collection of fees were contingent upon the consummation of the mortgage, or receipt of a certification, a counselor might have an incentive to counsel a consumer to accept a loan that is not in the consumer's best interest. The Bureau recognizes, however, that a creditor may wish to confirm that a counselor has provided services to a consumer, prior to paying a counseling fee. Accordingly, proposed § 1026.34(a)(5)(v) also provides that a creditor may otherwise confirm that a counselor has provided counseling to a consumer prior to paying counseling fees. The Bureau believes that proposed § 1026.34(a)(5)(v) will help preserve the availability of counseling for high-cost mortgages, and at the same time help ensure counselor independence and prevent conflicts of interest that may otherwise arise from creditor funding of counseling.

Proposed comment 34(a)(5)(v)–1 addresses the financing of counseling fees. As noted above, the Bureau intends to preserve the availability of counseling for high-cost mortgages. The proposed comment clarifies that proposed § 1026.34(a)(5)(v) does not prohibit a creditor from financing the counseling fee as part of the mortgage transaction, provided that the fee is a bona fide third party charge as defined by proposed § 1026.32(b)(5)(i). The Bureau believes that the proposal would ensure that several options are available for the payment of any counseling fees, such as a consumer paying the fee directly to the counseling agency, the creditor paying the fee to the counseling agency, or the creditor financing the counseling fee for the consumer.

The Bureau requests comment on whether to adopt additional or alternative restrictions on the compensation of counselors or counseling organizations for high-cost mortgage counseling services.

34(a)(5)(vi) Steering Prohibited

Proposed § 1026.34(a)(5)(vi) provides that a creditor that extends a high-cost mortgage shall not steer or otherwise direct a consumer to choose a particular counselor or counseling organization for the required counseling. The proposal is intended to help preserve counselor independence and prevent conflicts of interest that may arise when creditors refer consumers to particular counselors or counseling organizations. The Bureau notes that under the HECM program, lenders providing HECMs are prohibited from steering consumers to any particular counselor or counseling agency.[64]

The Bureau is similarly proposing to prohibit a creditor that extends high-cost mortgages from steering or otherwise directing a consumer to choose a particular counselor or counseling organization for the required counseling on the high-cost mortgage. The Bureau believes that absent a steering prohibition, a creditor could direct the consumer to a counselor with whom the creditor has a tacit or express agreement to refer customers in exchange for favorable advice on the creditor's products in the counseling session.

Whether steering of this type has occurred is a case-by-case determination and may be difficult to discern. Accordingly, the Bureau is proposing comment 34(a)(5)(vi)–1 and 2, which provide an example of an action that

[60] This is consistent with HUD's guidance related to the certification of counseling provided for the HECM program, which indicates that the issuance of a HECM counseling certificate ''attests ONLY to the fact that the client attended and participated in the required counseling and that the statutorily required counseling for a HECM was provided'' and ''does NOT indicate whether the counseling agency recommends or does not recommend the client for a reverse mortgage.'' HUD Handbook at 4–18 (emphases in original).

[61] 24 CFR 214.313(a), (b).

[62] 24 CFR 214.313(e); 214.303.

[63] *See* 75 FR 58539, 58670 (Sept. 24, 2010).

[64] HUD Handbook at 4–11.

constitutes steering, as well as an example of an action that does not constitute steering. The comment indicates that a creditor is engaged in steering if the creditor repeatedly highlights or otherwise distinguishes the same counselor in the notices it provides to consumers pursuant to proposed § 1026.34(a)(5)(vii), discussed below. In contrast, the comment clarifies that the rule would not prohibit a creditor from providing a consumer with objective information about a counselor, such as fees charged by the counselor.

The Bureau solicits comment on the proposed approach to prevent steering of consumers to particular counselors or counseling organizations. The Bureau also requests comment on the usefulness of the illustrations in proposed comment 34(a)(5)(vi)–1 and 2, and on whether any additional examples of activities that would or would not constitute steering should be included.

34(a)(5)(vii) List of Counselors

In order to help consumers obtain information about resources for counseling, the Bureau is proposing to require creditors to provide consumers who will receive a high-cost mortgage with information about housing counseling resources. Proposed § 1026.34(a)(5)(vii)(A) requires a creditor to provide to a consumer for whom counseling is required, a notice containing the Web site addresses and telephone numbers of the Bureau and HUD for access to information about housing counseling, and a list of five counselors or counseling organizations approved by HUD to provide high-cost mortgage counseling. Proposed § 1026.34(a)(5)(vii)(A) also requires the notice to be provided to the consumer no later than the time when either the RESPA good faith estimate or the disclosure required by § 1026.40 in lieu of a good faith estimate, as applicable, must be provided.

As discussed in the section-by-section analysis of proposed § 1024.20 in Regulation X, the Bureau is proposing that creditors will be required to provide a list of homeownership counselors to mortgage loan applicants generally. In order to facilitate compliance with proposed § 1026.34(a)(5)(vii)(A), the Bureau is proposing a safe harbor in § 1026.34(a)(5)(vii)(B) that provides that a creditor will be deemed to have complied with the requirements of paragraph (a)(5)(vii)(A) if the creditor provides the list of homeownership counselors or organizations required by 12 CFR 1024.20 to a consumer for whom high-cost mortgage counseling is required.

Proposed comment 34(a)(5)(vii)–1 addresses the provision of the list of homeownership counselors in situations in which there may be multiple creditors or multiple consumers involved in a high-cost mortgage transaction by providing a cross-reference to §§ 1026.5(d) and 1026.17(d) and their related commentary, which provide guidance on the provision of disclosures for open- and closed-end credit in such situations.

The Bureau seeks comment on whether the requirement to provide Bureau, HUD, and counselor contact information is necessary or helpful. In addition, the Bureau solicits comment on whether requiring a list of five counseling organizations or counselors is appropriate. The Bureau is aware that several State laws that impose requirements on creditors to provide consumers lists of housing counselors specify a list of five as well.[65] The Bureau is concerned that requiring a list of too few counselors or organizations would provide inadequate options to consumers, and could increase the risk for steering by creditors. The Bureau is also concerned, however, that requiring a list of too many counselors or organizations could be overwhelming to consumers, and could also create compliance challenges in certain geographic regions where there may be fewer counseling organizations.

The Bureau also requests comment on whether the safe harbor proposed in § 1026.24(a)(5)(vii)(B) is appropriate. The Bureau believes that most creditors will comply with the requirement to provide a list of counselors by fulfilling their obligations under 12 CFR 1024.20. However, the Bureau seeks comment on whether some creditors are likely to comply with this requirement independent of their obligations under RESPA, and if so, whether additional guidance would be helpful.

34(a)(6) Recommended Default

The Bureau is proposing a new § 1026.34(a)(6) to implement the prohibition on a creditor recommending a consumer default in connection with a high cost mortgage in new section 129(j) of TILA, which was added by section 1433(a) of the Dodd-Frank Act. Specifically, section 129(j) of TILA prohibits creditors from recommending or encouraging a consumer to default on an ''existing loan or other debt prior to and in connection with the closing or planned closing of a high-cost mortgage that refinances all or any portion of such existing loan.'' The Bureau, however, is proposing to use its authority under section 129(p)(2) of TILA to extend this prohibition in proposed § 1026.34(a)(6) to mortgage brokers, in addition to creditors. Section 129(p)(2) provides that the ''Bureau by regulation * * * shall prohibit acts or practices in connection with—* * *(B) refinancing of mortgage loans the Bureau finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower.''

Section 129(j) prohibits a practice—in connection with a refinancing—that is abusive or ''otherwise not in the interest of the borrower'' whereby a creditor advises a consumer to stop making payments on an existing loan with the creditor knowing that the consumer, by taking that advice, will default on that loan. Following the creditor's advice could therefore leave the consumer with no choice but to accept a high-cost mortgage originated by that creditor, with terms that are likely less favorable to the consumer, in order to refinance, and eliminate the default, on that existing loan. The Bureau believes that it is appropriate to extend the same prohibition against such creditor actions to mortgage brokers who often have significant interaction with consumers with regard to the refinancing of mortgage loans and could have similar incentives to encourage defaults that are not in the interest of the consumer. As stated by the Board in its final rule on higher-priced mortgage loans, 73 FR 44522, 44529 (July 30, 2008), ''[t]he authority granted to the Board under TILA [section 129(p)(2)] is broad * * *. [W]hile HOEPA's statutory restrictions apply only to creditors and only to loan terms or lending practices, [section 129(p)(2)] is not limited to creditors and only to loan terms or lending practices.'' Proposed § 1026.34(a)(6) therefore prohibits this practice for both creditors and mortgage brokers.[66]

[65] *See, e.g.,* NY Real Prop. Acts Law § 1304(2); Ariz. Rev. Stat. § 6–1703(A)(1).

[66] An additional statutory basis for extending this prohibition to mortgage brokers is the authority provided under Section 129(p)(2)(A) of TILA, which requires the Bureau to ''by regulation * * * prohibit acts or practices in connection with—(A) mortgage loans that the Bureau finds to be unfair, deceptive, or designed to evade the provisions of this section.'' Under the practice prohibited by Section 129(j), the borrower may be deceived into stopping payment on their existing loan due to a misrepresentation made by a mortgage broker that to do so will be of no consequence to the borrower—even though the nonpayment will result in a default by that borrower, in effect forcing the borrower to take the high-cost loan offered by the mortgage broker to eliminate that default. This scenario would likely meet the basic elements of a deceptive act or practice: (1) A representation, omission or practice that is likely to mislead the consumer; (2) the consumer acted reasonably in the

Continued

Proposed comment 34(a)(6) clarifies that whether a creditor or mortgage broker ''recommends or encourages'' a consumer to default on an existing loan depends on the relevant facts and circumstances, and provides examples. The Bureau solicits comment on the proposed examples and on additional possible examples where a creditor or mortgage broker may or may not be recommending or encouraging a consumer's default.

34(a)(7) Modification and Deferral Fees

The Bureau is proposing a new § 1026.34(a)(7) to implement the prohibition on modification and deferral fees for high-cost mortgages in new section 129(s) of TILA, as added by section 1433(b) of the Dodd-Frank Act. Specifically, section 129(s) of TILA prohibits a ''creditor, successor in interest, assignee, or any agent'' of these parties from charging a consumer ''any fee to modify, renew, extend, or amend a high-cost mortgage, or to defer any payment due under the terms of such mortgage.'' As proposed, § 1026.34(a)(7) closely follows the statutory language in its implementation of section 129(s).

The Bureau seeks comment on the applicability of the prohibition to a refinancing of a high-cost mortgage, including where the refinancing would place the consumer in a non-high-cost mortgage.

In order to ensure that the Bureau's final rule, within the scope of the Bureau's authorities, effectively protects and benefits consumers, the Bureau also seeks comment, in general, on the specific circumstances, including examples, under which the prohibition on modification and deferral fees is particularly needed to protect consumers. The Bureau further seeks information on the implications of the Bureau's proposal on practices for open-end credit, and specifically on the extent to which fees are charged for a consumer's renewal or extension of the draw period under such open-end credit plans.

34(a)(8) Late Fees

Section 1433(a) of the Dodd-Frank Act added to TILA a new section 129(k) establishing limitations on late fees on high-cost mortgages. The proposal implements these limitations, with minor modifications for clarity, in proposed § 1026.34(a)(8).

New TILA section 129(k)(1) generally provides that any late payment charge in connection with a high-cost mortgage must be specifically permitted by the terms of the loan contract or open-end credit agreement and must not exceed 4 percent of the ''amount of the payment past due.'' No such late payment charge may be imposed more than once with respect to a single late payment, or prior to the expiration of certain statutorily prescribed grace periods (*i.e.,* for transactions in which interest is paid in advance, no fee may be imposed until 30 days after the date the payment is due; for all other transactions, no fee may be imposed until 15 days after the date the payment is due). Proposed § 1026.34(a)(8)(i) and (ii) implements new TILA section 129(k)(1) consistent with the statute.

New TILA section 129(k)(1) does not define the phrase ''amount of the payment past due.'' Proposed comment 34(a)(8)(i)–1 explains that, for purposes of proposed § 1026.34(a)(8)(i), the ''payment past due'' in an open-end credit plan is the required minimum periodic payment, as provided under the terms of the plan. This comment is intended to clarify that, for open-end credit plans, where monthly payment amounts can vary depending on the consumer's use of the credit line, the ''payment past due'' is the required minimum periodic payment that was due immediately prior to the assessment of the late payment fee. The Bureau seeks comment on the appropriateness of this definition. The Bureau also seeks comment on whether additional guidance is needed concerning the meaning of the phrase ''amount of the payment past due'' in the context either of closed-end mortgages or in the case of partial mortgage payments.

34(a)(8)(iii) Multiple Late Charges Assessed on Payment Subsequently Paid

New TILA section 129(k)(2) prohibits the imposition of a late charge in connection with a high-cost mortgage payment, when the only delinquency is attributable to late charges assessed on an earlier payment, and the payment is otherwise a full payment for the applicable period and is paid by its due date or within any applicable grace period. The Bureau proposes to implement this prohibition on late-fee pyramiding consistent with statutory language in § 1026.34(a)(8)(iii). The Bureau notes that proposed § 1026.34(a)(8)(iii) is consistent with § 1026.36(c)(1)(ii), which similarly prohibits late-fee pyramiding by servicers in connection with a consumer credit transaction secured by a consumer's principal dwelling.

Proposed comment 34(a)(8)(iii)–1 illustrates the rule for a high-cost mortgage with regular periodic payments of $500 due by the 1st of each month (or before the expiration of a 15-day grace period), where a consumer makes a $500 payment on August 25 and another $500 payment on September 1. Under proposed § 1026.34(h)(2), it is impermissible to allocate any portion of the payment made on September 1 to cover a $10 late charge assessed on the payment made on August 25, such that the September 1 payment, which otherwise complies with the terms of the loan contract, becomes delinquent. The Bureau requests comment as to whether additional guidance is needed concerning the application of proposed § 1026.34(a)(8)(iii) to open-end credit plans.

34(a)(8)(iv) Failure To Make Required Payment

New TILA section 129(k)(3) provides that, if a past due principal balance exists on a high-cost mortgage as a result of a consumer's failure to make one or more required payments, and if permitted by the terms of the loan contract or open-end credit agreement permit, subsequent payments may be applied first to the past due principal balance (without deduction due to late fees or related fees) until the default is cured. The Bureau generally proposes to implement new TILA section 129(k)(3) consistent with statutory language in § 1026.34(a)(8)(iv), with modifications to clarify the application of the provision to open-end credit plans.

Proposed comment 34(a)(8)(iv)–1 illustrates the rule for a high-cost mortgage with regular periodic payments of $500 due by the 1st of each month (or before the expiration of a 15-day grace period), where a creditor imposes a $10 late fee after a consumer fails to make a timely payment on August 1 (or within the applicable grace period). If the consumer makes no payment until September 1, at which time the consumer makes a $500 payment, then under proposed § 1026.34(a)(8)(iv) (and if permitted by the terms of the loan contract), the creditor may apply that payment to satisfy the missed $500 payment that was due on August 1. The creditor may also impose a $10 late fee for the payment that was due on September 1 (assuming that the consumer makes no other payment prior to the expiration of

circumstances; and (3) the representation, omission, or practice is ''material,'' *i.e.,* is likely to affect the consumer's conduct or decision with regard to a product or service (*i.e.,* the accepting of a high-cost mortgage). *See* Board's final rule on higher-priced mortgage loans, 73 FR 44522, 44528–29 (July 30, 2008), citing to a letter from James C. Miller III, Chairman, Federal Trade Commission to Hon. John D. Dingell, Chairman, H. Comm. on Energy and Commerce (Oct. 14, 1983), in explaining the Board's authority to prohibit unfair and deceptive practices under then Section 129(l)(2) of TILA.

any applicable grace period for the payment that was due on September 1). The Bureau requests comment on this example, including on whether additional guidance is needed concerning the application of proposed § 1026.34(a)(8)(iv) to open-end credit plans.

34(a)(9) Payoff Statements

The Bureau is proposing a new § 1026.34(a)(9) to implement new section 129(t) of TILA, added by section 1433(d) of the Dodd-Frank Act, which: (1) specifically prohibits, with certain exceptions, a creditor or servicer from charging a fee for ''informing or transmitting to any person the balance due to pay off the outstanding balance on a high-cost mortgage''; and (2) requires payoff balances for high-cost mortgages to be provided within five business days of a request by a consumer or a person authorized by the consumer to obtain such information.

Proposed § 1026.34(a)(9), in implementing section 129(t), prohibits a creditor or servicer from charging a fee to a consumer (or a person authorized by the consumer to receive such information) for providing a statement of an outstanding pay off balance due on a high-cost mortgage. It allows, however, as provided by section 129(t), the charging of a processing fee to cover the cost of providing a payoff statement by fax or courier, so long as such fees do not exceed an amount that is comparable to fees imposed for similar services provided in connection with a non-high-cost mortgage. The creditor or servicer is required to make the payoff statement available to a consumer by a method other than by fax or courier and without charge. Prior to charging a fax or courier processing fee, the creditor or servicer is required to disclose to the consumer (or a person authorized by the consumer to receive the consumer's payoff information) that payoff statements are otherwise available for free. The proposal allows a creditor or servicer who has provided payoff statements on a high-cost mortgage to a consumer without charge (other than a processing fee for faxes or courier services) for four times during a calendar year to charge a reasonable fee for providing payoff statements during the remainder of the calendar year. Finally, the proposal requires payoff statements to be provided by a creditor or servicer within five business days after receiving a request by a consumer for such a statement (or a person authorized by the consumer to obtain such information).[67]

The Bureau seeks public comment on what additional guidance may be needed with regard to the fee and timing requirements for the provision of payoff statements for high-cost mortgages under proposed § 1026.34(a)(9).

34(a)(10) Financing of Points and Fees

Section 1433 of the Dodd-Frank Act added to TILA a new section 129(m) prohibiting the direct or indirect financing of (1) any points and fees; and (2) any prepayment penalty payable by the consumer in a refinancing transaction if the creditor or an affiliate of the creditor is the holder of the note being refinanced. The Bureau implements new TILA section 129(m) in proposed § 1026.34(a)(10). Proposed § 1026.34(a)(10) implements all aspects of the statute, except that the Bureau omits from the proposal statutory language concerning the financing of prepayment penalties payable by the consumer in a refinancing transaction. The Bureau notes that such penalties are subsumed in the definition of points and fees for § 1026.32 in proposed § 1026.32(b)(1)(vi) and (3)(iv). Thus, the prohibition against financing of ''points and fees'' necessarily captures the prohibition against financing of prepayment penalties payable in a refinancing transaction if the creditor or an affiliate of the creditor is the holder of the note being refinanced. Consistent with amended TILA section 103(bb)(4)(D) concerning the financing of credit insurance premiums (which new TILA section 129C(d) generally bans), proposed § 1026.34(a)(10) specifies that credit insurance premiums are not considered financed when they are calculated and paid in full on a monthly basis.

[67] *See* current § 1026.36(c)(1)(iii), which prohibits a servicer ''[i]n connection with a consumer credit transaction secured by a consumer's principal dwelling'' from failing ''to provide within a reasonable period of time after receiving a request from the consumer * * * an accurate statement of the total outstanding balance * * *.'' The commentary related to this section states that ''it would be reasonable under most circumstances to provide the statement within five business days of receipt of a consumer's request, and that ''[t]his time frame might be longer, for example, when the servicer is experiencing an unusually high volume of refinancing requests.'' *See also* new Section 129G of TILA added by section 1464 of the Dodd-Frank Act, which sets new timing requirements for the delivery of payoff statements for ''home loans'' but does not specifically address high-cost mortgages. It requires a ''creditor or servicer of a home loan'' to ''send an accurate payoff balance within a reasonable time, but in no case more than 7 business days, after the receipt of a written request for such balance from or on behalf of the borrower.'' The Bureau is implementing this provision in its rulemaking on mortgage servicing.

Proposed comment 34(a)(10)–1 clarifies that ''points and fees'' for proposed § 1026.34(a)(10) means those items that are required to be included in the calculation of points and fees under proposed § 1026.32(b)(1) through (5). Proposed comment 34(a)(10)–1 specifies that, for example, in connection with the extension of credit under a high-cost mortgage, a creditor may finance a fee charged in connection with the consumer's receipt of pre-loan counseling under § 1026.34(a)(5), because such a fee would be excluded from points and fees as a bona fide third-party charge pursuant to proposed § 1026.32(b)(5)(i).

Proposed comment 34(a)(10)–2 provides examples of the prohibition on financing of points and fees. Proposed comment 34(a)(10)–2 explains that a creditor directly or indirectly finances points and fees in connection with a high-cost mortgage if, for example, such points or fees are added to the loan balance or financed through a separate note, if the note is payable to the creditor or to an affiliate of the creditor. In the case of an open-end credit plan, a creditor also finances points and fees if the creditor advances funds from the credit line to cover the fees.

The Bureau requests comment on its proposed implementation of new TILA section 129(m). In particular, the Bureau requests comment on whether § 1026.34(a)(10) should prohibit the financing of charges that are not included in the calculation of points and fees, such as bona-fide third party charges (including certain amounts of private mortgage insurance premiums).

34(b) Prohibited Acts or Practices for Dwelling-Secured Loans; Structuring Loans To Evade High-Cost Mortgage Requirements

The Bureau is proposing a new § 1026.34(b) to implement the prohibition on structuring a loan transaction ''for the purpose and with the intent'' to evade the requirements for high-cost mortgages in new section 129(r) of TILA, which was added by section 1433(b) of the Dodd-Frank Act. Section 129(r) of TILA specifically prohibits a creditor from taking ''any action in connection with a high-cost mortgage'' to: (1) ''structure a loan as an open-end credit plan or another form of loan for the purpose and with the intent of evading the provisions of this title'' which include the high-cost mortgage requirements; or (2) divide a loan into separate parts ''for the purpose and with the intent'' to evade the same provisions.

Prior to the Dodd-Frank Act, open-end credit plans were not within the scope of HOEPA's coverage. Current § 1026.34(b) prohibits structuring a home-secured loan as an open-end plan to evade the requirements of HOEPA. The Dodd-Frank Act amended TILA, however, to include open-end credit plans within the scope of coverage of HOEPA (*see* Section 1431(a) of the Dodd-Frank Act amending section 103(aa) of TILA). Nevertheless, as noted, new section 129(r) prohibits the structuring of what would otherwise be a high-cost mortgage in the form of an open-end credit plan, or another loan form of loan, including dividing the loan into separate parts. Proposed § 1026.34(b) implements this new section by prohibiting the structuring of a transaction that is otherwise a high-cost mortgage as another form of loan, including dividing any loan transaction into separate parts, for the purpose and intent to evade the requirements of HOEPA.

New proposed comment 34(b)–1 provides examples of violations of proposed § 1026.34(b): (1) a loan that has been divided into two separate loans, thereby dividing the points and fees for each loan so that the HOEPA thresholds are not met, with the specific intent to evade the requirements of HOEPA; and (2) the structuring of a high-cost mortgage as an open-end home-equity line of credit that is in fact a closed-end home-equity loan in order to evade the requirement to include loan originator compensation in points and fees for closed-end mortgages under proposed § 1026.32(b)(1).

The proposal re-numbers existing comment 34(b)–1 as comment 34(b)–2 for organizational purposes. Notwithstanding the Dodd-Frank Act's expansion of coverage under HOEPA to include open-end credit plans, the Bureau believes that the guidance set forth in proposed comment 34(b)–2 remains useful for situations where it appears that a closed-end mortgage loan has been structured as an open-end credit plan to evade the closed-end HOEPA triggers. The Bureau proposes certain conforming amendments to proposed comment 34(b)–2, however, for consistency with the Bureau's proposed amendment to the definition of ''total loan amount'' for closed-end mortgage loans. *See* the section-by-section analysis to proposed § 1026.32(b)(6)(i), above.

Section 1026.36 Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling 36(k) Negative Amortization Counseling

Section 1414 of the Dodd-Frank Act added new TILA section 129C(f)(2), which creates a counseling requirement for certain mortgages that may result in negative amortization. TILA section 129C(f)(2) requires creditors to obtain documentation from a first-time borrower sufficient to demonstrate that the borrower has obtained homeownership counseling from a HUD-certified organization or counselor prior to extending credit to the borrower in connection with a closed-end transaction secured by a dwelling (other than a reverse mortgage subject to § 1026.33 or a transaction secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D)) that may result in negative amortization.

Background

The Dodd-Frank Act added two general requirements that creditors must fulfill prior to extending credit to a consumer secured by a dwelling or residential real property that includes a dwelling, other than a reverse mortgage, that may result in negative amortization. The first, found in new TILA 129C(f)(1), requires creditors to provide consumers with a disclosure that, among other things, describes negative amortization and states that negative amortization increases the outstanding principal balance of the account and reduces a consumer's equity in the property. The Bureau is not implementing this requirement in the current proposal, but is planning to implement it as part of its 2012 TILA–RESPA proposal. The second provision, found in new TILA 129C(f)(2), requires creditors to obtain sufficient documentation demonstrating that a first-time borrower has received homeownership counseling from a HUD-certified organization or counselor, prior to extending credit in connection with a residential mortgage loan that may result in negative amortization.

Because of the similarity of the second provision to the counseling requirement for high-cost mortgages, the Bureau is including the implementation of this counseling provision as part of this proposal. General background regarding HUD's housing counseling program can be found in the section-by-section analysis addressing high-cost mortgage counseling above.

The Bureau's Proposal

The Bureau is proposing to implement the counseling requirement for mortgages that may result in negative amortization created by new TILA section 129C(f)(1) in proposed § 1026.36(k). The Bureau is proposing to implement the general counseling requirement for first-time borrowers of mortgages that may result in negative amortization consistent with the statutory language. In addition to the general counseling requirement, pursuant to its authority under TILA section 105(a), the Bureau is proposing to include two additional provisions, the first to address steering by creditors to particular counselors or counseling organizations and the second to require the provision of a list of counselors to consumers. Both of these provisions are consistent with the requirements proposed for high-cost mortgage counseling discussed above. The Bureau notes, however, that it is not including certain additional provisions that the Bureau is proposing for high-cost mortgage counseling, due to differences in statutory language between the two counseling requirements. In addition to seeking comments on the proposed provisions below, the Bureau is also requesting comment on whether it would minimize compliance burdens if the Bureau conformed the counseling requirements for mortgages that may result in negative amortization with the counseling requirements for high-cost mortgages, despite differences in the statutory language.

36(k)(1) Counseling Required

The proposal implements the counseling requirement for negative amortization loans from TILA section 129C(f)(2) through § 1026.36(k)(1). Specifically, proposed § 1026.36(k)(1) provides that a creditor shall not extend credit to a first-time borrower in connection with a residential transaction secured by a dwelling (with exceptions for reverse mortgages and mortgages related to timeshare plans) that may result in negative amortization, unless the creditor receives documentation that the consumer has obtained counseling from a HUD-certified or approved counselor or counseling organization.[68] The Bureau is omitting from the proposal the statutory language limiting the requirement for counseling to a residential mortgage loan that may result in negative amortization ''that is not a qualified mortgage.'' The Bureau believes this language is unnecessary because a qualified mortgage by definition does not permit a payment schedule that results in an increase of

[68] The Bureau proposes to exercise its authority under section 105(a) of TILA and section 1405(b) of the Dodd-Frank Act to allow the list to include, in addition to HUD-certified counselors or organizations required by section 1414(a) of the Dodd-Frank Act, HUD-approved counselors and organizations. The Bureau is proposing to exercise its authority to provide flexibility in order to facilitate the availability of competent housing counselors for placement on the list. *See supra* note 24.

the principal balance under new TILA 129C(b)(2)(A).

Proposed comment 36(k)(1)–1 provides that counseling organizations or counselors certified or approved by HUD to provide the counseling required by proposed § 1026.36(k)(1) include organizations and counselors that are certified or approved by HUD pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) or 24 CFR part 214, unless HUD determines otherwise. This provision would allow currently approved counseling organizations to provide the counseling required by proposed § 1026.36(k)(1), but would be broad enough to account for future changes in HUD policy concerning eligibility to provide the required counseling.

The next proposed comment, comment 36(k)(1)–2, addresses the content of counseling to ensure that the counseling is useful and meaningful to the consumer with regard to the negative amortization feature of the loan. Specifically, comment 36(k)(1)–2 states that the homeownership counseling required pursuant to proposed § 1026.36(k)(1) must include information regarding the risks and consequences of negative amortization. The Bureau believes that a requirement that the counseling address the negative amortization feature of a loan is consistent the purpose of the statute. Absent any discussion of negative amortization, the particular concern reflected in the requirement that first-time borrowers of a mortgage that may result in negative amortization receive homeownership counseling would not necessarily be addressed.

To help facilitate creditor compliance with proposed § 1026.36(k)(1), proposed comment 36(k)(1)–3 provides examples of documentation that demonstrate that a consumer has received the required counseling, such as a certificate, letter, or email from a HUD-certified or approved organization or counselor indicating the consumer has received counseling.

Proposed comment 36(k)(1)–4 addresses when a creditor may begin to process the application for a mortgage that may result in negative amortization. As with high-cost mortgage counseling, the Bureau proposes that prior to receiving documentation of counseling, a creditor may not extend a mortgage to a consumer that may result in negative amortization, but may engage in other activities, such as processing an application for such a mortgage.

The Bureau solicits comment on the proposed general requirement and proposed comments, including whether the proposed guidance is adequate, or whether any additional guidance is needed.

36(k)(2) Definitions

Proposed § 1026(k)(2) provides guidance on the meanings of two key terms used in proposed § 1026.36(k)(1), ‘‘first-time borrower’’ and ‘‘negative amortization.’’ Specifically, proposed § 1026.36(k)(2)(i) provides that a first-time borrower means a consumer who has not previously received a closed-end mortgage loan or open-end credit plan secured by a dwelling. Proposed § 1026.36(k)(2)(ii) provides that negative amortization means a payment schedule with regular periodic payments that cause the principal balance to increase. The Bureau solicits comment on both of these definitions, and whether any changes to these definitions would be appropriate.

36(k)(3) Steering Prohibited

Consistent with its proposal to prohibit steering for high-cost mortgage counseling, the Bureau is proposing in § 1026.36(k)(3) to prohibit a creditor that extends mortgage credit that may result in negative amortization from steering or otherwise directing a consumer to choose a particular counselor or counseling organization for the counseling required by proposed § 1026.36(k). Proposed comment 36(k)(3)–1 references the proposed comments in 34(a)(5)(vi)–1 and –2, which provide an example of an action that constitutes steering, as well as an example of an action that does not constitute steering. The Bureau again solicits comment on whether any additional examples of activities that do or do not constitute steering should be included in the proposed comment.

36(k)(4) List of Counselors

Also consistent with its proposal for high-cost mortgage counseling, the Bureau is proposing in § 1026.36(k)(4)(i) to require a creditor to provide to a consumer for whom counseling is required under proposed § 1026.36(k), a notice containing the Web site addresses and phone numbers of the Bureau and HUD for access to information about homeownership counseling, and a list of five counselors or counseling organizations certified or approved by HUD to provide the required counseling. Proposed § 1026.36(k)(4)(i) also requires the notice to be provided to the consumer no later than the time that the RESPA good faith estimate must be provided. Consistent with the safe harbor proposed for the provision of a list of counselors for consumers required to receive high-cost mortgage counseling, proposed § 1026.36(k)(4)(ii) creates a safe harbor for compliance with the requirement to provide a list of counselors or counseling organizations if creditors provide the list of homeownership counselors or organizations required by 12 CFR 1024.20 to consumers for whom counseling is required under § 1026.36(k).

Proposed comment 36(k)(4)–1 addresses the provision of the list of homeownership counselors in situations in which there may be multiple creditors or multiple consumers involved in a mortgage transaction that may result in negative amortization, consistent with the comment proposed for high-cost mortgage counseling.

The Bureau seeks comment on whether the requirement to provide Bureau, HUD, and counselor contact information is appropriate, and whether it is appropriate to require the list to contain contact information for five counselors or counseling organizations. The Bureau also requests comment on whether the safe harbor for complying with the similar notice obligation under RESPA is appropriate. As with the requirement related to high-cost mortgages, the Bureau believes that most creditors will comply with this requirement to provide a list of counselors by fulfilling their obligations under proposed 12 CFR 1024.20. However, the Bureau again seeks comment on whether some creditors are likely to comply with this requirement independent of their obligations under RESPA, and if so, whether additional guidance would be helpful.

VI. Section 1022(b)(2) Analysis

In developing the proposed rule, the Bureau has considered potential benefits, costs, and impacts, and has consulted or offered to consult with the prudential regulators, the Federal Trade Commission, and HUD, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.[69]

As discussed above, HOEPA currently addresses potentially harmful practices in refinancing and closed-end home-equity mortgage loans. Loans that meet HOEPA’s triggers are subject to restrictions on loan terms as well as to

[69] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Act; and the impact on consumers in rural areas.

special disclosure requirements intended to ensure that borrowers in high-cost mortgages understand the features and implications of such loans. Borrowers with HOEPA loans also have enhanced remedies for violations of the law. The Dodd-Frank Act expanded the types of loans potentially covered by HOEPA to include purchase money mortgage loans and home-equity lines of credit secured by a consumer's principal dwelling. The Dodd-Frank Act also expanded the protections associated with HOEPA loans, including by adding new restrictions on loan terms, extending the requirement that a creditor verify a consumer's ability to repay to a home equity line of credit, and adding a requirement that consumers receive homeownership counseling before high-cost mortgages may be extended.

In addition to the amendments related to high-cost mortgages, the Bureau is also proposing an amendment to Regulation Z and an amendment to Regulation X to implement amendments made by Sections 1414(a) and 1450 of the Dodd-Frank Act to TILA and to RESPA related to homeownership counseling for other types of mortgage loans, respectively.

A. Provisions To Be Analyzed

The discussion below considers the potential benefits, costs, and impacts to consumers and covered persons of key provisions of the proposed rule, as well as certain alternatives proposed, which include:

1. Expanding the types of loans potentially covered by HOEPA to include purchase money mortgage loans and HELOCs;
2. Revising the existing HOEPA APR and points-and-fees triggers to implement Dodd-Frank Act requirements, as well as modifying the APR and points-and-fees calculations to determine whether a closed-end mortgage loan is a HOEPA loan;
3. Adding a prepayment penalty trigger;
4. Adding and revising several restrictions and requirements on loan terms and origination practices for HOEPA loans; [70] and
5. Implementing two separate homeownership counseling-related provisions mandated by the Dodd-Frank Act, namely, requiring lenders to provide a list of homeownership counselors or counseling organizations to applicants for loans covered by RESPA, and requiring creditors to obtain documentation that a first-time borrower of a negatively amortizing loan has received homeownership counseling.

The analysis considers the benefits and costs of certain provisions together where there are substantially similar benefits and costs. For example, expanding the types of loans potentially subject to HOEPA coverage to include purchase money mortgage loans and HELOCs would likely expand the number of high-cost mortgages. The overall impact of this expansion of coverage is generally discussed in the aggregate. In other cases, the analysis considers the costs and benefits of each provision separately.

The analysis also addresses certain alternative provisions in the proposed rule. As discussed in the section-by-section analysis, the Bureau requests comment on these proposed alternatives. The Bureau also seeks comment on the benefits, costs, and impacts of these alternatives for purposes of this analysis.

The analysis relies on data that the Bureau has obtained. The analysis also draws on evidence of the impact of State anti-predatory lending statutes that often place additional or tighter restrictions on mortgage loans than those required by HOEPA prior to the Dodd-Frank Act amendments. However, the Bureau notes that, in some instances, there are limited data that are publicly available with which to quantify the potential costs, benefits, and impacts of the proposed rule. For example, data on the terms and features of HELOCs are more limited and less available than data on closed-end mortgage loans, and the Bureau is not aware of any systematic and representative data on the prevalence of prepayment penalties or on points and fees on either closed-end mortgage loans or HELOCs. Moreover, some potential costs and benefits, such as the value of homeownership counseling, or reduced odds of an unanticipated fee or change in payments, are difficult to quantify. Therefore, the analysis generally provides a qualitative discussion of the benefits, costs, and impacts of the proposed rule.

B. Baseline for Analysis

The HOEPA amendments are self-effectuating, and the Dodd-Frank Act does not require the Bureau to adopt a regulation to implement these amendments. Thus, many costs and benefits of the proposed rule considered below would arise largely or entirely from the statute, not from the proposed rule. The proposed rule would provide substantial benefits compared to allowing the HOEPA amendments to take effect alone by clarifying parts of the statute that are ambiguous, such as how to determine whether a HELOC is a high-cost mortgage. Greater clarity on these issues should reduce the compliance burdens on covered persons by reducing costs for attorneys and compliance officers as well as potential costs of over-compliance and unnecessary litigation. Moreover, the costs that the regulation would impose beyond those imposed by the statute itself are likely to be minimal.

Section 1022 of the Dodd-Frank Act permits the Bureau to consider the benefits and costs of the rule solely compared to the state of the world in which the statute takes effect without an implementing regulation. To provide the public better information about the benefits and costs of the statute, however, the Bureau has nonetheless chosen to consider the benefits, costs, and impacts of the major provisions of the proposed rule against a pre-statutory baseline (*i.e.,* the benefits, costs, and impacts of the relevant provisions of the Dodd-Frank Act and the regulation combined).[71] There is one exception: the Bureau does not discuss below the benefits and costs of determining whether a loan is a high-cost mortgage, *e.g.,* the costs of computer systems and software, employee training, outside legal advice, and similar costs potentially necessary to determine whether a loan is defined as a high-cost mortgage.[72] The discussion does not consider these benefits and costs because these changes are required by the Dodd-Frank Act and the Bureau lacks discretion to waive these requirements. The Bureau has discretion in future rulemakings to choose the most appropriate baseline for that particular rulemaking.

[70] These restrictions and requirements include requiring that a creditor receive certification that a HOEPA borrower has received pre-loan counseling from an approved homeownership counselor; prohibiting creditors and brokers from recommending default on a loan to be refinanced with a high-cost mortgage; prohibiting creditors, servicers, and assignees from charging a fee to modify, defer, renew, extend, or amend a high-cost mortgage; limiting the fees that can be charged for a payoff statement; banning prepayment penalties; substantially limiting balloon payments; and requiring that a creditor assess a borrower's ability to repay a home equity line of credit.

[71] The Bureau chose as a matter of discretion to consider costs and benefits of provisions that are required by the Dodd-Frank Act to better inform the rulemaking.

[72] Some states have anti-predatory lending statutes that provide additional restrictions on mortgage terms and features beyond those under HOEPA. *See* 74 FR 43232, 43244 (Aug. 26, 2009) (surveying State laws that are coextensive with HOEPA). In general, State statutes that overlap and/or extend beyond the proposed rule would be expected to reduce both the costs and benefits.

C. Coverage of the Proposal

HOEPA. The provisions of the proposed rule that relate to high-cost mortgages apply to any consumer credit transaction that meets one of the HOEPA thresholds and that is secured by the consumer's principal dwelling, including both closed-end mortgage loans (including purchase money mortgages) and open-end credit plans (*i.e.,* home-equity lines of credit, or HELOCs), but not reverse mortgages.

In general in this section, the term ''creditor'' is used to describe depository institutions, credit unions, and independent mortgage companies that extend mortgage loans, though in places the discussion distinguishes between these types of creditors. When appropriate, this section discusses covered persons other than creditors or lenders, such as mortgage brokers and servicers. For example, as required by the Dodd-Frank Act, the restrictions on loan modification or deferral fees and fees for payoff statements would apply to mortgage servicers. In addition, the Bureau is proposing to extend the prohibition on recommended default to mortgage brokers.

Additional Counseling Provisions. The proposed requirement that lenders provide mortgage applicants a list of homeownership counselors applies to applications for a loan covered by RESPA (*i.e.,* purchase money mortgages, subordinate mortgages, refinancings, closed-end home-equity mortgages, open-end credit plans and reverse mortgages) except for lenders who comply with the similar list requirement under the HECM program. The negative amortization counseling provision applies only to closed-end mortgage loans that are made to first-time borrowers, that may result in negative amortization, and that are secured by a dwelling (other than a reverse mortgage or a transaction secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D)).

D. Potential Benefits and Costs to Consumers and Covered Persons

1. Expanding the Types of Loans Potentially Subject to HOEPA Coverage

Expanding the types of loans potentially subject to HOEPA coverage to include purchase money mortgage loans and HELOCs would increase the number of loans potentially subject to HOEPA coverage and as a result, almost certainly, the number of closed-end mortgage loans and HELOCs classified as high-cost mortgages. Data collected under the Home Mortgage Disclosure Act (HMDA) offer a rough illustration of the scope of the expansion of loans potentially covered by HOEPA.[73] Home-improvement and refinance loans accounted for 68 percent of closed-end mortgage loans secured by a principal dwelling reported in the 2010 HMDA data. Put differently, the data suggest that about 32 percent of home-secured closed-end mortgage loans in 2010 were not potentially subject to HOEPA coverage because they were purchase money mortgage loans.[74] If one additionally considers HELOCs, it is likely that closer to 40 percent of closed-end mortgage loans and HELOCs in 2010 were not eligible for HOEPA coverage.[75] The proposed rule would expand the types of loans potentially subject to HOEPA coverage to essentially all closed-end mortgage loans and open-end credit plans secured by a principal dwelling, except reverse mortgage transactions.

The Bureau expects, however, that only a small fraction of loans under the proposed rule would qualify as HOEPA loans and that few lenders would make a large number of HOEPA loans. The Bureau's analysis of loans reported in HMDA suggests that the share of all closed-end mortgage loans for lenders that report in HMDA might increase from roughly 0.04 percent under the current triggers to about 0.3 percent of loans under the revised triggers. Based on analysis of data from HMDA and Call Reports and statistical extrapolation to non-reporting entities, the Bureau estimates that the number of depository institutions that make any closed-end HOEPA loans would increase from about 6–7 percent of depository institutions to approximately 10–11 percent.[76] Many of these creditors are predicted to make few HOEPA loans: The share of depository institutions that make ten or more HOEPA loans is estimated to increase from about 0.5 percent under the current triggers to about 1.5 percent under the proposed rule. Similarly, the share of non-depository creditors for which HOEPA loans comprise more than three percent of all closed-end originations is estimated to rise from under five percent to just over seven percent.[77] Finally, although it is difficult to precisely estimate the share of HELOCs that will meet the HOEPA triggers, the effect of the proposed rule on creditors' business is likely limited because open-end lending generally comprises a small fraction of creditors' lending portfolio. The Bureau's analysis of Call Report data suggest that HELOCs comprise more than half of all home-secured loans for only about 5–6 percent of depository institutions, and those meeting the HOEPA triggers would be a small fraction of those portfolios. Taken together, these estimates suggest that the effect of the proposed rule would be minor for the vast majority of lenders.

a. Benefits and Costs to Consumers

The Bureau believes that the benefits and costs of expanding the types of loans potentially subject to HOEPA coverage, and in turn the likely number of HOEPA loans, should be similar qualitatively to the benefits and costs of current HOEPA provisions.[78]

These benefits may include improving applicants' and borrowers' understanding of the terms and features of a given high-cost mortgage and, in turn, facilitating their ability to shop for mortgages. The rule would also restrict or prohibit loan terms such as prepayment penalties and balloon

[73] The Home Mortgage Disclosure Act (HMDA), enacted by Congress in 1975, as implemented by the Bureau's Regulation C requires lending institutions annually to report public loan-level data regarding mortgage originations. For more information, see *http://www.ffiec.gov/hmda.* The illustration is not exact because not all mortgage lenders report in HMDA. The HMDA data capture roughly 90–95 percent of lending by the Federal Housing Administration and 75–85 percent of other first-lien home loans. Robert B. Avery, Neil Bhutta, Kenneth P. Brevoort & Glenn B. Canner, *The Mortgage Market in 2010: Highlights from the Data Reported under the Home Mortgage Disclosure Act,* 97 Fed. Res. Bull., December 2011, at 1, 1 n.2.

[74] The share of closed-end originations that were purchase money mortgages was lower in 2010 than in most preceding years. The share ranged between 42 percent and 47 percent of originations over the 2004–2008 period before it fell to 31 percent in 2009.

[75] Experian-Oliver Wyman's analysis of credit bureau data indicates that there were roughly 12 percent as many HELOC originations in 2010 as there were originations of closed-end mortgage or home equity loans. Specifically, Experian-Oliver Wyman estimated that there were roughly 7.6 million mortgages and 434,000 home equity loans originated in 2010 compared with about 948,000 HELOC originations. The estimate of 40 percent assumes that the fraction of closed-end originations that were purchase money mortgages among lenders that did not report in HMDA was comparable to the estimated 32 percent for HMDA reporters. More information about the Experian-Oliver Wyman quarterly Market Intelligence Report is available at *http://www.marketintelligencereports.com.*

[76] Every national bank, State member bank, and insured nonmember bank is required by its primary Federal regulator to file consolidated Reports of Condition and Income, also known as Call Report data, for each quarter, as of the close of business on the last day of each calendar quarter (the report date). The specific reporting requirements depend upon the size of the bank and whether it has any foreign offices. For more information, see *http://www2.fdic.gov/call_tfr_rpts/.*

[77] These estimates are based on the Bureau's analysis of mortgage lending by non-depository institutions based on HMDA data and data from the National Mortgage Licensing System.

[78] The Bureau is not aware of in-depth empirical analyses of the benefits or costs to consumers of the current HOEPA provisions specifically. In contrast, several studies have assessed the impacts of State anti-predatory lending laws, and, where relevant, findings of these studies are discussed below.

payments whose risks may be difficult for some borrowers to evaluate. Both of these factors could reduce the likelihood that a HOEPA borrower faces a sizable, unanticipated fee or increase in payments.

Improving borrowers' understanding of a given loan may increase borrowers' ability to shop, which could have additional benefits to consumers if, as a consequence, borrowers select a more favorable loan (which may be a loan that does not meet the HOEPA triggers) or if borrowers forgo taking out any mortgage, if none would likely be affordable. At least for some borrowers, obtaining information in the process of choosing a mortgage loan may be costly. These costs could include the time and effort of obtaining additional mortgage offers, trying to understand a large number of loan terms, and—particularly for an adjustable-rate loan—assessing the likelihood of various future contingencies.

A borrower who finds shopping for and understanding loan terms difficult or who needs to make a decision in a short timeframe, for example, may select a mortgage with less favorable loan terms than he or she could qualify for because the costs of shopping exceed the expected savings, reduced risk, or other benefits from another mortgage. The proposed rule would reduce the costs of understanding the loan terms. In doing so, the proposed rule would benefit not only applicants who opt, based on better information, not to take out a high-cost mortgage, but also high-cost mortgage borrowers, since these borrowers will have incurred lower costs in choosing a mortgage.

It appears that many consumers do not shop extensively when selecting a mortgage. Surveys of mortgage borrowers suggest that roughly 20–30 percent of borrowers contact one lender and a similar fraction consider only two lenders.[79] Given the estimated benefits to a consumer from shopping, this suggests that borrowers find the time and effort of additional shopping costly, they underestimate the potential value from shopping, or both.[80]

Some mortgage borrowers appear to have difficulty understanding or at least recalling details of their mortgage, particularly the terms and features of adjustable-rate mortgages.[81] Improved information about loan terms may be especially beneficial in the case of high-cost mortgages. At least along some dimensions, the types of borrowers who may be less certain about their mortgage terms are also the types of borrowers who are more likely to have taken out a subprime loan.[82] In addition, focus groups suggest that many subprime borrowers perceive their choice set as limited or experience a sense of desperation.[83] Borrowers with this perspective might be expected to focus on near-term features of the mortgage, rather than on the risk of, for example, a large payment increase due to a teaser rate expiring or to fluctuations in interest rates.

These benefits to consumers arise from making information less costly, but the potential benefits to consumers may be even greater if at least some borrowers make systematic errors in processing information. For example, consumers may not accurately gauge the probability of uncertain events.[84] Thus, it is possible that, in assessing the expected costs of a mortgage offer, some borrowers underestimate the likelihood of circumstances that lead, for example, to incurring a late-payment fee or the likelihood of moving or refinancing and thus of incurring a prepayment penalty.

The proposed rule could increase the cost of credit or curtail access to credit for a small share of HELOC borrowers and purchase money borrowers because, as detailed below, creditors may be reluctant to make HOEPA loans and may no longer offer loans that they currently make but that would meet the new HOEPA triggers. Studies of State anti-predatory mortgage lending laws, however, indicate these impacts of extending HOEPA coverage may be limited, as the State laws typically have only modest effects on the volume of subprime lending overall and on interest rates for loans that meet the State-law triggers.[85]

[79] *See, e.g.,* Jinkook Lee & Jeanne M. Hogarth, *Consumer Information Search for Home Mortgages: Who, What, How Much, and What Else?,* 9 Fin. Serv. Rev. 277 (2000) and James M. Lacko & Janis K. Pappalardo, *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment* (Federal Trade Commission Bureau of Economics Staff report, February 2004), *http://www.ftc.gov/be/workshops/mortgage/articles/lackopappalardo2004.pdf.* This survey evidence is broadly consistent with information obtained from lenders through outreach.

[80] Susan E. Woodward & Robert E. Hall, *Diagnosing Consumer Confusion and Sub-Optimal Shopping Effort: Theory and Mortgage-Market Evidence* (Nat'l Bureau of Econ. Research, Working Paper No. 16007, 2010), *available at www.nber.org/papers/w16007.*

[81] *See* Brian Bucks & Karen Pence, *Do Borrowers Know Their Mortgage Terms?,* 64 J. Urb. Econ. 218 (2008) and James M. Lacko & Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms* (Federal Trade Commission Bureau of Economics Staff Report, June 2007), *http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf.*

[82] *See* Brian Bucks & Karen Pence, *Do Borrowers Know Their Mortgage Terms?,* 64 J. Urb. Econ. 218 (2008).

[83] *See* James M. Lacko & Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms* (Federal Trade Commission Bureau of Economics Staff Report, June 2007), *http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf* and Danna Moore, *Survey of Financial Literacy in Washington State: Knowledge, Behavior, Attitudes, and Experiences* (Washington State University, Social and Economic Sciences Research Center, Technical Report 03–39, 2003), *http://www.dfi.wa.gov/news/finlitsurvey.pdf.*

[84] *See, e.g.,* Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue, & Matthew Rabin, Regulation for Conservatives: Behavioral Economics and the Case for ''Asymmetric Paternalism,'' 151 U. Pa. L. Rev. 1211 (2003).

[85] These studies have generally found that State laws typically have only small effects on the volume of subprime lending overall. Similarly, more restrictive State laws are associated with higher interest rates, but the evidence suggests this is the case only for fixed-rate loans and that the effect is modest. Nevertheless, the stronger laws were associated with a clearer reduction on the amount of subprime lending, and prohibitions of specific loan features such as prepayment penalties appear to reduce the prevalence of the prohibited feature. *See* Raphael W. Bostic, Souphala Chomsisengphet, Kathleen C. Engel, Patricia A. McCoy, Anthony Pennington-Cross, & Susan M. Wachter, *Mortgage Product Substitution and State Anti-Predatory Lending Laws: Better Loans and Better Borrowers?* (U. Pa. Inst. L. Econ., Research Paper No. 09–27, 2009), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1460871;* Lei Ding, Roberto G. Quercia, Carolina K. Reid, and Alan M. White (2011), ''State Anti-Predatory Lending Laws and Neighborhood Foreclosure Rates,'' *Journal of Urban Affairs,* Volume 33, Number 4, pages 451–467.

The arguably muted response of origination volume to passage of State anti-predatory lending laws appears to reflect, in part, the fact that the market substituted other products that did not trigger restrictions or requirements of the statute, for example, loans with lower initial promotional interest rates and longer promotional-rate periods.[86] It is possible that some borrowers would receive a more favorable loan if creditors respond to the expansion of the types of loans potentially subject to HOEPA coverage by substituting mortgage products that would not trigger HOEPA coverage, but it is also possible that some borrowers would receive less favorable loans or no loan at all.

The Bureau is unaware of data that would allow for strong inferences regarding the extent to which such substitution in creditors' mortgage product offerings leads to borrowers taking out more favorable loans. Studies of State anti-predatory mortgage lending statutes, however, suggest that stronger State statutes are associated with lower neighborhood-level mortgage default rates.[87] On the one hand, this finding might be seen as consistent with the possibility that at least some borrowers receive more beneficial loans. On the other hand, it might also reflect that access to credit is more limited in States with comparatively strong anti-predatory statutes, *i.e.,* that borrowers that are more likely to default may be less likely to receive a mortgage in these states. This latter interpretation, however, is arguably more difficult to reconcile with the finding that strong State statutes are estimated to have only a limited effect on the volume of subprime lending.

b. Benefits and Costs to Covered Persons

Expanding the types of loans potentially subject to HOEPA coverage to include purchase money mortgage loans and HELOCs would likely require creditors to generate and to provide HOEPA disclosures to a greater number of borrowers than today. It is difficult to predict the extent to which lenders may avoid making newly eligible loans under the proposed rule. However, the Bureau's estimation methodology in analyzing the paperwork burden associated with the proposed rule implies that on the order of 24,000 loans might qualify as high-cost mortgages or high-cost HELOCs. Nevertheless, the Bureau expects that the share of borrowers that receive a high-cost mortgage would remain a small fraction of all mortgage borrowers (by the Bureau's estimates, likely about 0.3 percent of all closed-end and open-end originations). Creditors would likely also incur costs to comply with the proposed rule that a creditor obtain certification that a HOEPA borrower has received homeownership counseling.

A small number of creditors may also lose a small fraction of revenue as a greater number of loans are subject to HOEPA. Based on outreach, the Bureau understands that some lenders have a negative perception of HOEPA loans. This perception coupled with the restrictions and liability provisions associated with HOEPA loans may reduce creditors' ability or willingness to make high-cost purchase money mortgage loans and HELOCs. Creditors may also be reluctant to make high-cost purchase money mortgage loans that they previously would have extended because of the general inability to sell HOEPA loans in the current market, primarily due to assignee liability.

If creditors were indeed unwilling to make the likely small fraction of loans that meet the revised HOEPA triggers and did not substitute other loan products, they would lose the full revenue from any loans that they choose to no longer originate. A second possibility is that creditors restrict high-cost mortgage lending in part by substituting alternative products that do not meet the HOEPA triggers. Even if all potential HOEPA loans were modified in this way so that the number of originations was unaffected, the alternative loans would presumably be less profitable (or at most equally profitable), since a creditor could have offered the same loan contract prior to the expansion of HOEPA. Thus, even when creditors substitute alternative loan products, creditors likely would incur some revenue loss.

The Bureau believes that expanding the types of loans potentially subject to HOEPA coverage to include purchase money mortgage loans and HELOCs could benefit covered persons that currently provide effective disclosures by leveling the playing field with competitors that fail to do so. It is possible that some creditors that currently originate purchase money mortgage loans or HELOCs that would be covered by expanded HOEPA do not currently provide applicants with clear information regarding the terms and features of those loans. By extending HOEPA to cover such transactions, borrowers will receive additional disclosures and homeownership counseling that may improve their understanding of the loan offer. This could allow creditors that currently provide effective disclosures to compete on more equal footing.

c. Scale of Affected Consumers and Covered Persons

Despite expanding the types of loans potentially subject to HOEPA coverage, which likely would result in an increase in the number and share of loans that are classified as HOEPA loans, HOEPA loans are expected to continue to account for a small fraction of both closed-end mortgage loans and HELOCs. Thus, the proposed rule would be expected to have no direct impact on the vast majority of creditors, since, as noted above, at most about ten percent of creditors are predicted to make HOEPA loans under the proposed rule, and few creditors are expected to make significant numbers of HOEPA loans. Similarly, the proposed rule would not be expected to directly affect the vast majority of borrowers—those who do not apply for or obtain a high-cost mortgage. As noted above, the Bureau estimates that the share of all closed-end mortgage loans for lenders that report in HMDA might increase from roughly 0.04 percent under the current triggers to about 0.3 percent of loans under the revised triggers. The estimated proportion of purchase-money mortgage loans that would qualify as high-cost mortgages is a bit higher, 0.4 percent, but still a small fraction of all such loans.

2. Revised APR and Points-and-Fees Triggers and Potential Use of Transaction Coverage Rate

The statute, and therefore the proposed rule, revise the APR and points-and-fees triggers, which would likely result in an increase in the number of high-cost mortgages. The Bureau estimates, for example, that these changes in the triggers would increase the fraction of refinance and home improvement loans that are high-cost mortgages made by lenders that reported in the 2010 HMDA data from about 0.06 percent of loans to 0.24 percent of loans. The Dodd-Frank Act also expanded the definition of points

[86] *See* Raphael W. Bostic, Souphala Chomsisengphet, Kathleen C. Engel, Patricia A. McCoy, Anthony Pennington-Cross, & Susan M. Wachter, *Mortgage Product Substitution and State Anti-Predatory Lending Laws: Better Loans and Better Borrowers?* (U. Pa. Inst. L. Econ., Research Paper No. 09–27, 2009), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1460871.*

87 Lei Ding, Roberto G. Quercia, Carolina K. Reid, and Alan M. White (2011), ''State Anti-Predatory Lending Laws and Neighborhood Foreclosure Rates,'' *Journal of Urban Affairs,* Volume 33, Number 4, pages 451–467.

[87] Lei Ding, Roberto G. Quercia, Carolina K. Reid, and Alan M. White (2011), ''State Anti-Predatory Lending Laws and Neighborhood Foreclosure Rates,'' *Journal of Urban Affairs,* Volume 33, Number 4, pages 451–467.

and fees to include new charges, including some costs that may be payable after consummation or account opening. The expanded definition of points and fees is expected to reinforce the effect of the revised points-and-fees trigger and to result in a greater number of loans that meet the new points-and-fees threshold.

In addition, as noted in the section-by-section analysis above, the Bureau is proposing in its 2012 TILA–RESPA Proposal a simpler, more inclusive definition of the finance charge. Because the APR and the calculation of points and fees both depend in part on the finance charge, the broader definition of finance charge would likely increase the number of closed-end mortgage loans that would meet the two triggers. The Bureau is seeking comment on whether to adopt modifications to approximately offset this increase, and has proposed two such measures specifically. One would use a transaction coverage rate (TCR) instead of the APR to determine whether a closed-end mortgage loan is a high-cost mortgage. The other would exclude the additional fees that would be captured by the broader definition of finance charge from being counted toward the points and fees trigger for high-cost mortgages.

As discussed in the Bureau's 2012 TILA–RESPA Proposal, in the section-by-section analysis above for proposed § 1026.32(a)(1)(i) and (b)(1)(i), and below in part VII, the Bureau does not currently have sufficient data to model the impact of the more expansive definition of finance charge on HOEPA and other affected regulatory regimes or the impact of potential modifications that the Bureau could make to the triggers to more closely approximate existing coverage levels.[88] The Bureau is working to obtain such data prior to issuing a final rule and is seeking comment on its plans for data analysis, as well as additional data and comment on the potential impacts of a broader finance charge definition and potential modifications to the triggers. The 2012 TILA–RESPA Proposal provides a qualitative assessment of the benefits and costs of expanding the finance charge definition, if the Bureau made no modifications to the triggers for HOEPA or other regimes. In order to facilitate rule-by-rule consideration of potential modifications, this notice provides a qualitative assessment of the impact of potential changes to the APR and points-and-fees calculations for HOEPA.

a. Benefits and Costs to Consumers

The Dodd-Frank Act revisions to the triggers may benefit consumers by increasing the number of loans classified as high-cost mortgages. As a result, the benefits and costs to consumers discussed above in the context of expanding HOEPA coverage are likely similar, at least qualitatively, to the benefits and costs of revising the triggers to capture a greater share of loans. As a result of the revised triggers, these benefits and costs would apply to a larger set of loans, although as noted above, the Bureau believes that high-cost loans would likely remain a small fraction of all loans. These benefits could include a better understanding of the risks associated with the loan which, in turn, may reduce the likelihood that a borrower takes out a mortgage he or she cannot afford; better loan terms due to increased shopping and an absence of loan features whose associated risks may be difficult for borrowers to understand.

Nonetheless, the proposed rule could impose costs on a small number of borrowers by raising the cost of credit or curtailing access to credit if creditors choose not to make loans that meet the revised triggers. As discussed above, however, available evidence based on State anti-predatory lending statutes suggests that tighter restrictions and more expansive definitions of high-cost mortgages typically have only a limited impact on the cost of credit and on originations.

With regard to the Bureau's separate proposal to expand the definition of finance charge, that change would also be expected to increase the number of loans classified as high-cost mortgages, as discussed in the 2012 TILA–RESPA Proposal. The Bureau is seeking comment in this proposal on whether to adopt specific measures that would approximately offset the impact on HOEPA coverage levels of an expanded definition of finance charge. Were the Bureau to adopt the proposed changes, the additional benefits and costs to consumers from further increasing the number of loans classified as high-cost mortgages would not occur. In addition, because the TCR excludes fees to non-affiliated third-parties, the TCR might result in some loans not being classified as high-cost mortgages that would qualify under an APR threshold using the current definition of finance charge.[89] The benefits and costs to consumers with such loans would be the inverse of those described above; the consumers would not receive the benefits of the additional disclosures, the limitations on certain terms and practices for high-cost mortgages, or enhanced remedies under HOEPA. However, consumers would also not face the potential increases in the cost of credit or potential restrictions on access to credit that may accompany expanded HOEPA coverage.

b. Benefits and Costs to Covered Persons

The benefits and costs to covered persons of revising the statutory HOEPA triggers would likely be expected to be similar, at least qualitatively, to those that would result from expanding the types of loans potentially subject to HOEPA coverage to purchase money mortgages and HELOCs. For example, creditors would likely incur costs associated with generating and providing HOEPA disclosures for additional loans that would be covered by the revised HOEPA triggers, as well as costs associated with obtaining certification that a HOEPA borrower has received homeownership counseling. As discussed above, a small number of creditors may also lose a very small fraction of revenue if they are reluctant to make high-cost mortgages and cannot offer alternatives that are as profitable as a HOEPA loan.

As discussed in connection with expanding the types of loans potentially subject to HOEPA coverage to include purchase money mortgages and HELOCs, revising the interest rate and points-and-fees triggers could benefit some covered persons by restricting practices of their competitors to obfuscate product costs. Some creditors may gain market share from competitors that do not currently provide complete

[88] In its 2009 Closed-End Proposal, the Board relied on a 2008 survey of closing costs conducted by Bankrate.com that contains data for hypothetical $200,000 loans in urban areas. Based on that data, the Board estimated that the share of first-lien refinance and home improvement loans that are subject to HOEPA would increase by .6 percent if the definition of finance charge was expanded. The Board also looked at the impact on two states and the District of Columbia because their anti-predatory lending laws had triggers below the level of the historical HOEPA APR threshold, which is benchmarked to U.S. Treasury securities. The Board concluded that the percentage of first-lien loans subject to those laws would increase by 2.5% in the District of Columbia and 4.0% in Illinois, but would not increase in Maryland. The Bureau is considering the 2010 version of the Bankrate.com survey, but as described in this notice the Bureau is also seeking additional data that would provide more representative information regarding closing and settlement costs that would allow for a more refined analysis of the proposals.

[89] As discussed above, the Bureau believes that the margin of differences between the TCR and current APR is significantly smaller than the margin between the current APR and the APR calculated using the expanded finance charge definition because relatively few third-party fees would be excluded by the TCR that are not already excluded under current rules. The Bureau is considering ways to supplement the data analysis described above to better assess this issue, and seeks comment and data regarding the potential impacts of the TCR relative to APR calculated using the current and proposed definitions of finance charge.

or clear information on loan terms if the HOEPA disclosures and counseling requirements, discussed below, allow applicants to better understand the costs and risks of their mortgages and thus allow creditors that successfully provide more effective disclosures to compete on more equal footing.

Again, as discussed in the 2012 TILA–RESPA Proposal, expanding the definition of finance charge would be expected to increase the number of loans classified as high-cost mortgages, with similar benefits and costs to covered persons as described above. The Bureau has proposed two modifications to approximately offset the impact of an expanded definition of finance charge. Were the Bureau to adopt the measures proposed in this rule, the benefits and costs of coverage under Federal regulatory regimes described above would likely not occur although there might still be effects on the coverage of various State mortgage laws and regulations. Using the TCR for the HOEPA APR test might also result in some loans not being classified as high-cost mortgages that would qualify under an APR threshold using the current definition of finance charge. The benefits and costs to providers of such loans would be the inverse of those described above; creditors would not incur the costs of compliance with the high-cost mortgage requirements or impact on revenue from offering alternative loans, or the potential benefits of restrictions on competitors that offer loans that would be excluded from HOEPA coverage using the TCR for the HOEPA APR test.

To adopt the proposed modifications, creditors might be required to update compliance systems to reflect changes to the finance charge calculation. These updates might involve one-time costs associated with software updates, legal expenses, and personnel training time. As discussed above, if the Bureau adopts the proposal, it expects to provide an implementation period that would coincide either with implementation of the disclosure modifications or with implementation of certain changes to coverage of HOEPA and other regulatory regimes that would be affected by the change in definition. Accordingly, the Bureau believes that software changes and other expenses would be incurred as part of the overall software and compliance system revisions required to comply with the other simultaneous changes, and therefore would not impose a substantial additional burden.

Using different metrics for purposes of disclosures and determining coverage of various regulatory regimes may also impose some ongoing complexity and compliance burden. As discussed above, the Bureau believes that any such effects with regard to transaction coverage rate would be mitigated by the fact that both TCR and APR would be easier to compute under the expanded definition of finance charge than the APR today using the current definition. In addition, the Bureau is seeking comment on whether use of the TCR or other trigger modifications should be optional, so that creditors could use the broader definition of finance charge to calculate APR and points and fees triggers if they would prefer.

The Bureau believes adoption of the proposed modifications would as a whole reduce the economic impacts on creditors of the more expansive definition of finance charge proposed in the 2012 TILA–RESPA Proposal.

3. New Prepayment-Penalty Trigger

The Dodd-Frank Act added a new HOEPA trigger for loans with a prepayment penalty. Under the Dodd-Frank Act, HOEPA protections would be triggered where the creditor may charge a prepayment penalty more than 36 months after consummation, or if the penalty is greater than 2 percent of the amount prepaid. High-cost mortgages, in turn, are prohibited from having prepayment penalties, so the prepayment penalty trigger effectively caps both the time period after consummation during which such a penalty may be charged and the amount of any such penalty.

a. Benefits and Costs to Consumers

The proposed rule would potentially benefit a small number of consumers by potentially making it easier to refinance a high-cost mortgage. Prepayment penalties can prevent consumers from refinancing in circumstances where it would be advantageous for the consumer to do so as would be true if, for example, interest rates fall or the borrowers' credit score improves. The prepayment penalty trigger coupled with the prohibition on prepayment penalties would remove this barrier to obtaining a more favorable loan.

The proposed rule may be particularly beneficial to borrowers that, in taking out a mortgage, under-estimate the likelihood that they will move or that more favorable terms might be available in the future so that refinancing would be advantageous. Likewise, eliminating prepayment penalties could benefit borrowers that select a loan based on terms that are immediately relevant or certain rather than costs and benefits of the loan terms that are uncertain or in the future.

Nevertheless, the proposed rules regarding prepayment penalties would potentially result in some borrowers taking out a mortgage that is less favorable than they would if the proposed rule were not implemented. For example, this would be true for a borrower who is unlikely to move or refinance and may be willing to accept a prepayment penalty in exchange for a lower interest rate if a lender offered mortgage products with such a trade-off.[90] The proposed rules regarding prepayment penalties could, more generally, reduce access to credit for some potential applicants if creditors that previously used such penalties to manage prepayment and interest-rate risk reduce lending or increase interest rates or fees as a result of the proposed rule.

At this time, the Bureau cannot quantify the extent to which lenders may restrict lending or increase fees or interest rates as a result of the proposed rule. To do so would require, among other information, comprehensive data on the terms and features—including details of any prepayment penalties—of mortgage contracts that creditors offer. The Bureau does not currently have such data. Similarly, the Bureau cannot quantify the share of borrowers or the costs to borrowers who may receive a less-favorable mortgage than if the proposed rule did not restrict prepayment penalties. Estimating these quantities would require not only data on the alternative mortgage contracts that borrowers might be offered but also information on how consumers value each of the alternative contracts.

The Bureau believes that the potential benefits and costs to consumers of the high-cost mortgage prepayment penalty trigger, however, could be muted by other Dodd-Frank Act provisions related to ability-to-repay requirements that separately restrict such penalties for closed-end mortgage loans that are not qualified mortgages.[91] For example, under the Dodd-Frank Act, most closed-end, dwelling-secured mortgage loans will generally be prohibited from having a prepayment penalty unless they are fixed-rate, non-higher-priced, qualified mortgages. Moreover, under the Dodd-Frank Act, even such qualifying closed-end mortgage loans may not have a prepayment penalty that exceeds three percent, two percent, or one percent of the amount prepaid during the first, second, and third years following

[90] At least for subprime loans, loans with a prepayment penalty tend to have lower interest rates. *See, e.g.,* Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts,* 94 Cornell L. Rev. 1073–1152 (2009).

[91] *See* 15 U.S.C. 1639c.

consummation, respectively (and no prepayment penalty thereafter). Finally, under the Dodd-Frank Act, prepayment penalties are included in the points and fees calculation for qualified mortgages. For qualified mortgages, points and fees are capped at three percent of the total loan amount, so unless a creditor originating a qualified mortgage can forgo some or all of the other charges that are included in the definition of points and fees, it necessarily will need to limit the amount of prepayment penalties that may be charged in connection with the loan.

b. Costs to Covered Persons

The proposed rule could increase the risk and, in turn, the costs that the likely small number of creditors that would make high-cost mortgages would assume in making such a loan. Prepayment penalties are one tool that creditors can use to manage prepayment and interest rate risk and to increase the likelihood that creditors recoup the costs of making the loan. The proposed rule would limit creditors' ability to manage prepayment and interest rate risk in this way, although creditors might be expected to adjust the contracts that they offer to at least partially offset any associated revenue loss. The Bureau notes that the costs to creditors associated with this component of the proposed rule could be muted by the effect of the other provisions of the Dodd-Frank Act that limit prepayment penalties, as discussed above.

4. New and Revised Restrictions and Requirements for High-Cost Mortgages

The proposed rule also tightens existing restrictions for high-cost mortgages, including on balloon payments, acceleration clauses, and loan structuring to evade HOEPA and, as discussed above, bans prepayment penalties for high-cost mortgages. Further, the proposed rule adds new restrictions including limiting fees for late payments and fees for transmission of payoff statements; prohibiting fees for loan modification, payment deferral, renewal, or extension; prohibiting financing of prepayment penalties in a refinancing or of points and fees; and prohibiting recommended default. Finally, the rule provides for an expansion of the existing ability-to-repay requirement to open-end credit plans and adds a requirement that a creditor receive certification that a borrower with a high-cost mortgage has received pre-loan homeownership counseling.

a. Benefits and Costs to Consumers

Taken together, the proposed rules' requirements and restrictions would potentially have a variety of benefits to the likely small number of borrowers with a high-cost mortgage. These potential benefits include reducing the likelihood that a borrower would face unexpected payment increases, increasing the likelihood a borrower can refinance, and improving a borrower's ability to obtain a mortgage that is affordable and otherwise meets their needs.

The restrictions on acceleration clauses, late fees, and fees for loan modification, payment deferral, renewal, or similar actions each reduce the likelihood of unanticipated payment increases. Steady, predictable payments may simplify consumers' budgeting and may particularly benefit borrowers with high-cost mortgages if, as might be expected, these borrowers tend to have fewer resources to draw upon to meet unanticipated payment increases. Although scheduled balloon payments may be more predictable than, say, a late fee, balloon payments may typically be much larger. The proposed rule's limits on balloon payments may reduce the likelihood that a borrower with insufficient financial assets to make the balloon payment feels pressure to refinance the loan, potentially at a higher interest rate or with new fees.

Several of the requirements and restrictions may help borrowers to select the mortgage that best suits their needs. First, the requirement that the creditor assess the repayment ability of an applicant for a high-cost HELOC may help to ensure that the HELOC is affordable for the borrower. Second, the provision that prohibits a creditor from recommending that a consumer default on an existing loan in connection with closing a high-cost mortgage that refinances the existing loan would make it less likely that, because of a pending default, a borrower is pressured or constrained to consummate a mortgage, particularly one whose terms had changed unfavorably after the initial application. Third, by prohibiting financing of points and fees or a prepayment penalty as part of a refinance, the proposed rule could improve borrowers' ability to assess the costs of a given mortgage. In particular, the costs of points and fees or of a prepayment penalty may be less salient to borrowers if they are financed, because the cost is spread out over many years. When points and fees are instead paid up front, the costs may be more transparent for some borrowers, and consequently the borrower may more readily recognize a relatively high fee. Fourth, pre-loan counseling would potentially improve applicants' mortgage decision-making by improving applicants' understanding of loan terms. This benefit is qualitatively similar to the benefits of the HOEPA disclosure. Moreover, counseling may benefit a borrower by, for example, improving the borrower's assessment of his or her ability to meet the scheduled loan payments and by making the borrower aware of other alternatives (such as purchasing a different home or a different mortgage product). Finally, some applicants may find information on loan terms and features to be more useful or effective when delivered in a counseling setting rather than in paper form. Counseling could also complement the HOEPA disclosure by providing applicants an opportunity to resolve questions regarding information on the disclosure itself. In addition, in weighing the feasibility or merits of a loan, applicants may focus on the loan features that are most easily understood, most immediately relevant, or most certain; homeownership counseling could mitigate any bias in an applicant's decision-making by focusing either on less understood or less immediate, but still important, provisions.

It is possible, however, that creditors would respond to the tighter restrictions on high-cost mortgages by increasing the cost of credit or even no longer extending loans to these borrowers. As noted above, however, to date the evidence suggests that restricting high-cost lending may have only modest effects on the cost of credit and on the supply of credit, at least as measured by mortgage originations. Further, the pre-loan counseling requirement could impose costs on borrowers. Not only might the borrower have to pay for counseling, but the need to obtain counseling could conceivably delay the closing process, and such delay may be costly for some borrowers.

b. Benefits and Costs to Covered Persons

Creditors that already assess a HELOC-borrower's ability to repay may benefit from the proposed rule's requirement that all creditors do so if creditors that currently do so gain market share as their competitors incur costs to meet this requirement. The requirement that a creditor receive certification that a borrower with a high-cost mortgage has received pre-loan homeownership counseling may benefit creditors by reducing the time that a creditor would need to spend to help a borrower select a mortgage or to answer a borrower's questions.

In light of the tighter restrictions and requirements on high-cost mortgages, lenders may be less willing to make HOEPA loans. If so, then some creditors' revenues may decline by a likely small proportion either because they do not extend any credit to a borrower to whom they would have previously made a high-cost loan, or because they extend an alternative loan that does not qualify as a high-cost loan but that results in lower revenue.

The Bureau seeks comment on the two proposed alternative definitions of balloon payments. Information provided by interested parties may inform the analysis of the impacts of this provision under the finalized rule.

In some instances the potential impacts of these restrictions may extend beyond creditors. The proposed rule would extend the prohibition on recommended default to brokers as well as creditors, for example. This prohibition is expected to have little impact on covered persons because the Bureau believes that few, if any, creditors or brokers have a business model premised on recommending default on a loan to be refinanced as a HOEPA loan. The limits on various fees, detailed above, apply to servicers as well as creditors. Both of these sets of covered persons could incur revenue losses or greater costs if such fees are important risk management tools.

The Bureau believes creditors would incur recordkeeping and data retention costs due to the proposed requirement that a creditor receive certification that a borrower received pre-loan counseling. Based on the estimation methodology for analyzing the paperwork burden associated with the proposed rule, the Bureau estimates that these costs to be roughly $600 in total for all creditors that make any high-cost mortgages. These costs may be small relative to the quantity of other information that must be retained and that, under the proposed 2012 TILA–RESPA rule, would generally be required to be retained in machine-readable format.

5. Counseling-Related Provisions for RESPA-Covered Loans and Negative-Amortization Loans

The proposed rule would include two additional provisions required by the Dodd-Frank Act related to homeownership counseling that apply to loans with negative amortization and loans covered by RESPA. First, the proposed rule would require lenders to provide a list of HUD-certified or -approved homeownership counselors or counseling organizations to applicants for all mortgages covered by RESPA, except where the lender has provided a list under HUD's HECM program. HECMs are currently subject to counseling and counselor-list requirements, so to avoid duplication and potential borrower confusion, the proposed rule's counselor-list requirement would not be applied to these mortgages.

The proposed rule would also require that both HOEPA borrowers as well as first-time borrowers of loans that may result in negative amortization similarly receive a counselor list. However, HOEPA loans and negative-amortization loans are a subset of loans covered by RESPA, and the proposed counselor-list requirement for these types of loans would be satisfied by complying with the RESPA requirement. Therefore, there are no additional costs and benefits from the counselor-list requirements for either HOEPA loans or negative-amortization loans for first-time borrowers.

With respect to first-time borrowers with a loan that could have negative amortization, the proposed rule would require that a creditor receive documentation that the borrower received homeownership counseling. The proposed rule would not specify any particular elements that must be included in the documentation.

a. Benefits and Costs to Consumers

The two non-HOEPA homeownership counseling provisions included in the proposed rule would generally have benefits to consumers that are similar in nature to those of requiring that creditors receive certification that a borrower with a high-cost mortgage has received homeownership counseling. In particular, as discussed above, homeownership counseling may improve borrowers' understanding of their mortgages, it may complement the information provided in disclosures, and it could counteract any tendency among borrowers to consider only loan features that are most easily understood, most immediately relevant, or most certain.

The proposed rule would not mandate counseling for potential borrowers of mortgages covered by RESPA, but requiring lenders to provide the list of homeownership counselors or counseling organizations may prompt some borrowers who were unaware of these resources (or of their geographic proximity) to seek homeownership counseling. This may especially be the case for borrowers who feel confused or overwhelmed by the information and disclosures provided by the lender.

In contrast, the proposed rule would require that a creditor receive documentation that a first-time borrower that has applied for a loan that could have negative amortization has received homeownership counseling. First-time borrowers may particularly benefit from homeownership counseling if they have greater difficulty, relative to other borrowers, in understanding or assessing loan terms and features because they do not have experience with obtaining or paying on a mortgage.

The Bureau believes that requiring applicants of loans covered by RESPA to receive a list of HUD-certified or -approved homeownership counselors or counseling organizations should not result in costs to consumers beyond those passed on by creditors. More specifically, the information contained on the list should be readily understandable, the time required of the borrower to receive the disclosure should be minimal, and borrowers may choose to not follow up on this information.

First-time borrowers with a loan that may have negative amortization will likely have to pay for the counseling, either upfront or by financing the fee. In addition, counseling may be costly, at least in terms of time, for borrowers who do not find it helpful. In addition, the counseling requirement may impose delays on loan closing, which could be costly, for example, for a borrower who is contractually obligated to close on a home by a certain date.

b. Benefits and Costs to Covered Persons

The Bureau believes that covered persons would incur costs from providing potential borrowers of loans covered by RESPA with a list of HUD-certified or approved homeownership counselors or counseling organizations but that these costs are likely less than one dollar per application. The Bureau expects that the list would be a single page and that it would be provided with other materials that the lender is required to provide. In addition, the Bureau expects to create a Web site portal to make it easy for lenders and consumers to obtain lists of homeownership counselors in their areas, and the Bureau solicits comments on alternative measures that the Bureau could take to minimize the compliance burden associated with producing and providing the counselor list.

The Bureau also believes that the costs of obtaining documentation that a first-time borrower with a negative-amortization loan has obtained counseling are likely small because such loans should be quite rare. Not only are loans with negative-amortization features uncommon, but also the provision would apply only to first-time borrowers for such loans.[92] Further, the creditor would only be required to receive the documentation of counseling. For these reasons, the Bureau believes that the burden to creditors would be minimal.

As discussed in the section-by-section analysis above, the proposed counseling requirements for high-cost mortgage borrowers differ from the counseling requirements for mortgages that may result in negative amortization. For creditors that extend both high-cost mortgages and loans that may negatively amortize, the Bureau recognizes that creditors may incur costs from having to ensure compliance with differing counseling requirements. These costs may include requiring additional staff training. The Bureau solicits comment on whether conforming the counseling requirements for mortgages that may result in negative amortization with the counseling requirements for high-cost mortgages would help ease compliance burdens on creditors.

Creditors may benefit from these two counseling-related provisions by gaining market share relative to creditors that do not provide clear and complete information to borrowers regarding loan terms. This could occur if, as a result of counseling, applicants to such a creditor obtained a better understanding of the loan offer and were less likely to accept it.

E. Potential Specific Impacts of the Proposed Rule

1. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, As Described in Section 1026

The Bureau does not expect the proposed rule to have a unique impact on depository institutions and credit unions with $10 billion or less in total assets as described in Section 1026. As noted above, although not all creditors report in HMDA, those data suggest that the vast majority of creditors do not make any HOEPA loans. The Bureau expects this would be the case under the proposed rule as well, so few institutions would likely be directly impacted by the proposed rule. As might be expected given the fact that most depository institutions that make mortgage loans (almost 99 percent of the universe of depository institutions that make any closed-end mortgage loans or HELOCs) are estimated to have less than $10 billion in total assets, the estimated share of these lenders that currently make any closed-end HOEPA loans of 6–7 percent is essentially identical to the estimate for all depository institutions. Likewise, about 9–10 percent of depository institutions and credit unions with $10 billion or less in total assets are predicted to make any HOEPA loans under the proposed rule, a fraction just a bit below the estimated 10–11 percent for all depository institutions and credit unions. The impact of the proposed rule on depository institutions and credit unions may vary based on the types of loans that an institution makes currently including, for example, the share of mortgage lending comprised of purchase money mortgages and HELOCs relative to closed-end refinance and home-improvement loans.

2. Impact of the Proposed Provisions on Consumers in Rural Areas

The impact of the proposed rule on consumers in rural areas may differ from those for consumers located in urban areas for several reasons. First, rural borrowers may have fewer creditors that they readily comparison shop among. A potential reduction in lending for newly classified HOEPA loans may therefore have a greater impact in rural areas, and a rural borrower that is offered a high-cost mortgage may be less able to obtain a non-HOEPA loan from a different lender. Moreover, mobile homes are more common in rural areas; nearly 16 percent of housing units in rural areas are mobile homes compared to less than four percent of housing units in urban areas.[93] From outreach, the Bureau understands that loans for manufactured housing typically have higher interest rates and therefore may be more likely than other mortgages to exceed the revised interest rate trigger. HMDA data suggest this is likely to be the case, since the share of home improvement or refinance loans (those types of loans currently covered by HOEPA) that are identified as HOEPA loans in those data is about 2–3 percent for loans secured by a manufactured home compared with about 0.05 percent of loans secured by other types of 1–4 family homes, for example. In addition, the HMDA data do not include lenders that do not have a branch in a metropolitan statistical area. These data, which inform the analysis of the proposed rule, are therefore unlikely to be representative of rural mortgage transactions. For these reasons, the Bureau requests that interested parties provide data or information on the impact of the proposed rule on consumers in rural areas.

F. Additional Analysis Being Considered and Request for Information

The Bureau will further consider the benefits, costs and impacts of the proposed provisions and additional proposed modifications before finalizing the proposal. As noted above, there are a number of areas where additional information would allow the Bureau to better estimate the benefits, costs, and impacts of this proposal and more fully inform the rulemaking. The Bureau asks interested parties to provide comment or data on various aspects of the proposed rule, as detailed in the section-by-section analysis. The most significant of these include information or data addressing:

- Measures to account for potential adoption of a broader definition of finance charge, as separately proposed in the Bureau's 2012 TILA–RESPA Proposal;
- The two proposed alternative definitions of a balloon payment;
- Whether conforming the counseling requirements for negative-amortization loans with those for high-cost mortgages would reduce compliance burdens;
- Whether data speak to the distribution of loan terms and features of HELOCs as well as information or data on how provisions in the proposed rule may affect the share of HELOCs that meet the post-Dodd-Frank Act triggers compared to the share of closed-end mortgage loans that meet these triggers;
- Whether certain types of compensation paid to originators of open-end credit plans should be included in the definition of points and fees for open-end credit plans; and
- Whether the homeownership counselor list for loans covered by Regulation X should be required to be given to applicants for all federally related mortgage loans, *i.e.,* including refinances and home-equity lines of credit, in addition to applicants for purchase money mortgages.

Information provided by interested parties regarding these and other aspects of the proposed rule may be considered in the analysis of the costs and benefits of the final rule.

To supplement the information discussed in in this preamble and any

[92] Data from the 2007 Survey of Consumer Finances (SCF), the most recent survey year available at the time this analysis was conducted, indicate that only 0.3 percent of mortgages in 2007 reportedly had negative-amortization features. This estimate is only suggestive because it is an estimate of the stock, rather than the flow, of mortgages with such features. That said, given changes in the mortgage market since 2007, the Bureau believes it is likely the case that mortgages that may potentially negatively amortize likely have become even rarer since 2007. The 2007 estimate is lower than estimates from the prior six waves of the SCF, which ranged from 1.3 to 2.3 percent.

[93] Estimates are five-year estimates from the 2006–2010 American Community Surveys (*http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_GCT2501.US26&prodType=table*).

information that the Bureau may receive from commenters, the Bureau is currently working to gather additional data that may be relevant to this and other mortgage related rulemakings. These data may include additional data from the National Mortgage License System (NMLS) and the NMLS Mortgage Call Report, loan file extracts from various lenders, and data from the pilot phases of the National Mortgage Database. The Bureau expects that each of these datasets will be confidential. This section now describes each dataset in turn.

First, as the sole system supporting licensure/registration of mortgage companies for 53 agencies for states and territories and mortgage loan originators under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act), NMLS contains basic identifying information for non-depository mortgage loan origination companies. Firms that hold a State license or State registration through NMLS are required to complete either a standard or expanded Mortgage Call Report (MCR). The Standard MCR includes data on each firm's residential mortgage loan activity including applications, closed loans, individual mortgage loan originator activity, line of credit and other data repurchase information by state. It also includes financial information at the company level. The expanded report collects more detailed information in each of these areas for those firms that sell to Fannie Mae or Freddie Mac.[94] To date, the Bureau has received basic data on the firms in the NMLS and de-identified data and tabulations of data from the Mortgage Call Report. These data were used, along with data from HMDA, to help estimate the number and characteristics of non-depository institutions active in various mortgage activities. In the near future, the Bureau may receive additional data on loan activity and financial information from the NMLS including loan activity and financial information for identified lenders. The Bureau anticipates that these data will provide additional information about the number, size, type, and level of activity for non-depository lenders engaging in various mortgage origination and servicing activities. As such, it supplements the Bureau's current data for non-depository institutions reported in HMDA and the data already received from NMLS. For example, these new data will include information about the number and size of closed-end first and second loans originated, fees earned from origination activity, levels of servicing, revenue estimates for each firm and other information. The Bureau may compile some simple counts and tabulations and conduct some basic statistical modeling to better model the levels of various activities at various types of firms. In particular, the information from the NMLS and the MCR may help the Bureau refine its estimates of benefits, costs, and impacts for each of the revisions to the GFE and HUD–1 disclosure forms, changes to the HOEPA thresholds, changes to requirements for appraisals, updates to loan originator compensation rules, proposed new servicing requirements and the new ability to pay standards.

Second, the Bureau is working to obtain a random selection of loan-level data from a handful of lenders. The Bureau intends to request loan file data from lenders of various sizes and geographic locations to construct a representative dataset. In particular, the Bureau will request a random sample of ''GFEs'' and ''HUD–1'' forms from loan files for closed-end mortgage loans. These forms include data on some or all loan characteristics including settlement charges, origination charges, appraisal fees, flood certifications, mortgage insurance premiums, homeowner's insurance, title charges, balloon payment, prepayment penalties, origination charges, and credit charges or points. Through conversations with industry, the Bureau believes that such loan files exist in standard electronic formats allowing for the creation of a representative sample for analysis. The Bureau may use these data to further measure the impacts of certain proposed changes. Calculations of various categories of settlement and origination charges may help the Bureau calculate the various impacts of proposed changes to the definitions of finance charges and other aspects of the proposal, including proposed changes in the number and characteristics of loans that exceed the HOEPA thresholds, loans that would meet the high rate or high risk definitions mandating additional consumer protections, and loans that meet the points and fees thresholds contained in the ability-to-repay provisions of the Dodd-Frank Act.

Third, the Bureau may also use data from the pilot phases of the National Mortgage Database (NMDB) to refine its proposals and/or its assessments of the benefits costs and impacts of these proposals. The NMDB is a comprehensive database, currently under development, of loan-level information on first lien single-family mortgages. It is designed to be a nationally representative sample (1 percent) and contains data derived from credit reporting agency data and other administrative sources along with data from surveys of mortgage borrowers. The first two pilot phases, conducted over the past two years, vetted the data development process, successfully pretested the survey component and produced a prototype dataset. The initial pilot phases validated that credit repository data are both accurate and comprehensive and that the survey component yields a representative sample and a sufficient response rate. A third pilot is currently being conducted with the survey being mailed to holders of five thousand newly originated mortgages sampled from the prototype NMDB. Based on the 2011 pilot, a response rate of fifty percent or higher is expected. These survey data will be combined with the credit repository information of non-respondents, and then deidentified. Credit repository data will be used to minimize non-response bias, and attempts will be made to impute missing values. The data from the third pilot will not be made public. However, to the extent possible, the data may be analyzed to assist the CFPB in its regulatory activities and these analyses will be made publically available.

The survey data from the pilots may be used by the Bureau to analyze consumers shopping behavior regarding mortgages. For instance, the Bureau may calculate the number of consumers who use brokers, the number of lenders contacted by borrowers, how often and with what patterns potential borrowers switch lenders, and other behaviors. Questions may also assess borrowers understanding of their loan terms and the various charges involved with origination. Tabulations of the survey data for various populations and simple regression techniques may be used to help the Bureau with its analysis.

In addition to the comment solicited elsewhere in this proposed rule, the Bureau requests commenters to submit data and to provide suggestions for additional data to assess the issues discussed above and other potential benefits, costs, and impacts of the proposed rule. The Bureau also requests comment on the use of the data described above. Further, the Bureau seeks information or data on the proposed rule's potential impact on consumers in rural areas as compared to consumers in urban areas. The Bureau also seeks information or data on the potential impact of the proposed rule on depository institutions and credit

[94] More information about the Mortgage Call Report can be found at *http://mortgage.nationwidelicensingsystem.org/slr/common/mcr/Pages/default.aspx.*

unions with total assets of $10 billion or less as described in Dodd-Frank Act section 1026 as compared to depository institutions and credit unions with assets that exceed this threshold and their affiliates.

VII. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[95] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[96]

An IRFA is not required for this proposal because the proposal, if adopted, would not have a significant economic impact on a substantial number of small entities.

A. Overview of Analysis and Data

The analysis below evaluates the potential economic impact of the proposed rule on small entities as defined by the RFA.[97] It considers effects of the revised APR and points-and-fees triggers and of the extension of HOEPA coverage to purchase money mortgages and HELOCs. In addition, the analysis considers the impact of the two non-HOEPA counseling-related provisions which would be implemented as part of the proposed rule. The analysis does not consider the interaction between State anti-predatory lending laws and HOEPA. The Bureau notes that State statutes that place tighter restrictions on high-cost mortgages than either current or amended HOPEA may reduce the economic impact of the proposed rule.[98]

The analysis below uses a pre-statute baseline—except for one of the aspects of the rule over which the Bureau lacks discretion.[99] The Bureau does not have discretion over whether to extend HOEPA to purchase money mortgage loans and HELOCs. Lenders today generally have processes and often software systems to determine whether a loan is a HOEPA loan. Lenders will have to update these processes and systems to determine whether a purchase money mortgage loan or HELOC is a HOEPA loan. The cost of determining whether a loan is a HOEPA loan is therefore unavoidable under the statute.

The analysis considers the impact of the proposed rule's revisions to HOEPA on closed-end lending by depository institutions (DIs), closed-end lending by non-depositories (non-DIs), and home equity lines of credit separately because these components of the analysis necessarily rely on different data sources. The starting point for much of the analysis of closed-end lending is loan-level data reported under the Home Mortgage Disclosure Act (HMDA).[100] The HMDA data include information on high-cost mortgage lending under the current HOEPA triggers, but some creditors are exempt from reporting to HMDA.[101] For exempt DIs, the Bureau estimates the extent of creditors' high-cost, closed-end lending under the current and post-Dodd Frank Act triggers based on Call Report data (which are available for all DIs). For exempt non-DIs, the Bureau supplements data on non-depositories that report in HMDA with data from the Nationwide Mortgage Licensing System and Registry Mortgage Call Report (NMLS/MCR).[102] The Bureau does not have comprehensive loan-level data for HELOCs comparable to the HMDA data for closed-end mortgage loans, and this portion of the analysis draws on Call Report data as well as data from the 2007 Survey of Consumer Finances (SCF).[103] Finally, in all cases the Bureau notes that it is not aware of representative quantitative data on prepayment penalties, but available evidence suggests that this new trigger would have little impact on HOPEA coverage.[104]

As a measure of the potential impact of the proposed rule, the analysis considers the potential share of revenue a creditor may forgo if it were to make no high-cost mortgages.[105] The Bureau believes that this approach very likely provides a conservative upper bound on the effects on creditors' revenues, since some of the new loans potentially subject to HOEPA coverage might still be made (either as high-cost mortgages or with alternative terms to avoid the HOEPA triggers). The Bureau notes that

[95] 5 U.S.C. 601 *et seq.*

[96] 5 U.S.C. 609.

[97] For purposes of assessing the impacts of the proposed rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (''NAICS'') classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[98] In its analysis of a proposed change to the definition of finance charge, the Board noted that, at least as of 2009, only Illinois, Maryland, and Washington, DC had APR triggers below the then-existing HOEPA APR trigger for first-lien mortgage loans. 74 FR 43232, 43244 (Aug. 26, 2009).

[99] The Bureau notes that the HOEPA amendments of the Dodd-Frank Act are self-effectuating and that the Dodd-Frank Act does not require the Bureau to promulgate a regulation. Viewed from this perspective, the proposal reduces burdens by clarifying statutory ambiguities that may impose costs such as increased costs for attorneys and compliance officers, over-compliance, and unnecessary litigation.

[100] The Home Mortgage Disclosure Act (HMDA), enacted by Congress in 1975, as implemented by the Bureau's Regulation C requires lending institutions annually to report public loan-level data regarding mortgage originations. For more information, see *http://www.ffiec.gov/hmda.*

[101] Depository institutions with assets less than $39 million (in 2010), for example, and those with branches exclusively in non-metropolitan areas and those that make no purchase money mortgage loans are not required to report to HMDA. Reporting requirements for non-depository institutions depend on several factors, including whether the company made fewer than 100 purchase money or refinance loans, the dollar volume of mortgage lending as share of total lending, and whether the institution had at least five applications, originations, or purchased loans from metropolitan areas.

[102] The Nationwide Mortgage Licensing System is a national registry of non-depository financial institutions including mortgage loan originators. Portions of the registration information are public. The Mortgage Call Report data are reported at the institution level and include information on the number and dollar amount of loans originated, the number and dollar amount of loans brokered, and on HOEPA originations. The analysis in this part draws on HMDA and NMLS/MCR data by classifying non-depository institutions with similar reported amounts of originations and of HOEPA lending in the two data sets.

[103] The Bureau assumes that few, if any, non-DIs originate HELOCs due to lack of funding for lines of credit and lack of access to the payment system. Data from the 2010 SCF will be available for analysis in connection with the final rule.

[104] Trends and aggregate statistics suggest that loans originated in recent years are very unlikely to have prepayment penalties for two reasons. First, prepayment penalties were most common on subprime and near-prime loans, a market that has disappeared. Second, by one estimate, nearly 90 percent of 2010 originations were purchased by Fannie Mae or Freddie Mac or were FHA or VA loans (Tamara Keith, ''What's Next for Fannie, Freddie? Hard to Say,'' February 10, 2011, available at *http://www.npr.org/2011/02/10/133636987/whats-next-for-fannie-freddie-hard-to-say*). Fannie Mae and Freddie Mac purchase very few loans with prepayment penalties—in a random sample of loans from the FHFA's Historical Loan Performance data, a very small percentage of loans originated between 1997 and 2011 had a prepayment penalty. Finally, the Bureau believes that prepayment penalties that would trigger HOEPA coverage would be rare, because other Dodd-Frank Act provisions concerning ability to repay requirements and ''qualified mortgages'' will separately restrict such penalties.

[105] Revenue has been used in other analyses of economic impacts under the RFA. For purposes of this analysis, the Bureau uses revenue as a measure of economic impact. In the future, the Bureau will consider whether a feasible alternative numerical measure would be more appropriate for financial firms.

at least some creditors currently extend HOEPA loans. Further, creditors may still make some loans that might otherwise meet the new HOEPA triggers by changing the loan terms to avoid being a high-cost mortgage (though perhaps with a partial revenue loss).[106] Moreover, this approach is consistent with the possibility that some creditors may be less willing to make high-cost mortgages in the future due to new and revised restrictions on HOEPA loans, but the Bureau believes that any such effect on creditors' willingness to extend HOEPA loans likely is small.[107]

B. Overview of Market for High-Cost Mortgages

HOEPA loans comprise a small share of total mortgage loans. HMDA data indicate that less than one percent of loans meet the current HOEPA triggers and that this share has generally declined over time.[108] Between 2004 and 2010, HOEPA loans typically comprised about 0.2 percent of originations of home-secured refinance or home-improvement loans made by creditors that report in HMDA. This fraction peaked at 0.44 percent in 2005 and fell to 0.06 percent by 2010.[109] Similarly, few creditors originate HOEPA loans. The number of creditors extending HOEPA loans ranged between about 1,000 and 2,300 over the 2004 and 2009 period, or between 12 and 27 percent of creditors. However, only about 650 creditors in HMDA, or roughly eight percent of creditors in HMDA, reported any HOEPA loans in 2010.[110]

C. Number and Classes of Affected Entities

Around half of commercial banks and thrifts meet the Small Business Administration's definition of small entities, and the large majority of these institutions originate mortgages (Table 1). By comparison, almost 90 percent of credit unions are small entities, but about 40 percent of credit unions have no closed-end mortgage originations. About 90 percent of non-DI mortgage originators have revenues below the relevant Small Business Administration threshold.[111]

TABLE 1—ESTIMATED NUMBER OF AFFECTED ENTITIES AND SMALL ENTITIES BY NAICS CODE

	NAICS	Small entity threshold	Total entities	Small entities	Entities that originate closed-end mortgages	
					Total	Small
Depository institutions						
Commercial banks	522110	$175M assets	6,596	3,764	6,362	3,597
Savings institutions [a]	522120	$175M assets	1,145	491	1138	487
Credit unions [b]	522130	$175M assets	7,491	6,569	4,359	3,441
Non-depository institutions						
Mortgage companies [c]	522292	$7M revenues	2,515	2,282	2,515	2,282

[a] Asset size obtained from December 2010 Call Report data as compiled by SNL Financial. Savings institutions include thrifts, savings banks, mutual banks, and similar institutions. Estimated number of creditors originating any closed-end mortgages based on 2010 HMDA data and, for entities that do not report to HMDA, loan counts are projected based on Call Report data.

[b] Asset size and engagement in closed-end mortgage loans obtained from December 2010 National Credit Union Administration Call Report. Count of credit unions engaged in closed-end mortgage transactions may include some institutions that make only first-lien open-end loans.

[c] Estimates are based on the NMLS/MCR data for Q2 and Q3 of 2011. Entities that report to MCR are considered to originate mortgages if they report either: (1) Originating at least one closed-end mortgage; or (2) a positive dollar value of originated loans. To estimate the number of small entities, revenue for entities that did not report revenue is estimated based on the dollar value and number of loans originated and the dollar value and number of loans brokered. Revenue is not reported for 78 percent of mortgage companies in the MCR data, so the estimated number of small entities may contain substantial estimation uncertainty and may be more sensitive to model specification than if revenue were available for a larger fraction of entities.

D. Impact of Revised Triggers on Depository Institutions

1. Closed-End HOEPA Lending by Small Depository Institutions

To assess the proposed rule's impacts, the analysis aims to estimate the counterfactual set of loans that would have met the definition of a HOEPA loan if the revised triggers had been in effect in 2010.[112] One can readily

[106] By the same token, the analysis also implicitly assumes that creditors that do not currently make HOEPA loans will not rethink their policies and make HOEPA loans in the future. Although it seems the less likely concern, the Bureau notes that creditors could change their policies if a large share of creditors' originations would now meet the HOEPA thresholds.

[107] The Bureau has proposed separately in the 2012 TILA–RESPA Proposal to expand the definition of the finance charge. If that change is adopted, it would be expected to increase the number of loans classified as high-cost mortgages under HOEPA's APR and points-and-fees tests separate and independent from the statutory changes to the APR triggers. The Bureau notes that it has accounted for the impacts of this potential change in the 2012 TILA–RESPA Proposal, including in that Proposal's Initial Regulatory Flexibility Analysis and Small Business Review Panel Process. In connection with the proposed definition change, the Bureau seeks comment in this proposal on whether to modify the triggers, including by using the TCR in place of the APR, to approximately offset the impact of a broader definition of finance charge on HOEPA coverage levels. As discussed in the Dodd-Frank Act section 1022 analysis, adoption of those adjustments might impose some one-time implementation costs and compliance complexity, but the Bureau believes adoption of the proposed modifications would as a whole reduce the economic impacts on creditors of the more expansive definition of finance charge proposed in the 2012 TILA–RESPA Proposal.

[108] The information on whether a loan was a HOEPA loan has been collected in HMDA since 2004.

[109] These percentages correspond to nearly 36,000 loans in 2005 and roughly 3,400 loans in 2010.

[110] The statistics for 2004–2009 are drawn from Federal Reserve *Bulletin* articles that summarize the HMDA data each year. In contrast, the 2010 numbers are based on the analysis of 2010 HMDA data and may differ slightly from those presented in the *Bulletin* article that summarizes the 2010 HMDA data due to subsequent data revisions and small differences in definitions (*e.g.,* not counting a loan as a HOEPA loan even if it is flagged as a HOEPA loan if it appears ineligible to be a HOEPA loan because the property is not owner-occupied.)

[111] The Bureau expects that the economic impact of the proposed rule on mortgage brokers that are small entities (for example, from prohibiting brokers from recommending default) would not be significant.

[112] The HMDA data contain a flag which indicates whether a loan was classified as a HOEPA loan as well as a variable that reports the spread between the loan's APR and the APOR for higher-priced mortgage loans. Higher-priced mortgage loans are first-liens for which this spread is at least 1.5 percentage points and subordinate liens with a

Continued

identify 2010 HMDA loans that would have met the revised APR triggers based on information in the HMDA data. In contrast, the Bureau is not aware of an approach to directly determine whether a loan in the 2010 HMDA data would meet the revised points-and-fees trigger and, hence, whether the loan would have been flagged as a HOEPA loan. To overcome this data limitation, the Bureau modeled the probability that a loan would have been flagged as a HOEPA loan in HMDA as a function of: (i) the loan amount and (ii) the difference between the loan's APR and the APR trigger.[113]

The changes to the APR and points-and-fees triggers are estimated to increase the share of loans made by HMDA-reporters and potentially subject to HOEPA that are classified as high-cost mortgages from 0.06 percent of loans to 0.3 percent.[114] Under the current HOEPA regulations, fewer than five percent of small depository institutions are estimated to make *any* HOEPA loans, and only about 0.2 percent of small DIs are estimated to have made at least 10 HOEPA loans in 2010 (Table 2). As expected, the estimates imply that the shares of lenders would have been larger if the revised triggers had been in place. Nevertheless, by these estimates, HOEPA loans would have remained a small fraction of closed-end originations by small DIs, and the vast majority of small DIs would have made no HOEPA loans under the revised triggers.

TABLE 2—ESTIMATED NUMBER OF SMALL DIS THAT ORIGINATE ANY HOEPA LOANS OR 10 OR MORE HOEPA LOANS UNDER THE CURRENT AND REVISED HOEPA TRIGGERS

	Pre-Dodd-Frank Act	Post-Dodd-Frank Act
Estimated number that make any HOEPA loans	505	655
Percent of small depository institutions	4.7%	6.1%
Estimated number that make 10 or more HOEPA loans	24	50
Percent of small depository institutions	0.2%	0.5%

2. Costs to Small Depository Institutions From Changes in Closed-End Originations

To gauge the potential effect of the Dodd-Frank Act amendments to HOEPA related to high-cost, closed-end mortgage loans, the Bureau approximates the potential revenue loss to DIs that report in HMDA based on the estimated share, from HMDA, of home-secured loan originations that would be high-cost mortgage loans and the share of total income (for banks and thrifts) or total outstanding balances (for credit unions) accounted for by mortgage loans based on Call Report data.[115]

The Bureau estimates that high-cost closed-end mortgage loans account for just a fraction of revenue for most small DIs under both the current and revised triggers (Table 3). The Bureau estimates that, post-Dodd-Frank Act, four percent of small DIs might lose more than one percent of revenue, compared with 1.5 percent of small DIs under the current triggers. At most, about one percent of small DIs would have revenue losses greater than three percent if these creditors chose to make no high-cost, closed-end mortgage loans.

TABLE 3—ESTIMATED REVENUE SHARES ATTRIBUTABLE TO HIGH-COST, CLOSED-END MORTGAGE LENDING FOR SMALL DIS PRE- AND POST-DODD-FRANK ACT

	Pre-Dodd-Frank Act	Post-Dodd-Frank Act
Number with HOEPA revenue share >1% [a]	162	429
Percent of small depositories	1.5%	4.0%
Number with HOEPA revenue share >3% [a]	36	102

spread of 3.5 percentage points or greater. Importantly, the ''higher-priced'' mortgage loan thresholds are well below the APR triggers for HOEPA. The spread is calculated as of the date the loan's rate was set. Based on these variables, the analysis defines as a high-cost mortgage any HMDA loan that is either flagged as a HOEPA loan or that has an estimated APR spread that exceeds the relevant HOEPA trigger. The current HOEPA APR trigger is relative to a comparable Treasury security, but the reported spread in HMDA is relative to APOR, so it is not possible to determine with certainty whether a HMDA loan meets the current APR trigger, and not all loans that are estimated to be above the APR trigger are flagged as HOEPA loans. The Bureau also considered a narrower definition of a high-cost mortgage, namely, any loan that was identified as a HOEPA loan in the HMDA data. Conclusions based on this alternative definition are qualitatively similar to those under the primary, more conservative definition described above.

[113] The statistical model also includes creditor-specific fixed effects, which are intended to capture systematic unobserved differences across creditors that affect the share of a creditor's total loans that are HOEPA loans. The model captures the effect of the changes in the APR triggers through the fact that the gap between the triggers and APR would generally narrow, which increases the estimated probability that a loan would have been flagged as a high-cost loan. Modeling the probability as a function of loan size indirectly approximates the effect of the Dodd-Frank Act revisions to the points-and-fees triggers. More specifically, the points-and-fees trigger is defined, in part, based on points and fees as a percentage of the loan amount, so that, given two loans with identical points and fees, the loan with a smaller loan amount should be more likely to be flagged as a HOEPA loan. Indeed, HOEPA loans are more prevalent for loans with smaller loan amounts in HMDA. Thus, this appears to provide a reasonable approach to capturing variation in the likelihood that a loan is a HOEPA loan. Nonetheless, the Bureau solicits information or data (including data on points and fees or on prepayment penalties) from interested parties that could be used to refine or evaluate this approximation.

[114] Loans potentially subject to HOEPA coverage in this context are loans for non-business purposes secured by a lien on an owner-occupied 1–4 family property, including manufactured homes. In addition, the estimate of the share of loans subject to HOEPA coverage currently excludes purchase money mortgages, which are included in the estimate of this share under the proposed rule.

[115] Data on interest and fee income are not available in the credit union Call Report data. This calculation assumes that interest and fee income for HOEPA and non-HOEPA loans are comparable at banks and thrifts and assumes that the share of outstanding balances accounted for by mortgages is a reasonable proxy for the share of mortgage revenue for a given credit union.

TABLE 3—ESTIMATED REVENUE SHARES ATTRIBUTABLE TO HIGH-COST, CLOSED-END MORTGAGE LENDING FOR SMALL DIS PRE- AND POST-DODD-FRANK ACT—Continued

	Pre-Dodd-Frank Act	Post-Dodd-Frank Act
Percent of small depositories	0.3%	0.9%

[a] Revenue shares for commercial banks and savings institutions are based on interest and fee income from loans secured by 1–4 family homes (including home equity lines of credit, which cannot be distinguished) as a share of total interest and non-interest income. NCUA Call Report data for credit unions do not contain direct measures of income from mortgages and other sources, so the mortgage revenue share is assumed to be proportional to the dollar value of closed- and open-end real-estate loans and lines of credit as a share of total outstanding balances on loans and leases.

3. Open-End HOEPA Lending by Small Depository Institutions

Call Report data for banks and thrifts indicate that nearly all banks and thrifts that make home-equity lines of credit also make closed-end mortgage loans, so the estimated numbers of affected entities are essentially identical to those shown in the first two rows of Table 1.[116] Based on the credit union Call Report data, the Bureau estimates that 268 credit unions—all of which were small entities—originated HELOCs but no closed-end mortgage loans in 2010. Thus, the Bureau estimates that 4,627 credit unions and 3,709 small credit unions would potentially be affected by either the changes to closed-end triggers or the extension of HOEPA to home equity lines of credit. With regard to non-DIs, the Bureau estimates that few, if any, non-DIs that are small entities make HELOCs because non-DIs generally are less likely to be able to fund lines of credit and to have access to the payment system.

4. Effect of the Dodd-Frank Act on Open-End HOEPA Lending

HELOCs account for more than ten percent of the value of outstanding loans and leases for about 12–13 percent of small DIs, and they comprise more than one-quarter of outstanding balances on loans and leases for only about 2–3 percent of small DIs (Table 4).

TABLE 4—HELOCS REPRESENT A MODEST PORTION OF MOST SMALL DEPOSITORIES' LENDING

	Percent of DIs [a]	Number of DIs [a]
HELOCs > 10% of all loans/leases	11.9–13.4	1,286–1,451
HELOCs > 25% of all loans/leases	2.3–2.9	251–319

[a] First-lien HELOCs cannot be distinguished from other first liens in the credit union Call Report data. The ranges reflect alternative assumptions on the value of credit union's HELOC receivables: the lower bound assumes that no first liens are HELOCs, and the upper bound assumes that all adjustable-rate first liens with an adjustment period of one year or less are HELOCs.

5. Direct Costs Associated With the Dodd-Frank Act for Open-End HOEPA Loans

Data from SCF indicate that an estimated 1.2 percent of outstanding HELOCs would potentially meet the proposed APR triggers. The analysis of closed-end mortgage loans for HMDA reporters imply that roughly half of loans that meet any HOEPA trigger meet the APR trigger. Thus, combining these estimates suggests that about 2.4 percent of HELOCs might meet the HOEPA triggers.[117]

The SCF is the only source of nationally representative data on interest rates on consummated HELOCs that the Bureau is aware of, but the Bureau acknowledges that the SCF provides a small sample of HELOCs.[118] Thus, in addition to the approximation error in extrapolating from closed-end mortgage loans to HELOCs due to data limitations, the SCF-based estimate of 1.2 percent is likely imprecisely estimated but reflects the best available estimate given existing data. Given these caveats, the analysis considers how the conclusions would differ if one assumed that a greater fraction of HELOCs would meet the HOEPA triggers. For context, as noted above, the Bureau estimates that roughly 0.3 percent of closed-end mortgage loans would be high-cost mortgages, a percentage one-eighth the estimate for HELOCs, which might suggest that the HELOC estimate is conservative.

The Bureau estimates that, if the rough estimate of 2.4 percent described above were accurate, fewer than 100 small DIs (less than one percent of small DIs) would experience a revenue loss that exceeds one percent (Table 5). If the actual proportion of high-cost HELOCs were a bit more than twice as high as the Bureau estimates, *i.e.,* at five percent, then the estimated share of small depositories that might experience a one percent revenue loss increases to not quite five percent, and about 0.1 percent of small DIs might experience a loss greater than three percent of revenue by these estimates. Under the relatively conservative assumption that ten percent of HELOCs are high-cost mortgages (*i.e.,* over four times the SCF-based estimate), about 13 percent of small DIs might be expected to lose greater than one percent of revenue, and less than two percent of DIs would have estimated losses that exceed three percent of revenue.

[116] Nine of the 5,512 commercial banks and savings institutions with outstanding revolving mortgage receivables reported no outstanding closed-end receivables and are estimated to have made no closed-end loans. Five of these were small depositories.

[117] The share of high-cost, HELOCs that meet the APR trigger arguably might be greater or less than the share for high-cost, closed-end mortgage loans. On the one hand, HELOCs tend to be for smaller amounts, so points and fees may tend to be a larger percent of loan size. On the other hand, based on outreach, the Bureau believes that points and fees may be less prevalent for HELOCs than for closed-end mortgage loans.

[118] The Bureau solicits information or data from interested parties on interest rates on home-equity lines of credit, particularly information on interest rates for HELOC originations.

TABLE 5—ESTIMATED SHARES OF REVENUE FROM POST-DODD-FRANK ACT HIGH-COST HELOCs FOR SMALL DEPOSITORY INSTITUTIONS

	Assumed share of post-DFA high-cost HELOCS		
	2.4 percent	5 percent	10 percent
Number with HOEPA revenue share >1%[a]	80	507	1,390
Percent of small depository institutions	0.7%	4.7%	12.8%
Number with HOEPA revenue share >3%[a]	0	15	200
Percent of small depository institutions	0%	0.1%	1.8%

[a] First-lien HELOCs cannot be distinguished from other first liens in the credit union Call Report data. The estimated revenue shares assume all adjustable-rate first liens with an adjustment period of one year or less are HELOCs (corresponding to the upper bound estimates in Table 4).

For depository institutions, the potential loss in revenue due to the Dodd-Frank Act revisions to HOEPA comprises the losses from both closed- and open-end lending. To assess the potential revenues losses for DIs from both sources, the Bureau first estimates the combined loss based on the assumption that ten percent of HELOCs would be HOEPA loans.[119] Under this conservative assumption, the Bureau estimates that roughly 17 percent of small DIs would lose more than one percent of revenue if these creditors made neither closed-end nor open-end HOEPA loans, and about three percent of small DIs would lose three percent of revenue under this scenario. If instead five percent of HELOCs were HOEPA loans—a proportion more than twice the estimate based on the SCF and therefore still conservative—the Bureau estimates approximately ten percent of small DIs would have combined losses that exceed one percent of revenue, and about one percent of small DIs would lose more than three percent of revenue.[120]

E. Impact of Revised Triggers on Non-Depository Institutions

Closed-End HOEPA Lending by Small Non-Depository Institutions

The Bureau estimates based on the NMLS/MCR data that 2,282 out of 2,515 total non-depository mortgage originators are small entities (Table 1). According to the NMLS/MCR data, many non-DI creditors originate just a few loans. Just less than one-quarter of nonbank creditors are estimated to have originated ten or fewer loans, for example, and about 40 percent of non-DIs made at most 25 loans. These fractions are similar for small non-DIs as well.[121]

The Bureau estimates that the number of HOEPA loans originated by non-DIs that report in HMDA would increase from fewer than 100 loans under the current triggers to over 7,000 under the post-Dodd-Frank Act triggers.[122] The Bureau notes that this is a substantial increase. However, even with this large estimated increase in the absolute number of HOEPA loans, the Bureau estimates that less than 0.4 percent of all closed-end mortgage loans originated by non-DIs that report in HMDA would be HOEPA loans. Moreover, over three-quarters of the estimated increase is driven by two creditors that made no loans in 2010 that were flagged as HOEPA loans in HMDA but that account for the majority of the new HOEPA loans. Two additional creditors account for another roughly nine percent of the new HOEPA loans. The vast majority of originations by these four creditors were mortgages on manufactured homes, particularly purchase money mortgage loans. Based on the number of originations and revenue, the Bureau believes that the largest creditors for manufactured homes are not small entities. The increase in the number of loans covered therefore very likely overstates the impact on small entities.

In estimating the effects of the Dodd-Frank Act revisions to HOEPA on non-DIs' revenues, the Bureau assumes that the share of revenue from HOEPA lending is the same as the share of HOEPA originations for a given creditor. Thus, to examine the impact of the proposed rule on revenue for non-DIs, the Bureau estimates the probability that HOEPA loans comprise more than one percent or three percent of all originations for non-DIs that report in the 2010 HMDA data and extrapolates these estimates for non-DIs that do not report in HMDA.[123]

Under this assumption, the NMLS/MCR data indicate that HOEPA loans accounted for more than one percent of revenue for about five percent of small non-DIs in 2010 (Table 6) and for more than three percent of revenue for a slightly smaller fraction.[124] Less than ten percent of small non-DIs are estimated to have more than one percent of revenue from HOEPA loans under the new APR and points-and-fees triggers, and roughly seven percent of small non-DIs are estimated to have more than three percent of revenue from HOEPA loans.[125]

[119] This calculation is based on combining the estimated revenue loss on closed-end mortgage loans for HMDA-reporters and the estimated loss on HELOCs, which is available for all DIs (since it draws only on the Call Report data). The Bureau then estimates the probability that a DI that does not report in HMDA would have a combined revenue loss of more than one percent based on the institution type, assets, and estimated percentage revenue loss on HELOCs.

[120] The corresponding estimates for all DIs are comparable.

[121] Over half of non-DI originators also broker loans. Revenue from brokering or other sources may mitigate the potential revenue losses of the Dodd-Frank Act amendments on those creditors.

[122] Unlike the Call Report data for DIs, however, the Bureau cannot currently match the NMLS/MCR data to HMDA to project HOEPA lending under the post-Dodd-Frank Act triggers by non-DIs that do not report in HMDA.

[123] The extrapolation is done based on the number of originations and whether HOEPA loans accounted for more than one or three percent of 2010 originations under the current HOEPA triggers.

[124] These estimates are based in part on modeling revenue, and therefore the likelihood that a non-DI is a small entity, because data on revenue are missing for the majority of originators in NMLS/MCR.

[125] The extrapolation from non-DIs that report in HMDA to non-DIs that do not report in HMDA assumes that patterns of lending among non-reporters are similar to patterns at reporters that have comparable originations and similar pre-Dodd-Frank Act HOEPA shares. This extrapolation for creditors that specialize in manufactured-housing mortgages is subject to two caveats. First, as noted, the post-Dodd-Frank Act revisions to HOEPA may particularly increase the share of HOEPA loans among creditors that specialize in loans on manufactured homes, particularly for home purchase. Second, the NMLS/MCR data do not include information on the extent of manufactured-home lending, so the Bureau cannot directly estimate how many non-DI manufactured-housing specialists do not report in HMDA.

TABLE 6—ESTIMATED SHARES OF HOEPA LOAN ORIGINATIONS FOR SMALL NON-DIS PRE- AND POST-DODD-FRANK ACT [a]

	Pre-DFA		Post-DFA	
	Number	Percent	Number	Percent
HOEPA loans > 1% of all loans	121	5.3	207	9.1
HOEPA loans > 3% of all loans	113	5.0	170	7.4

[a] Number and percent of post-Dodd-Frank Act HOEPA originations are projected based on estimated post-Dodd-Frank Act originations of HOEPA loans by HMDA-reporting non-DIs, conditional on total originations in 2010 and on pre-Dodd-Frank Act HOEPA loans as a share of 2010 originations. In particular, in projecting the probability that a creditor made more than one (three) percent HOEPA loans post-Dodd-Frank Act, the Bureau controls for whether pre-Dodd-Frank Act HOEPA loans comprised more than one (three) percent of originations. To estimate the number of small entities, revenue for entities that did not report revenue is estimated based on the dollar value and number of loans originated and the dollar value and number of loans brokered. The estimated probability that a non-DI that reports to HMDA is a small entity is projected from the MCR data based on the number of originations.

F. TILA and RESPA Counseling-Related Provisions

The proposed rule would also implement two Dodd-Frank Act provisions related to homeownership counseling. The Bureau expects that neither of these provisions would result in a sizable revenue loss for small creditors. The first requires that a creditor obtain sufficient documentation to demonstrate that a borrower received homeownership counseling before extending a negative-amortization mortgage to a first-time borrower. This requirement will likely apply to only a small fraction of mortgages: only 0.3 percent of mortgages in the 2007 SCF reportedly had negative-amortization features, and by definition this is an upper bound on the share of negative-amortization mortgages held by first-time borrowers.[126] Moreover, the provision only requires a creditor to obtain documentation, which the Bureau expects to be a comparatively low burden. For these reasons, the Bureau believes that the burden to creditors would be minimal, as noted in parts VI and VIII.

The second provision is a new requirement that lenders provide loan applicants a list of HUD-certified or -approved homeownership counselors or counseling agencies located in the area of the lender. Under the proposed rule, this requirement would apply to all applicants for a federally related mortgage loan (except for HECM applicants where the lender complies with the similar HECM list requirement) and so would apply to a large number of applications—under the Bureau's estimation methodology in analyzing the paper work burden, nearly 16 million applications for mortgages and HELOCs. Nevertheless, the Bureau believes the burden is likely to be minimal—less than 1 dollar per application—because it should be straightforward to obtain and to provide the geographically specific information on certified or approved homeownership counselors or counseling organizations. Further, the list will likely be provided with other documents that the applicant must receive from the lender.

G. Conclusion

The Bureau estimates that, under the proposed rule, only a small fraction of depository institutions would be expected to lose more than three or even more than one percent of revenue even under the conservative assumption that lenders forgo making any HOEPA loans. For example, under the assumption that five percent of HELOCs fell within the HOEPA triggers—a proportion more than twice the estimate based on the SCF and therefore still conservative—the Bureau estimates that about ten percent of small DIs would have combined losses that exceed one percent of revenue, and roughly one percent of small DIs would lose more than three percent of revenue. In all cases, the TILA and RESPA counseling provisions noted above would have little impact on these impact estimates.

For non-depository institutions, less than ten percent of small non-DIs are estimated to have more than one percent of revenue from HOEPA loans under the new APR and points-and-fees triggers, and about seven percent of small non-DIs are estimated to have more than three percent of revenue from HOEPA loans.[127] In all cases, the TILA and RESPA counseling provisions noted above would have little impact on these impact estimates.

Certification

Accordingly, the undersigned certifies that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. The Bureau requests comment on the analysis above and requests any relevant data.

VIII. Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking, and identified as such, has been submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (Paperwork Reduction Act or PRA). Under the PRA, the Bureau may not conduct or sponsor, and a person is not required to respond to, this information collection unless the information collection displays a currently valid control number.

This proposed rule would amend 12 CFR part 1024 (Regulation X) and 12 CFR part 1026 (Regulation Z). Both Regulations X and Z currently contain collections of information approved by OMB. The Bureau's OMB control number for Regulation X is 3170–0016 and for Regulation Z is 3170–0015.

As described below, the proposed rule would amend the collections of information currently in Regulation X and Regulation Z. RESPA and Regulation X are intended to provide consumers with greater and more timely information on the nature and costs of the residential real estate settlement process. As previously discussed, the proposed rule would amend the information collections currently required by Regulation X by requiring that lenders distribute to prospective borrowers of virtually all federally related mortgage loans a list of federally certified or approved homeownership counselors or counseling organizations located in the area of the lender. *See* the section-by-section analysis to proposed § 1024.20, above. TILA and Regulation Z are intended to ensure effective disclosure of the costs and terms of credit to consumers. As previously discussed, the proposed rule would amend the information collections currently required by Regulation Z by

[126] For context, the comparable shares of loans that allowed for negative amortization in the 1989–2004 SCFs varied between 1.3–2.3 percent of loans. These percentages are based on the share of mortgage borrowers who said their payment did not change when the interest rate on their adjustable-rate mortgage changed.

[127] See Table 6, supra.

(1) Expanding the categories of loans for which a special HOEPA disclosure is required, (2) requiring that creditors distribute a list of federally approved housing counselors to prospective borrowers of high-cost mortgages and (in the case of first-time borrowers) negatively amortizing mortgage loans, and (3) requiring creditors to receive and review confirmation that prospective borrowers of high-cost mortgages and (in the case of first-time borrowers) negatively amortizing mortgage loans have received required pre-loan counseling. *See generally* the section-by-section analysis to proposed § 1026.32(a)(1) and (c), § 1026.34(a)(5), and § 1026.36(k), above.

The information collection in the proposed rule is required to provide benefits for consumers and would be mandatory. *See* 15 U.S.C. 1601 *et seq.;* 12 U.S.C. 2601 *et seq.* Because the Bureau does not collect any information under the proposed rule, no issue of confidentiality arises. The likely respondents would be depository institutions (*i.e.,* commercial banks/savings institutions and credit unions) and non-depository institutions (*i.e.,* mortgage companies or other non-bank lenders) subject to Regulation X or the high-cost mortgage requirements or negative amortization loan counseling requirements of Regulation Z.[128]

Under the proposed rule, the Bureau would account for the entire paperwork burden for respondents under Regulation X. The Bureau generally would also account for the paperwork burden associated with Regulation Z for the following respondents pursuant to its administrative enforcement authority: insured depository institutions with more than $10 billion in total assets, their depository institution affiliates, and certain non-depository lenders. The Bureau and the FTC generally both have enforcement authority over non-depository institutions for Regulation Z. Accordingly, the Bureau has allocated to itself half of the estimated burden to non-depository institutions. Other Federal agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Bureau's burden estimation methodology.

Using the Bureau's burden estimation methodology, the total estimated burden under the proposed changes to Regulation X for all of the nearly 15,000 institutions subject to the proposed rule, would be approximately 16,400 hours for one-time changes and 260,000 hours annually. Using the Bureau's burden estimation methodology, the total estimated burden under the proposed changes to Regulation Z for the roughly 5,200 institutions, including Bureau respondents,[129] that are estimated to make high-cost mortgages subject to the proposed rule would be approximately 38,300 hours of one-time costs and about 1,600 hours annually.

The aggregate estimates of total burdens presented in this part VIII are based on estimated costs that are weighted averages across respondents. The Bureau expects that the amount of time required to implement each of the proposed changes for a given institution may vary based on the size, complexity, and practices of the respondent.

A. Information Collection Requirements

The Bureau believes the following aspects of the proposed rule would be information collection requirements under the PRA.

1. Provision of List of Federally Approved Housing Counselors

The Bureau estimates one-time and ongoing costs to respondents of complying with the housing counselor disclosure requirements in proposed §§ 1024.20, 1026.34(a)(5)(vii), 1026.36(k)(4) as follows. First, the Bureau assumes that lenders who are required to comply with proposed § 1026.34(a)(5)(vii) and § 1026.36(k)(4) would comply with those provisions by satisfying the disclosure obligation in proposed § 1024.20, as permitted by the proposed rule. Thus, the Bureau does not aggregate the burden to respondents of providing the counselor list disclosures in proposed § 1026.34(a)(5)(vii) (high-cost mortgages) and § 1026.36(k)(4) (negative amortization loans to first-time borrowers). However, the Bureau does aggregate burden for reviewing the relevant portions of the regulations and training relevant employees.

One-time costs. The Bureau estimates that covered persons would incur one-time costs associated with reviewing the regulation and training relevant employees. Specifically, the Bureau estimates that, for each covered person, one attorney and one compliance officer would each take 7.5 minutes (15 minutes in total) to read and review the sections of the proposed regulation that describe the housing counseling disclosures, based on the length of the sections. The Bureau also estimates that each loan officer or other loan originator will need to receive 7.5 minutes of training concerning the disclosures.[130] The Bureau estimates the total one-time costs across all relevant providers of reviewing the relevant portions of the proposed regulation and conducting training to be about 16,400 hours and roughly $869,000, or about $174,000 per year if annualized over five years. Table 1, below, shows the Bureau's estimate of the total one-time paperwork burden to all respondents to comply with the housing counselor disclosure requirements in proposed §§ 1024.20, 1026.34(a)(5)(vii), and § 1026.36(k)(4).

Ongoing costs. On an ongoing basis, the Bureau estimates that producing and providing the required housing counselor disclosures to an applicant will take approximately one minute and that the cost of producing the required disclosures will be $0.10 per disclosure. The estimated ongoing paperwork burden to all Bureau respondents taken together is approximately 258,700 burden hours and about $13.4 million annually, or less than 1 dollar per loan application. Table 2, below, shows the Bureau's estimates of the total ongoing annual paperwork burden to all Bureau respondents to comply with the requirement to provide mortgage loan applicants with a list of federally approved housing counselors.

2. Receipt of Certification of Counseling for High-Cost Mortgages

The Bureau estimates one-time and ongoing costs to respondents of complying with the requirement to receive the high-cost mortgage counseling certification, as required by proposed § 1026.34(a)(5)(i) and (v), as

[128] For purposes of this PRA analysis, references to "creditors" or "lenders" shall be deemed to refer collectively to commercial banks, savings institutions, credit unions, and mortgage companies (*i.e.,* non-depository lenders), unless otherwise stated. Moreover, reference to "respondents" shall generally mean all categories of entities identified in the sentence to which this footnote is appended, except as otherwise stated or if the context indicates otherwise.

[129] There are 154 depository institutions (and their depository affiliates) that are subject to the Bureau's administrative enforcement authority. For purposes of this PRA analysis, the Bureau's respondents under Regulation Z are 130 depository institutions that originate either open or closed-end mortgages and an estimated 2,515 non-depository institutions that are subject to the Bureau's administrative enforcement authority. Unless otherwise specified, all references to burden hours and costs for the Bureau respondents for the collection under Regulation Z are based on a calculation of half of the estimated 2,515 non-depository institutions.

[130] The burden-hour estimate of training assumes that a total of 30 minutes is required for training on all aspects of the proposed rule. For simplicity, these time estimates assume that an equal amount of time is spent on each of the four provisions, but the Bureau expects the proportion of time allocated to each topic in the 30 minute total training time may vary. The estimation methodology also assumes that a trainer will spend an hour for every ten hours of trainee time.

follows. The Bureau estimates that 54 depository institutions and 354 non-depository institutions subject to the Bureau's administrative enforcement authority would originate high-cost mortgages.[131] The Bureau estimates that this universe of relevant providers would each incur a one-time burden of 24 minutes for compliance or legal staff to read and review the relevant sections of the regulation (12 minutes for each of two compliance or legal staff members). The Bureau also estimates that this universe of relevant providers would incur a one-time burden of 7.5 minutes each to conduct initial training for each loan officer or other loan originator concerning the receipt of certification of counseling. The Bureau estimates that the total one-time burden across all relevant providers of complying with the high-cost mortgage housing counseling certification requirement would be about 2,100 hours and roughly $98,000.

On an ongoing basis, the Bureau estimates that respondents would incur a burden of 2 minutes per origination to receive and review the certification form. In addition, the Bureau estimates that, on average, a creditor would incur a cost of $0.025 to retain the certification form. The Bureau estimates that the total ongoing burden across all relevant providers of complying with the high-cost mortgage housing counseling certification requirement would be about 400 hours and $20,000 annually. The Bureau's estimates of the total one-time and ongoing annual paperwork burden to all Bureau respondents to comply with the requirement to receive certification of high-cost mortgage counseling are set forth in Tables 1 and 2, below.

3. Receipt of Documentation of Counseling for Negative Amortization Loans

The Bureau does not separately estimate the paperwork burden to respondents of complying with the requirement to receive documentation that first-time borrowers in negatively amortizing loans have received pre-loan homeownership counseling, as required by proposed § 1026.36(k). The Bureau believes that any such burden will be minimal. The universe of respondents for this provision is negligible. Based on data from the 2007 Survey of Consumer Finances, the Bureau estimates that only 0.3 percent of all outstanding mortgages in 2007 had negative amortization features. This estimate is an upper bound on the share of negatively amortizing loans held by first-time borrowers. Further, the Bureau believes that few if any mortgages originated currently could potentially negatively amortize. Moreover, the Bureau believes that the burden to respondents of complying with the provision would be *de minimis* since the required elements of the documentation are minimal, and the provision would require creditors only to receive and retain this documentation as part of the loan file.

4. HOEPA Disclosure Form

The Bureau believes that respondents will incur certain one-time and ongoing paperwork burden pursuant to proposed § 1026.32(a)(1), which implements Dodd-Frank's extension of HOEPA coverage to purchase money mortgage loans and open-end credit plans. As a result of proposed § 1026.32(a)(1), respondents that extend purchase money mortgage loans or open-end credit plans that are high-cost mortgages would be required to provide borrowers the special HOEPA disclosure required by § 1026.32(c). The Bureau has identified the following paperwork burdens in connection with proposed § 1026.32(a)(1).

a. Revising the HOEPA Disclosure Form

First, the Bureau estimates the burden to creditors originating high-cost purchase money mortgage loans and high-cost HELOCs of revising the HOEPA disclosure required by § 1026.32(c). The Bureau believes that respondents making high-cost purchase money mortgage loans would incur minimal or no additional burden, because the Bureau expects that these respondents would provide the same HOEPA disclosures used for refinance and closed-end home-equity loans subject to § 1026.32.

As discussed in the section-by-section analysis to proposed § 1026.32(c), however, the calculation of certain of the required disclosures differs between the open-end and closed-end credit contexts. Therefore, the Bureau separately estimates the burden for revising the HOEPA disclosure for respondents likely to make high-cost HELOCs. The Bureau estimates that 45 depository institutions for which it has administrative enforcement authority would be likely to originate a high-cost HELOC. Because non-depository institutions are generally less able to fund lines of credit and to have access to the payment system, the Bureau believes that few, if any, non-depository institutions originate open-end credit plans.

The Bureau believes that respondents that are likely to make high-cost HELOCs would incur a one-time burden, but no ongoing burden, in connection with revising the HOEPA disclosure. The one-time burden includes a total estimated burden of less than 1,900 hours across all relevant providers to update their software and information technology systems to generate the HOEPA disclosure form appropriate for open-end credit plans. This estimate combines the burdens for large creditors and a fraction of smaller creditors whom the Bureau assumes would develop the necessary software and systems internally. The Bureau assumes that the remainder of smaller creditors would rely on third-party vendors to obtain a revised disclosure form for high-cost HELOCs; these small creditors are assumed to incur the dollar costs passed on from a vendor that offers the product but no hours burden. In addition, the Bureau assumes that respondents that are likely to make high-cost HELOCs would spend 7.5 minutes each training a subset of loan officers or other loan originators that may make such loans. The Bureau estimates that the training burden across all relevant providers would total nearly 1,300 hours. The total one-time burden across all relevant providers to revise the HOEPA disclosure is therefore about 3,100 hours. The Bureau estimates the corresponding dollar-cost burden is roughly $169,000, corresponding to about $34,000 per year for all respondents if this one-time cost were annualized over five years. The estimated total one-time burden is summarized in Table 1, below.

b. Providing the HOEPA Disclosure Form

Respondents that make any high-cost mortgage would incur costs to review the provisions of the regulation related to the HOEPA disclosure. These costs could vary considerably across creditors. A creditor that currently makes high-cost mortgages might be expected to have lower costs to review the relevant section of the regulation than would a creditor that has not previously made high-cost mortgages but now expects to make such loans as a result of, for example, the revised triggers and extension of HOEPA to purchase money mortgage loans and HELOCs. The Bureau's estimates are averages of these costs across lenders.

[131] In the case of high-cost mortgages, TILA defines ''creditor'' as a person that, in any 12 month period, originates two or more high-cost mortgages, or one or more high-cost mortgage through a broker. For purposes of determining the universe of relevant providers for this provision, the Bureau does not attempt to calculate how many of the respondents that have made HOEPA loans in the past made only one HOEPA loan. Thus, the number of relevant providers used to calculate the paperwork burden for this provision may be an overestimate.

One-time costs. Based on the length of the proposed section, the Bureau estimates the one-time burden across all relevant providers to read and review the HOEPA disclosure provision and to obtain any necessary legal guidance would be slightly more than 30 minutes for each of two legal or compliance staff members. Across all relevant providers, the Bureau assumes an average one-time burden of 7.5 minutes each per loan officer or other loan originator for initial training concerning the disclosure. Under these assumptions, the total one-time burden across all relevant providers is estimated to be about 2,200 hours and approximately $110,000, or about $22,000 annually if the costs were divided equally over five years.

Ongoing costs. On an ongoing basis, the Bureau estimates that producing and providing the required disclosures to an applicant will take approximately 2 minutes and that the cost of producing the required disclosures will be $0.10 per disclosure. The Bureau assumes that, on average, the cost of retaining a copy of the disclosure for recordkeeping will cost $0.025 per disclosure. The Bureau estimates that, taken together, the production, provision, and record-retention costs for across all relevant providers would total approximately 400 hours and nearly $21,000 annually.

TABLE 1—ONE-TIME COSTS FOR ALL CFPB RESPONDENTS

Information collection	Hours	Dollars
Provision of list of Federally approved housing counselors	16,400	869,000
Receipt of certification of counseling for high-cost mortgages	2,100	98,000
Revision of HOEPA disclosure for applicability to open-end credit	3,100	169,000
Provision of HOEPA disclosure	2,200	110,000
Total burden, All Respondents	23,900	1,246,000

TABLE 2—ONGOING COSTS FOR ALL CFPB RESPONDENTS

Information collection	Hours	Dollars
Provision of list of Federally approved housing counselors	258,700	13,406,000
Receipt of certification of counseling for high-cost mortgages	400	20,000
Revision of HOEPA disclosure for applicability to open-end credit	—	—
Provision of special HOEPA disclosure	400	21,000
Total annual burden, All Respondents	259,600	13,447,000

B. Comments

Comments are specifically requested concerning: (i) Whether the proposed collections of information are necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (ii) the accuracy of the estimated burden associated with the proposed collections of information; (iii) how to enhance the quality, utility, and clarity of the information to be collected; and (iv) how to minimize the burden of complying with the proposed collections of information, including the application of automated collection techniques or other forms of information technology. Comments on the collection of information requirements should be sent to the Office of Management and Budget (OMB), Attention: Desk Officer for the Consumer Financial Protection Bureau, Office of Information and Regulatory Affairs, Washington, DC, 20503, or by the internet to *http://oira_submission@omb.eop.gov*, with copies to the Bureau at the Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, or by the internet to *CFPB_Public_PRA@cfpb.gov*.

List of Subjects

12 CFR Part 1024

Condominiums, Consumer protection, Housing, Mortgagees, Mortgages, Mortgage servicing, Recordkeeping requirements, Reporting.

12 CFR Part 1026

Advertising, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside bold arrows, and language that would be deleted is shown inside bold brackets.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau proposes to amend Regulation X, 12 CFR part 1024, and Regulation Z, 12 CFR part 1026, as set forth below.

PART 1024—REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X)

1. The authority citation for part 1024 continues to read as follows:

Authority: 12 U.S.C. 2603–2605, 2607, 2609, 2617, 5512, 5581.

2. A new § 1024.20 is added to read as follows:

►§ 1024.20 List of homeownership counselors.

(a) *Provision of list.* (1) Except as otherwise provided in this section, not later than three business days after a lender, mortgage broker, or dealer receives an application, or information sufficient to complete an application, the lender must provide the loan applicant with a clear and conspicuous written list of five homeownership counselors or counseling organizations located:

(i) Within the zip code of the loan applicant's current address; or

(ii) If five counselors or counseling organizations are not within the zip code of the loan applicant's current address, then within the zip code or zip codes closest to the loan applicant's current address.

(2) The list of homeownership counselors or counseling organizations distributed to each loan applicant under this section shall include only homeownership counselors and counseling organizations listed on either:

(i) The most current list of homeownership counselors or counseling organizations made available by the Bureau to lenders for use in complying with the requirements of this section; or

(ii) The most current list maintained by HUD of homeownership counselors or counseling organizations who are certified by the Secretary of HUD pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)), or are otherwise approved by HUD.

(3) The list of homeownership counselors or counseling organizations provided under this section must include:

(i) The name, business address, telephone number, and, if available from the Bureau or HUD, the email address and Web site of each listed homeownership counselor or counseling organization; and

(ii) The Web site addresses and telephone numbers of the Bureau and HUD where applicants can access information on homeownership counseling.

(4) The list of homeownership counselors or counseling organizations provided under this section may be combined and provided with other mortgage loan disclosures required pursuant to Regulation Z or this part unless prohibited by Regulation Z or this part.

(5) A mortgage broker or dealer may provide the list of homeownership counselors or counseling organizations required under this section to any loan applicant from whom it receives or for whom it prepares an application. If the mortgage broker or dealer has provided the required list of homeownership counselors or counseling organizations, the lender is not required to provide an additional list. The lender is responsible for ensuring that the list of homeownership counselors or counseling organizations is provided to a loan applicant in accordance with this section.

(6) If the lender, mortgage broker, or dealer does not provide the list of homeownership counselors or counseling organizations required under this section to the loan applicant in person, the lender must mail or deliver the list to the loan applicant by other means. The list may be provided in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (ESIGN) (15 U.S.C. 7001 *et seq.*).

(7) The lender is not required to provide the list of homeownership counselors or counseling organizations required under this section if, before the end of the three-business-day period provided in paragraph (a)(1) of this section, the lender denies the application or the loan applicant withdraws the application.

(8) If a mortgage loan transaction involves more than one lender, only one list of homeownership counselors or counseling organizations required under this section must be given to the loan applicant and the lenders shall agree among themselves which lender must comply with the requirements that this section imposes on any or all of them. If there is more than one loan applicant, the required list of homeownership counselors or counseling organizations may be provided to any loan applicant with primary liability on the mortgage loan obligation.

(b) *Open-end lines of credit (home-equity plans) under Regulation Z.* For a federally related mortgage loan that is a home-equity line of credit under Regulation Z, a lender or mortgage broker that provides the loan applicant with the list of homeownership counselors or counseling organizations required under this section may comply with the timing and delivery requirements set out in either paragraph (a) of this section or 12 CFR 1026.40(b).

(c) *Home Equity Conversion Mortgages.* A lender is not required to provide an applicant for a Home Equity Conversion Mortgage, as defined in 12 U.S.C. 1715z–20(b)(3), the list of homeownership counselors or counseling organizations required under this section, if the lender is required by HUD to provide, and does provide, a list of counselors or counseling agencies specializing in counseling on such mortgages to the applicant.◄

PART 1026—TRUTH IN LENDING (REGULATION Z)

3. The authority citation for part 1026 is revised to read as follows:

Authority: 12 U.S.C. ►2601; 2603–2605, 2607, 2609, 2617, 5511,◄ 5512, ►5532,◄ 5581; 15 U.S.C. 1601 *et seq.*

Subpart A—General

4. Section 1026.1 is amended by revising paragraph (d)(5) to read as follows:

§ 1026.1 Authority, purpose, coverage, organization, enforcement, and liability.

* * * * *

(d) * * *

(5) Subpart E contains special rules for mortgage transactions. Section 1026.32 requires certain disclosures and provides limitations for closed-end loans ►and open-end credit plans◄ that have rates or fees above specified amounts ►or certain prepayment penalties◄. Section 1026.33 requires special disclosures, including the total annual loan cost rate, for reverse mortgage transactions. Section 1026.34 prohibits specific acts and practices in connection with [closed-end] mortgage transactions that are subject to § 1026.32. Section 1026.35 prohibits specific acts and practices in connection with closed-end higher-priced mortgage loans, as defined in § 1026.35(a). Section 1026.36 prohibits specific acts and practices in connection with an extension of credit secured by a dwelling.

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

5. Section 1026.31 is amended by revising paragraph (c)(1) to read as follows:

§ 1026.31 General rules.

* * * * *

(c) *Timing of disclosure.* (1) *Disclosures for certain* 【*closed-end*】 *home mortgages.* The creditor shall furnish the disclosures required by § 1026.32 at least three business days prior to consummation ►or account opening◄ of a ►high-cost mortgage as defined in § 1026.32(a)◄ 【mortgage transaction covered by § 1026.32】.

(i) *Change in terms.* After complying with paragraph (c)(1) of this section and prior to consummation ►or account opening◄, if the creditor changes any term that makes the disclosures inaccurate, new disclosures shall be provided in accordance with the requirements of this subpart.

(ii) *Telephone disclosures.* A creditor may provide new disclosures by telephone if the consumer initiates the change and if, ►prior to or◄ at consummation ►or account opening◄:

(A) The creditor provides new written disclosures; and

(B) The consumer and creditor sign a statement that the new disclosures were provided by telephone at least three days prior to consummation ►or prior to account opening, as applicable◄.

(iii) *Consumer's waiver of waiting period before consummation ►or account opening◄.* The consumer may, after receiving the disclosures required by paragraph (c)(1) of this section, modify or waive the three-day waiting period between delivery of those disclosures and consummation ►or account opening◄ if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the signature of all the consumers entitled to the waiting period. Printed forms for this purpose are prohibited, except when creditors are permitted to use printed forms pursuant to § 1026.23(e)(2).

* * * * *

6. Section 1026.32 is amended by:

A. Revising the section heading;

B. Revising paragraph (a);

C. Revising paragraph (b);

D. Revising paragraphs (c)(3), (4) and (5);

E. Revising paragraph (d) introductory text, paragraph (d)(1), and paragraphs (d)(6) through (8).

The additions and revisions read as follows:

§ 1026.32 Requirements for ►high-cost◄ [certain closed-end] home mortgages.

(a) ►*High-cost mortgages*◄ [*Coverage.*] (1) ►*Coverage.* For purposes of this subpart, *high-cost mortgage* means any consumer credit transaction, other than a reverse-mortgage transaction as defined in § 1026.33(a), that is secured by the consumer's principal dwelling, and in which:◄ [Except as provided in paragraph (a)(2) of this section, the requirements of this section apply to a consumer credit transaction that is secured by the consumer's principal dwelling, and in which either:]

Alternative 1—Paragraph (a)(1)(i)

(i) ►The annual percentage rate applicable to the transaction, as described in paragraph (a)(2) of this section, will exceed the average prime offer rate, as defined in § 1026.35(a)(2)(ii), for a comparable transaction by more than:

(A) 6.5 percentage points for a first-lien transaction, other than as described in paragraph (a)(1)(i)(B) of this section;

(B) 8.5 percentage points for a first-lien transaction if the dwelling is personal property and the total loan amount is less than $50,000; or

(C) 8.5 percentage points for a subordinate-lien transaction; or◄ [The annual percentage rate at consummation will exceed by more than 8 percentage points for first-lien loans, or by more than 10 percentage points for subordinate-lien loans, the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor; or]

Alternative 2—Paragraph (a)(1)(i)

(i) ►The transaction coverage rate, as defined in § 1026.35(a)(2)(i), applicable to the closed-end mortgage loan or the annual percentage rate applicable to the open-end credit plan, as provided in paragraph (a)(2) of this section, will exceed the average prime offer rate, as defined in § 1026.35(a)(2)(ii), for a comparable transaction by more than:

(A) 6.5 percentage points for a first-lien transaction, other than as described in paragraph (a)(1)(i)(B) of this section;

(B) 8.5 percentage points for a first-lien transaction if the dwelling is personal property and the total loan amount is less than $50,000; or

(C) 8.5 percentage points for a subordinate-lien transaction; or◄ [The annual percentage rate at consummation will exceed by more than 8 percentage points for first-lien loans, or by more than 10 percentage points for subordinate-lien loans, the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor; or]

(ii) The total points and fees payable [by the consumer at or before loan closing will exceed] ►in connection with the transaction, as described in paragraphs (b)(1) through (5) of this section, will exceed:

(A) 5 percent of the total loan amount for a transaction with a total loan amount of $20,000 or more; or

(B) The lesser of 8 percent of the total loan amount or $1,000 for a transaction with a total loan amount of less than $20,000◄ [the greater of 8 percent of the total loan amount, or $400]; the ►$1,000◄ [$400] figure shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1[.] ►; or

(iii) Under the terms of the loan contract or open-end credit agreement, the creditor can charge a prepayment penalty, as defined in paragraph (b)(8) of this section, more than 36 months after consummation or account opening, or prepayment penalties that can exceed, in total, more than two percent of the amount prepaid.◄

(2) ►*Determination of transaction coverage rate or annual percentage rate.* For purposes of paragraph (a)(1)(i) of this section, a creditor shall determine the transaction coverage rate or annual percentage rate, as applicable, for a transaction based on the following:

(i) For a fixed-rate transaction in which the annual percentage rate will not vary during the term of the loan or plan, the interest rate in effect on the date of consummation or account opening of the transaction;

(ii) For a variable-rate transaction in which the interest rate may vary during the term of the loan or plan in accordance with an index that is not under the creditor's control, the interest rate that results from adding the maximum margin permitted at any time during the term of the loan or plan to the value of the index rate in effect on the date of the consummation or account opening of the transaction; and

(iii) For a transaction in which the interest rate may vary during the term of the loan or plan, other than a transaction described in paragraph (a)(2)(ii) of this section, the maximum interest rate that may be imposed during the term of the loan or plan.◄ [This section does not apply to the following:

(i) A residential mortgage transaction.

(ii) A reverse mortgage transaction subject to § 1026.33.

(iii) An open-end credit plan subject to subpart B of this part.]

(b) *Definitions.* For purposes of this subpart, the following definitions apply:

(1) For purposes of paragraph (a)(1)(ii) of this section, ►in connection with a closed-end mortgage loan,◄ *points and fees* means:

(i) All items [required to be disclosed under § 1026.4(a) and 1026.4(b), except interest or the time-price differential;] ►included in the finance charge under § 1026.4(a) and (b), but excluding items described in § 1026.4(c) through (e) (except to the extent otherwise included by this paragraph (b)(1)) and also excluding:

(A) Interest or the time-price differential;

(B) Any premium or other charge for any guaranty or insurance protecting the creditor against the consumer's default or other credit loss to the extent that the premium or charge is:

(*1*) Assessed in connection with any Federal or State agency program;

(*2*) Not in excess of the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)), provided that the premium or charge is required to be refundable on a pro rata basis and the refund is automatically issued upon notification of the satisfaction of the underlying mortgage loan; or

(*3*) Payable after consummation.◄

(ii) All compensation paid ►directly or indirectly by a consumer or creditor to a loan originator, as defined in § 1026.36(a)(1), including a loan originator that is also the creditor in a table-funded transaction◄ [to mortgage brokers];

(iii) All items listed in § 1026.4(c)(7) (other than amounts held for future payment of taxes) ►payable at or before consummation, unless:◄ [unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor; and]

(A) The charge is reasonable;

(B) The creditor receives no direct or indirect compensation in connection with the charge; and

(C) The charge is not paid to an affiliate of the creditor;◄

(iv) ►Premiums or other charges payable at or before consummation for any credit life, credit disability, credit unemployment, or credit property insurance, or any other life, accident, health, or loss-of-income insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract;◄ [Premiums or other charges for credit life, accident, health, or loss-of-income insurance, or debt-cancellation coverage (whether or not the debt-cancellation coverage is insurance under applicable law) that provides for cancellation of all or part of the consumer's liability in the event of the loss of life, health, or income or in the case of accident, written in connection with the credit transaction.]

►(v) The maximum prepayment penalty, as defined in paragraph (b)(8)(i) of this section, that may be charged or collected under the terms of the mortgage loan; and

(vi) The total prepayment penalty, as defined in paragraph (b)(8)(i) of this section, incurred by the consumer if the consumer refinances the existing mortgage loan with the current holder of the existing loan, a servicer acting on behalf of the current holder, or an affiliate of either.◄

(2) ►For purposes of paragraph (b)(1)(ii) of this section, the term *points and fees* does not include compensation paid to:

(i) An employee of a retailer of manufactured homes who does not take a residential mortgage loan application, offer or negotiate terms of a residential mortgage loan, or advise a consumer on loan terms (including rates, fees, and other costs) but who, for compensation or other monetary gain, or in expectation of compensation or other monetary gain, assists a consumer in obtaining or applying to obtain a residential mortgage loan;

(ii) A person that only performs real estate brokerage activities and is licensed or registered in accordance with applicable State law, unless such person is compensated by a creditor or loan originator, as defined in § 1026.36(a)(1), or by any agent of the creditor or loan originator; or

(iii) A servicer or servicer employees, agents, and contractors, including but not limited to those who offer or negotiate terms of a transaction for purposes of renegotiating, modifying, replacing, and subordinating principal of existing mortgages where borrowers are behind in their payments, in default, or have a reasonable likelihood of being in default or falling behind.

(3) For purposes of paragraph (a)(1)(ii) of this section, in connection with an open-end credit plan, *points and fees* means:

(i) All items included in the finance charge under § 1026.4(a) and (b) and payable at or before account opening, except interest or the time-price differential;

(ii) All items listed in § 1026.4(c)(7) (other than amounts held for future payment of taxes) payable at or before account opening, unless:

(A) The charge is reasonable;

(B) The creditor receives no direct or indirect compensation in connection with the charge; and

(C) The charge is not paid to an affiliate of the creditor;

(iii) Premiums or other charges payable at or before account opening for any credit life, credit disability, credit unemployment, or credit property insurance, or any other life, accident, health, or loss-of-income insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract;

(iv) The maximum prepayment penalty, as defined in paragraph (b)(8)(ii) of this section, that may be charged or collected under the terms of the open-end credit plan;

(v) Any fees charged for participation in an open-end credit plan, as described in § 1026.4(c)(4), whether assessed on an annual or other periodic basis; and

(vi) Any transaction fee, including any minimum fee or per-transaction fee, that will be charged for a draw on the credit line.

(4) For purposes of paragraph (b)(3) of this section, the term *points and fees* does not include any fees or charges that the creditor waives at or before account opening unless such fees or charges may be imposed on the consumer after account opening.

(5) For purposes of paragraphs (b)(1) and (3) of this section, the term *points and fees* does not include:

(i) *Bona fide third-party charges.* Any bona fide third-party charge not retained by the creditor, loan originator, or an affiliate of either, except to the extent that the charge is required to be included in points and fees under paragraph (b)(1)(i)(B) of this section. For purposes of this paragraph (b)(5)(i), the term *loan originator* means a loan originator as that term is defined in § 1026.36(a)(1), notwithstanding § 1026.36(f).

(ii) *Bona fide discount points.* (A) Up to two bona fide discount points paid by the consumer in connection with the transaction if the interest rate for the loan or plan without such points does not exceed:

(*1*) The average prime offer rate, as defined in § 1026.35(a)(2)(ii), by more than one percentage point; or

(*2*) In the case of a transaction secured by personal property, the average rate for a loan insured under Title I of the National Housing Act (12 U.S.C. 1702 *et seq.*) by more than one percentage point.

(B) If two bona fide discount points have not been excluded under paragraph (b)(5)(ii)(A) of this section, up to one bona fide discount point paid by the consumer in connection with the transaction if the interest rate for the loan or plan without such points does not exceed:

(*1*) The average prime offer rate, as defined in § 1026.35(a)(2)(ii), by more than two percentage points; or

(*2*) In the case of a transaction secured by personal property, the average rate for a loan insured under Title I of the National Housing Act (12 U.S.C. 1702 *et seq.*) by more than two percentage points.

(C) For purposes of this paragraph (b)(5)(ii), the term *bona fide discount point* has the same meaning as in § 1026.43(e)(3)(iv).

(6) *Total loan amount.* (i) *Closed-end mortgage loans.* The total loan amount for a closed-end mortgage loan is calculated by taking the amount of credit extended at consummation that the consumer is legally obligated to repay, as reflected in the loan contract, and deducting any cost that is both included in points and fees under § 1026.32(b)(1) and financed by the creditor.

(ii) *Open-end credit plan.* The total loan amount for an open-end credit plan is the credit limit for the plan when the account is opened.

(7)◄ *Affiliate* means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*).

►(8) *Prepayment penalty.* (i) *Closed-end mortgage loans.* For a closed-end mortgage loan, *prepayment penalty* means a charge imposed for paying all or part of the transaction's principal before the date on which the principal is due.

(ii) *Open-end credit plans.* For an open-end credit plan, *prepayment penalty* means a charge imposed by the creditor if the consumer terminates the open-end credit plan prior to the end of its term.◄

(c) * * *

(3) *Regular payment;* ►*minimum periodic payment example;*◄ *balloon payment.* ►(i) For a closed-end loan, the◄[The] amount of the regular monthly (or other periodic) payment and the amount of any balloon payment ►provided in the credit contract, if permitted under paragraph (d)(1) of this section◄. The regular payment disclosed under this paragraph shall be treated as accurate if it is based on an amount borrowed that is deemed accurate and is disclosed under paragraph (c)(5) of this section.

►(ii) For an open-end credit plan:

(A) An example showing the first minimum periodic payment for the draw period, the first minimum periodic payment for any repayment period, and the balance outstanding at the beginning of any repayment period. The example must be based on the following assumptions:

(1) The consumer borrows the full credit line, as disclosed in paragraph (c)(5) of this section, at account opening and does not obtain any additional extensions of credit;

(2) The consumer makes only minimum periodic payments during the draw period and any repayment period; and

(3) The annual percentage rate used to calculate the example payments remains the same during the draw period and any repayment period. The creditor must provide the minimum periodic payment example based on the annual percentage rate for the plan, as described in paragraph (c)(2) of this section, except that if an introductory annual percentage rate applies, the creditor must use the rate that will apply to the plan after the introductory rate expires.

(B) If the credit contract provides for a balloon payment under the plan as permitted under paragraph (d)(1) of this section, a disclosure of that fact and an example showing the amount of the balloon payment based on the assumptions described in paragraph (c)(3)(ii)(A) of this section.

(C) A statement that the example payments show the first minimum periodic payments at the current annual percentage rate if the consumer borrows the maximum credit available when the account is opened and does not obtain any additional extensions of credit, or a substantially similar statement.

(D) A statement that the example payments are not the consumer's actual payments and that the actual minimum periodic payments will depend on the amount the consumer borrows, the interest rate applicable to that period, and whether the consumer pays more than the required minimum periodic payment, or a substantially similar statement.◄

(4) *Variable-rate.* For variable-rate transactions, a statement that the interest rate and monthly payment may increase, and the amount of the single maximum monthly payment, based on the maximum interest rate required to be ►included in the contract by◄ [disclosed under] § 1026.30.

(5) *Amount borrowed* ►*; credit limit.* (i) For a closed-end mortgage loan◄ [For a mortgage refinancing], the total amount the consumer will borrow, as reflected by the face amount of the note; and where the amount borrowed includes premiums or other charges for optional credit insurance or debt-cancellation coverage, that fact shall be stated, grouped together with the disclosure of the amount borrowed. The disclosure of the amount borrowed shall be treated as accurate if it is not more than $100 above or below the amount required to be disclosed.

►(ii) For an open-end credit plan, the credit limit for the plan when the account is opened.◄

(d) *Limitations.* A ►high-cost mortgage◄ [mortgage transaction subject to this section] shall not include the following terms:

Alternative 1—Paragraph (d)(1)(i)

(1)(i) *Balloon payment.* ►Except as provided by paragraphs (d)(1)(ii) and (iii) of this section, a payment schedule with a payment that is more than twice as large as the average of regular periodic payments.◄ [For a loan with a term of less than five years, a payment schedule with regular periodic payments that when aggregated do not fully amortize the outstanding principal balance.]

Alternative 2—Paragraph (d)(1)(i)

(1)(i) *Balloon payment.* ►Except as provided by paragraphs (d)(1)(ii) and (iii) of this section, a payment schedule with a payment that is more than two times a regular periodic payment.◄ [For a loan with a term of less than five years, a payment schedule with regular periodic payments that when aggregated do not fully amortize the outstanding principal balance.]

(ii) *Exception.* The limitations in paragraph (d)(1)(i) of this section do not apply to ►a mortgage transaction with a payment schedule that is adjusted to the seasonal or irregular income of the consumer.

(iii) *Open-end credit plans.* If the terms of an open-end credit plan provide for a repayment period during which no further draws may be taken, the limitations in paragraph (d)(1)(i) of this section apply only to the repayment period. If the terms of an open-end credit plan do not provide for any repayment period, the limitations in paragraph (d)(1)(i) of this section apply to the draw period.◄ [loans with maturities of less than one year, if the purpose of the loan is a "bridge" loan connected with the acquisition or construction of a dwelling intended to become the consumer's principal dwelling.]

* * * * *

(6) *Prepayment penalties.* ►A prepayment penalty, as defined in paragraph (b)(8) of this section.◄ [Except as allowed under paragraph (d)(7) of this section, a penalty for paying all or part of the principal before the date on which the principal is due. A prepayment penalty includes computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d).]

(7) ►[Reserved.]◄ [*Prepayment penalty exception.* A mortgage transaction subject to this section may provide for a prepayment penalty (including a refund calculated according to the rule of 78s) otherwise permitted by law if, under the terms of the loan:

(i) The penalty will not apply after the two-year period following consummation;

(ii) The penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or an affiliate of the creditor;

(iii) At consummation, the consumer's total monthly debt payments (including amounts owed under the mortgage) do not exceed 50 percent of the consumer's monthly gross income, as verified in accordance with § 1026.34(a)(4)(ii); and

(iv) The amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation.]

(8)►*Acceleration of debt.*◄ [*Due-on-demand clause.*] A demand feature that permits the creditor to ►accelerate the indebtedness by terminating the high-cost mortgage◄ [terminate the loan] in advance of the original maturity date and to demand repayment of the entire outstanding balance, except in the following circumstances:

►(i) The consumer fails to meet the repayment terms for any outstanding balance that results in a default in payment under the loan or open-end credit agreement;

(ii) The acceleration is pursuant to a due-on-sale clause in the loan or open-end credit agreement; or

(iii) The consumer materially violates some other provision of the loan or open-end credit agreement unrelated to the payment schedule.◄

[(i) There is fraud or material misrepresentation by the consumer in connection with the loan;

(ii) The consumer fails to meet the repayment terms of the agreement for any outstanding balance; or

(iii) There is any action or inaction by the consumer that adversely affects the creditor's security for the loan, or any right of the creditor in such security.]

7. Section 1026.34 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1026.34 Prohibited acts or practices in connection with high-cost mortgages.

(a) *Prohibited acts or practices for high-cost mortgages.* [A creditor extending mortgage credit subject to § 1026.32 shall not:] (1) *Home improvement contracts.* ►A creditor shall not pay◄ [Pay] a contractor under a home improvement contract from the proceeds of a ►high-cost mortgage◄ [mortgage covered by § 1026.32], other than:

(i) By an instrument payable to the consumer or jointly to the consumer and the contractor; or

(ii) At the election of the consumer, through a third-party escrow agent in accordance with terms established in a written agreement signed by the consumer, the creditor, and the contractor prior to the disbursement.

(2) *Notice to assignee.* ►A creditor may not sell◄ [Sell] or otherwise assign a ►high-cost mortgage◄ [mortgage subject to § 1026.32] without furnishing the following statement to the purchaser or assignee: ''Notice: This is a mortgage subject to special rules under the Federal Truth in Lending Act. Purchasers or assignees of this mortgage could be liable for all claims and defenses with respect to the mortgage that the borrower could assert against the creditor.''

(3) *Refinancings within one-year period.* Within one year of having extended ►a high-cost mortgage, a creditor shall not refinance any high-cost mortgage to the same borrower into another high-cost mortgage◄ [credit subject to § 1026.32, refinance any loan subject to § 1026.32 to the same borrower into another loan subject to § 1026.32], unless the refinancing is in the borrower's interest. An assignee holding or servicing ►a high-cost mortgage◄ [an extension of mortgage credit subject to § 1026.32,– shall not, for the remainder of the one-year period following the date of origination of the credit, refinance any ►high-cost mortgage◄ [loan subject to § 1026.32] to the same borrower into another ►high-cost mortgage◄ [loan subject to § 1026.32], unless the refinancing is in the borrower's interest. A creditor (or assignee) is prohibited from engaging in acts or practices to evade this provision, including a pattern or practice of arranging for the refinancing of its own loans by affiliated or unaffiliated creditors►.◄ [, or modifying a loan agreement (whether or not the existing loan is satisfied and replaced by the new loan) and charging a fee,]

(4) *Repayment ability ►for high-cost mortgages.* In connection with a closed-end, high-cost mortgage, a creditor must comply with the repayment ability requirements set forth in § 1026.43. In connection with an open-end, high-cost mortgage, a creditor shall not open a plan for a consumer where credit is or will be extended◄ [Extend credit subject to § 1026.32 to a consumer] based on the value of the consumer's collateral without regard to the consumer's repayment ability as of ►account opening◄ [consummation], including the consumer's current and reasonably expected income, employment, assets other than the collateral, current obligations, and mortgage-related obligations.

(i) *Mortgage-related obligations.* For purposes of this paragraph (a)(4), mortgage-related obligations are expected property taxes, premiums for mortgage-related insurance required by the creditor as set forth in § 1026.35(b)(3)(i), and similar expenses.

(ii) *Verification of repayment ability.* Under this paragraph (a)(4) a creditor must verify the consumer's repayment ability as follows:

(A) A creditor must verify amounts of income or assets that it relies on to determine repayment ability, including expected income or assets, by the consumer's Internal Revenue Service Form W–2, tax returns, payroll receipts, financial institution records, or other third-party documents that provide reasonably reliable evidence of the consumer's income or assets.

(B) Notwithstanding paragraph (a)(4)(ii)(A), a creditor has not violated paragraph (a)(4)(ii) if the amounts of income and assets that the creditor relied upon in determining repayment ability are not materially greater than the amounts of the consumer's income or assets that the creditor could have verified pursuant to paragraph (a)(4)(ii)(A) at the time ►of account opening◄ [the loan was consummated].

(C) A creditor must verify the consumer's current obligations.

(iii) *Presumption of compliance.* A creditor is presumed to have complied with this paragraph (a)(4) with respect to a transaction if the creditor:

(A) Verifies the consumer's repayment ability as provided in paragraph (a)(4)(ii);

(B) ►Determines the consumer's repayment ability taking into account current obligations and mortgage-related obligations as defined in paragraph (a)(4)(i) of this section, and using the largest required minimum periodic payment based on the following assumptions:

(*1*) The consumer borrows the full credit line at account opening with no additional extensions of credit;

(*2*) The consumer makes only required minimum periodic payments during the draw period and any repayment period;

(*3*) If the annual percentage rate may increase during the plan, the maximum annual percentage rate that is included in the contract, as required by § 1026.30, applies to the plan at account opening and will apply during the draw period and any repayment period.◄ [Determines the consumer's repayment ability using the largest payment of principal and interest scheduled in the first seven years following consummation and taking into account current obligations and mortgage-related obligations as defined in paragraph (a)(4)(i); and]

(C) Assesses the consumer's repayment ability taking into account at least one of the following: The ratio of total debt obligations to income, or the income the consumer will have after paying debt obligations.

(iv) *Exclusions from presumption of compliance.* Notwithstanding the previous paragraph, no presumption of compliance is available for a transaction for which:

(A) The regular periodic payments [for the first seven years] would cause the principal balance to increase; or

(B) The [term of the loan is less than seven years and the] regular periodic payments when aggregated do not fully amortize the outstanding principal balance ►except as otherwise provided by § 1026.32(d)(1)(ii)◄.

(v) *Exemption.* This paragraph (a)(4) does not apply to temporary or ''bridge'' loans with terms of twelve months or less, such as a loan to purchase a new dwelling where the consumer plans to sell a current dwelling within twelve months.

►(5) *Pre-loan counseling.* (i) *Certification of counseling required.* A creditor shall not extend a high-cost mortgage to a consumer unless the creditor receives written certification that the consumer has obtained counseling on the advisability of the mortgage from a counselor that is approved to provide such counseling by the Secretary of the U.S. Department of Housing and Urban Development or, if permitted by the Secretary, by a State housing finance authority.

(ii) *Timing of counseling.* The counseling required under this paragraph (a)(5) must occur after the consumer receives either the good faith estimate required by the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 *et seq.*) or the disclosures required by § 1026.40.

(iii) *Affiliation prohibited.* (A) *General.* The counseling required under this paragraph (a)(5) shall not be provided by a counselor who is employed by or affiliated with the creditor.

(B) *Exception.* The prohibition under paragraph (a)(5)(iii)(A) does not apply to a State housing finance authority that both extends a high-cost mortgage to a consumer and provides, either itself or through an affiliate, counseling to the consumer on the high-cost mortgage.

(iv) *Content of certification.* The certification of counseling required under paragraph (a)(5)(i) must include:

(A) The name(s) of the consumer(s) who obtained counseling;

(B) The date(s) of counseling;

(C) The name and address of the counselor;

(D) A statement that the consumer(s) received counseling on the advisability of the high-cost mortgage based on the terms provided in either the good faith estimate or the disclosures required by § 1026.40; and

(E) A statement that the counselor has verified that the consumer(s) received the disclosures required by either § 1026.32(c) or the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 *et seq.*) with respect to the transaction.

(v) *Counseling fees.* A creditor may pay the fees of a counselor or counseling organization for providing counseling required under this paragraph (a)(5) but may not condition the payment of such fees on the consummation or account-opening of a mortgage transaction. If the consumer withdraws the application that would result in the extension of a high-cost mortgage, a creditor may not condition the payment of such fees on the receipt of certification from the counselor required by paragraph (a)(5)(i) of this section. A creditor may, however, confirm that a counselor has provided counseling to the consumer pursuant to this paragraph (a)(5) prior to paying the fee of a counselor or counseling organization.

(vi) *Steering prohibited.* A creditor that extends a high-cost mortgage shall not steer or otherwise direct a consumer to choose a particular counselor or counseling organization for the counseling required under this paragraph (a)(5).

(vii) *List of counselors.* (A) *General.* A creditor must provide to a consumer for whom counseling is required under this paragraph (a)(5), a notice containing the Web site addresses and telephone numbers of the Bureau and the U.S. Department of Housing and Urban Development for access to information about housing counseling, and a list of five counselors or counseling organizations approved by the Secretary of the U.S. Department of Housing and Urban Development to provide the counseling required under paragraph (a)(5) of this section. The notice must be provided no later than the time when either the good faith estimate required by the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 *et seq.*) or the disclosures required by § 1026.40, as applicable, must be provided.

(B) *Safe harbor.* A creditor is deemed to have complied with the requirements of paragraph (a)(5)(vii)(A) if the creditor provides the list of homeownership counselors required by 12 CFR 1024.20 to a consumer for whom counseling is required under this paragraph (a)(5).

(6) *Recommended default.* A creditor or mortgage broker, as defined in section 1026.36(a)(2), may not recommend or encourage default on an existing loan or other debt prior to and in connection with the consummation or account opening of a high-cost mortgage that refinances all or any portion of such existing loan or debt.

(7) *Modification and deferral fees.* A creditor, successor-in-interest, assignee, or any agent of such parties may not charge a consumer any fee to modify, renew, extend or amend a high-cost mortgage, or to defer any payment due under the terms of such mortgage.

(8) *Late fees.* (i) *General.* Any late payment charge imposed in connection with a high-cost mortgage must be specifically permitted by the terms of the loan contract or open-end credit agreement and may not exceed four percent of the amount of the payment past due. No such charge may be imposed more than once for a single late payment.

(ii) *Timing.* A late payment charge may be imposed in connection with a high-cost mortgage only if the payment is not received by the end of the 15-day period beginning on the date the payment is due or, in the case of a high-cost mortgage on which interest on each installment is paid in advance, the end of the 30-day period beginning on the date the payment is due.

(iii) *Multiple late charges assessed on payment subsequently paid.* A late payment charge may not be imposed in connection with a high-cost mortgage payment if any delinquency is attributable only to a late payment charge imposed on an earlier payment, and the payment otherwise is a full payment for the applicable period and is paid by the due date or within any applicable grace period.

(iv) *Failure to make required payment.* The terms of a high-cost mortgage agreement may provide that any payment shall first be applied to any past due balance. If the consumer fails to make a timely payment by the due date and subsequently resumes making payments but has not paid all past due payments, the creditor may impose a separate late payment charge for any payment(s) outstanding (without deduction due to late fees or related fees) until the default is cured.

(9) *Payoff statements.* (i) *Fee prohibition.* In general, a creditor or servicer (as defined in 12 CFR 1024.2(b)) may not charge a fee for providing to a consumer, or a person authorized by the consumer to obtain such information, a statement of the amount due to pay off the outstanding balance of a high-cost mortgage.

(ii) *Processing fee.* A creditor or servicer may charge a processing fee to cover the cost of providing a payoff statement, as described in paragraph (a)(9)(i) of this section, by fax or courier, provided that such fee may not exceed an amount that is comparable to fees imposed for similar services provided in connection with consumer credit transactions that are secured by the consumer's principal dwelling and are not high-cost mortgages. A creditor or servicer shall make a payoff statement available to a consumer, or a person authorized by the consumer to obtain such information, by a method other than by fax or courier and without charge pursuant to paragraph (a)(9)(i) of this section.

(iii) *Processing fee disclosure.* Prior to charging a processing fee for provision of a payoff statement by fax or courier, as permitted pursuant to paragraph (a)(9)(ii) of this section, a creditor or servicer shall disclose to a consumer or a person authorized by the consumer to obtain the consumer's payoff statement that payoff statements, as described in paragraph (a)(9)(i) of this section, are available for free pursuant to paragraph (a)(9)(i) of this section.

(iv) *Fees permitted after multiple requests.* A creditor or servicer that has provided a payoff statement, as described in paragraph (a)(9)(i) of this section, to a consumer, or a person authorized by the consumer to obtain such information, without charge, other than the processing fee permitted under paragraph (a)(9)(ii) of this section, four times during a calendar year, may thereafter charge a reasonable fee for providing such statements during the remainder of the calendar year. Fees for payoff statements provided to a consumer in a subsequent calendar year are subject to the requirements of this section.

(v) *Timing of delivery of payoff statements.* A payoff statement, as described in paragraph (a)(9)(i) of this section, for a high-cost mortgage shall be provided by a creditor or servicer within five business days after receiving a request for such statement by a consumer or a person authorized by the consumer to obtain such statement.

(10) *Financing of points and fees.* A creditor that extends credit under a high-cost mortgage may not finance any points and fees, as that term is defined in § 1026.32(b)(1) through (5). Credit insurance premiums or debt cancellation or suspension fees that are required to be included in points and fees under § 1026.32(b)(1)(iv) or (3)(iii) shall not be considered financed by the creditor when they are calculated and paid in full on a monthly basis.◄

(b) *Prohibited acts or practices for dwelling-secured loans;* [*open-end credit.* In connection with credit secured by the consumer's dwelling that does not meet the definition in § 1026.2(a)(20), a creditor shall not structure a home-secured loan as an open-end plan to evade the requirements of § 1026.32.]►*structuring loans to evade high-cost mortgage requirements.* A creditor shall not structure any transaction that is otherwise a high-cost mortgage in a form, for the purpose, and with the intent to evade the requirements of a high-cost mortgage subject to this subpart, including by dividing any loan transaction into separate parts.◄

8. Section 1026.36 is revised to add new paragraphs (g), (h), (i), (j), and (k) as follows:

§ 1026.36 Prohibited acts or practices in connection with credit secured by a dwelling.

* * * * *

►(g) [Reserved.]

(h) [Reserved.]

(i) [Reserved.]

(j) [Reserved.]

(k) *Negative amortization counseling.* (1) *Counseling required.* A creditor shall not extend credit to a first-time borrower in connection with a closed-end transaction secured by a dwelling, other than a reverse mortgage transaction subject to § 1026.33 or a transaction secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), that may result in negative amortization for the loan, unless the creditor receives documentation that the consumer has obtained homeownership counseling from a counseling organization or counselor certified or approved by the U.S. Department of Housing and Urban Development to provide such counseling.

(2) *Definitions.* For the purposes of this paragraph (k), the following definitions apply:

(i) A "first-time borrower" means a consumer who has not previously received a closed-end mortgage loan or open-end credit plan secured by a dwelling.

(ii) "Negative amortization" means a payment schedule with regular periodic payments that cause the principal balance to increase.

(3) *Steering prohibited.* A creditor that extends credit to a first-time borrower in connection with a closed-end transaction secured by a dwelling, other than a reverse mortgage transaction subject to § 1026.33 or a transaction secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), that may result in negative amortization shall not steer or otherwise direct a consumer to choose a particular counselor or counseling organization for the counseling required under this paragraph (k).

(4) *List of counselors.* (i) *General.* A creditor must provide to a consumer for whom counseling is required under this paragraph (k), a notice containing the Web site addresses and telephone numbers of the Bureau and the U.S. Department of Housing and Urban Development for access to information about homeownership counseling, and a list of five counselors or counseling organizations certified or approved by the U.S. Department of Housing and Urban Development to provide homeownership counseling. The notice must be provided no later than the time when the good faith estimate required by the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 *et seq.*) must be provided.

(ii) *Safe harbor.* A creditor is deemed to have complied with the requirements of paragraph (k)(4)(i) of this section if the creditor provides the list of homeownership counselors required by 12 CFR 1024.20 to a consumer for whom counseling is required under this paragraph (k).◄

9. In Supplement I to Part 1026—Official Interpretations:

A. Under *Section 1026.31—General Rules:*

i. The subheading *31(c)(1) Disclosures for certain closed-end home mortgages* and paragraph 1. under that subheading are revised.

ii. Under subheading *31(c)(1)(i) Change in terms,* paragraph 2. is revised.

iii. Under subheading *31(c)(1)(ii) Telephone disclosures,* paragraph 1. is revised.

iv. The subheading *31(c)(1)(iii) Consumer's waiver of waiting period before consummation* is revised.

B. Under *Section 1026.32—Requirements for Certain Closed-End Home Mortgages:*

i. The heading *Section 1026.32—Requirements for Certain Closed-End Home Mortgages* is revised.

ii. The subheading *32(a) Coverage* is revised.

iii. The subheading *32(a)(1) Coverage* and paragraph 1. under that subheading are added.

iv. Under new subheading *32(a)(1) Coverage:*

a. Under subheading *Paragraph 32(a)(1)(i),* paragraphs 1., 2., 3., and 4. are revised.

b. Under subheading *Paragraph 32(a)(1)(ii),* paragraph 1. is re-designated and revised as paragraph 1. under subheading *32(b)(6) Total loan amount,* subheading *32(b)(6)(i) Closed-end mortgage loans,* paragraph 2. is re-designated as paragraph 1. under subheading *Paragraph 32(a)(1)(ii)* and new paragraph 2. is added.

c. The subheading *Paragraph 32(a)(1)(iii)* and paragraphs 1. and 2. under that subheading are added.

v. The subheading *Paragraph 32(a)(2)* and paragraph 1. under that subheading are revised and paragraphs 2., 3., and 4. are added.

vi. Under subheading *32(b) Definitions:*

a. Under subheading *Paragraph 32(b)(1)(i),* paragraph 1. is revised and paragraphs 2., 3., and 4. are added.

b. Under subheading *Paragraph 32(b)(1)(ii),* paragraph 1. is revised, paragraph 2. is re-designated and revised under subheading *Paragraph 32(b)(1)(iii),* paragraph 1. and new paragraphs 2. and 3. are added under subheading *Paragraph 32(b)(1)(ii).*

c. Under subheading *Paragraph 32(b)(1)(iv),* paragraph 1. is revised and paragraph 2. is added.

d. The subheading *Paragraph 32(b)(3)(i)* and paragraph 1. under that subheading are added.

e. The subheading *Paragraph 32(b)(3)(ii)* and paragraph 1. under that subheading are added.

f. The subheading *Paragraph 32(b)(3)(iii)* and paragraph 1. under that subheading are added.

g. The subheading *Paragraph 32(b)(3)(v)* and paragraph 1. under that subheading are added.

h. The subheading *Paragraph 32(b)(3)(vi)* and paragraphs 1. and 2. under that subheading are added.

i. The subheading *Paragraph 32(b)(4)* and paragraph 1. under that subheading are added.

j. The subheading *Paragraph 32(b)(5),* the subheading *32(b)(5)(i) Bona fide third-party charges* and paragraphs 1., 2., and 3. under that subheading, and the subheading *32(b)(5)(ii) Bona fide discount points* and paragraph 1. under that subheading are added.

k. The subheading *32(b)(8) Prepayment penalty* and paragraphs 1., 2., and 3. under that subheading are added.

vii. Under subheading *32(c) Disclosures:*

a. The subheading *32(c)(2) Annual percentage rate* and paragraph 1. under that subheading are added.

b. The subheading *32(c)(3) Regular payment; balloon payment* is revised, paragraph 1. is re-designated as subheading *Paragraph 32(c)(3)(i),* paragraph 1., and new paragraph 1. is added under subheading *32(c)(3) Regular payment; balloon payment.*

c. Under subheading *32(c)(4) Variable-rate,* paragraph 1. is revised.

d. The subheading *32(c)(5) Amount borrowed* and paragraph 1. under that subheading are revised.

viii. Under subheading *32(d) Limitations:*

a. Paragraph 1. is revised.

b. Under subheading *32(d)(1)(i) Balloon payment,* paragraph 1. is revised and paragraph 2. is added.

c. Under subheading *32(d)(2) Negative amortization,* paragraph 1. is revised.

d. Under subheading *32(d)(6) Prepayment penalties,* paragraph 1. is removed and reserved.

e. The subheading *32(d)(7) Prepayment penalty exception* and paragraph 1. under that subheading are removed and reserved.

f. Under the subheading *32(d)(7) Prepayment penalty exception,* the subheading *Paragraph 32(d)(7)(iii)* and paragraphs 1., 2., and 3. under that subheading are removed, and the subheading *Paragraph 32(d)(7)(iv)* and paragraphs 1. and 2. under that subheading are removed.

g. The subheading *32(d)(8) Due-on-demand clause* is revised.

h. The subheading *Paragraph 32(d)(8)(ii)* and paragraph 1. under that subheading are revised.

i. Under the subheading *Paragraph 32(d)(8)(iii),* paragraphs 1. and 2. are revised and paragraph 3. is added.

C. Under *Section 1026.34—Prohibited Acts or Practices in Connection with High-Cost Mortgages:*

i. The subheading *34(a)(2) Notice to Assignee* is revised.

ii. Under the subheading *34(a)(3) Refinancings within one-year period,* paragraph 2. is revised.

iii. Under the subheading *34(a)(4) Repayment ability:*

a. Paragraphs 1., 2., 3., 4., and 5. are revised.

b. Under the subheading *Paragraph 34(a)(4)(ii)(B),* paragraph 2. is revised.

c. Under the subheading *Paragraph 34(a)(4)(ii)(C),* paragraph 1. is revised.

d. Under the subheading *34(a)(4)(iii) Presumption of compliance,* paragraph 1. is revised.

e. Under the subheading *Paragraph 34(a)(4)(iii)(B),* paragraph 1. is revised.

iv. New *34(a)(5) Pre-loan counseling, 34(a)(6) Recommended default, 34(a)(7) Modification and deferral fees, 34(a)(8) Late fees, 34(a)(9) Payoff statements* and *34(a)(10) Financing of points and fees* are added.

v. The subheading *34(b) Prohibited acts or practices for dwelling-secured loans; open-end credit* and paragraphs 1. and 2. under that subheading are revised.

D. Under *Section 1026.36—Prohibited Acts or Practices in Connection with Credit Secured by a Dwelling:*

i. New *36(k) Negative amortization counseling* is added.

The revisions, removals, and additions read as follows:

SUPPLEMENT I TO PART 1026—OFFICIAL INTERPRETATIONS

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

Section 1026.31—General Rules

* * * * *

31(c)(1) Disclosures for certain ❲*closed-end*❳ *home mortgages.*

1. *Pre-consummation* ►*or account opening*◄ *waiting period.* A creditor must furnish § 1026.32 disclosures at least three business days prior to consummation ►for a closed-end, high-cost mortgage and at least three business days prior to account opening for an open-end, high-cost mortgage◄. Under § 1026.32, ''business day'' has the same meaning as the rescission rule in comment 2(a)(6)–2—all calendar days except Sundays and the Federal legal holidays listed in 5 U.S.C. 6103(a). However, while the disclosure rule under §§ 1026.15 and 1026.23 extends to midnight of the third business day, the rule under § 1026.32 does not. For example, under § 1026.32, if disclosures were provided on a Friday, consummation ►or account opening◄ could occur any time on Tuesday, the third business day following receipt of the disclosures. If the timing of the rescission rule were to be used, consummation ►or account opening◄ could not occur until after midnight on Tuesday.

31(c)(1)(i) Change in terms.

* * * * *

2. *Sale of optional products at consummation* ►*or account opening*◄. If the consumer finances the purchase of optional products such as credit insurance and as a result the monthly payment differs from what was previously disclosed under § 1026.32, redisclosure is required and a new three-day waiting period applies. (See comment 32(c)(3)–1 on when optional items may be included in the regular payment disclosure.)

31(c)(1)(ii) Telephone disclosures.

1. *Telephone disclosures.* Disclosures by telephone must be furnished at least three business days prior to consummation ►and prior to account opening◄, calculated in accord with the timing rules under § 1026.31(c)(1).

31(c)(1)(iii) Consumer's waiver of waiting period before consummation ►or account opening◄.

* * * * *

Section 1026.32—Requirements for ►*High-Cost*◄❲*Certain Closed-End Home*❳ *Mortgages*

32(a) ►*High-Cost Mortgages.*◄❲*Coverage.*❳

►*32(a)(1) Coverage.*

1. The term *high-cost mortgage* includes both a closed-end mortgage loan and an open-end credit plan secured by the consumer's principal dwelling. For purposes of determining coverage under § 1026.32, an open-end consumer credit transaction is the account opening of an open-end credit plan. An advance of funds or a draw on the credit line under an open-end credit plan subsequent to account opening does not constitute an open-end ''transaction.''◄

Paragraph 32(a)(1)(i).

1. ►*Transaction coverage rate.* The transaction coverage rate is calculated solely for purposes of determining whether a closed-end transaction is subject to § 1026.32. The creditor is not required to disclose the transaction coverage rate to the consumer. The creditor determines the transaction coverage rate in the same manner as the transaction's annual percentage rate under § 1026.32(a)(2) except that, for purposes of calculating the transaction coverage rate and determining coverage under § 1026.32, the amount of the prepaid finance charge is modified in accordance with § 1026.35(a)(2)(i). For guidance on determining the transaction coverage rate, see commentary to § 1026.35(a)(2)(i). The transaction coverage rate that results from these special rules must be compared to the average prime offer rate to determine whether the closed-end transaction is subject to § 1026.32.◄❲*Application date.* An

application is deemed received when it reaches the creditor in any of the ways applications are normally transmitted. (See § 1026.19(a).) For example, if a borrower applies for a 10-year loan on September 30 and the creditor counteroffers with a 7-year loan on October 10, the application is deemed received in September and the creditor must measure the annual percentage rate against the appropriate Treasury security yield as of August 15. An application transmitted through an intermediary agent or broker is received when it reaches the creditor, rather than when it reaches the agent or broker. (See comment 19(b)–3 to determine whether a transaction involves an intermediary agent or broker.)❳

2. ►*Average prime offer rate; closed-end credit.* The term ''average prime offer rate'' is defined in § 1026.35(a)(2)(ii). *High-cost mortgages* include consumer credit transactions secured by the consumer's principal dwelling with a transaction coverage rate or an annual percentage rate, as applicable, that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by the specified amount. The published table of average prime offer rates indicates how to identify the comparable transaction. For guidance on determining the average prime offer rate for closed-end credit for purposes of this section, see comments 35(a)(2)(ii)–1 through –4._ ◄❲*When fifteenth not a business day.* If the 15th day of the month immediately preceding the application date is not a business day, the creditor must use the yield as of the business day immediately preceding the 15th.❳

3. ►*Average prime offer rate; open-end credit plans.* Section 1026.32(a)(1)(i) requires a creditor to identify a ''comparable transaction'' when determining the average prime offer rate for an open-end credit plan. The published table of average prime offer rates lists average prime offer rates for a wide variety of types of closed-end loans. Accordingly, § 1026.32(a)(1)(i) requires a creditor to determine the average prime offer rate for an open-end credit plan by reference to the average prime offer rate for the most closely comparable closed-end loan, based on applicable loan characteristics and other loan pricing terms. For example, if a home-equity line of credit has a variable-rate feature, a creditor must utilize the appropriate, corresponding rate table for adjustable rates for closed-end loans. If the variable-rate feature has a fixed-rate period (*i.e.,* the period until the rate adjusts) that is not in whole years, a creditor must use the table for the loans using the number of whole years closest to the actual term. For example, if a variable-rate feature has an initial fixed-rate period of 20 months, a creditor must use the table for two-year adjustable rate loans. If the variable-rate feature has no initial fixed-rate period or has an initial fixed-rate period of less than one year, a creditor must use the applicable table for one-year adjustable rate loans. For example, if the initial fixed-rate period is six months, a creditor must use the applicable one-year annual percentage rate. ◄❲*Calculating annual percentage rates for variable-rate loans and discount loans.* Creditors must use the rules set out in the commentary to § 1026.17(c)(1) in calculating the annual percentage rate for variable-rate loans (assume the rate in effect at the time of disclosure remains unchanged) and for discount, premium, and stepped-rate transactions (which must reflect composite annual percentage rates).❳

4. ►*Total loan amount less than $50,000.* See § 1026.32(b)(6) and comment 32(b)(6)–1 for guidance on total loan amount for purposes of § 1026.32(a)(1)(i).◄❲*Treasury securities.* To determine the yield on comparable Treasury securities for the annual percentage rate test, creditors may use the yield on actively traded issues adjusted to constant maturities published in the Federal Reserve Board's ''Selected Interest Rates'' (statistical release H–15). Creditors must use the yield corresponding to the constant maturity that is closest to the loan's maturity. If the loan's maturity is exactly halfway between security maturities, the annual percentage rate on the loan should be compared with the yield for Treasury securities having the lower yield. In determining the loan's maturity, creditors may rely on the rules in § 1026.17(c)(4) regarding irregular first payment periods. For example:

i. If the H–15 contains a yield for Treasury securities with constant maturities of 7 years and 10 years and no maturity in between, the annual percentage rate for an 8-year mortgage loan is compared with the yield of securities having a 7-year maturity, and the annual percentage rate for a 9-year mortgage loan is compared with the yield of securities having a 10-year maturity.

ii. If a mortgage loan has a term of 15 years, and the H–15 contains a yield of 5.21 percent for constant maturities of 10 years, and also contains a yield of 6.33 percent for constant maturities of 20 years, then the creditor compares the annual percentage rate for a 15-year mortgage loan with the yield for constant maturities of 10 years.

iii. If a mortgage loan has a term of 30 years, and the H–15 does not contain a yield for 30-year constant maturities, but contains a yield for 20-year constant maturities, and an average yield for securities with remaining terms to maturity of 25 years and over, then the annual percentage rate on the loan is compared with the yield for 20-year constant maturities.❳

Paragraph 32(a)(1)(ii).

1. ❲*Total loan amount.* For purposes of the ''points and fees'' test, the total loan amount is calculated by taking the amount financed, as determined according to § 1026.18(b), and deducting any cost listed in § 1026.32(b)(1)(iii) and § 1026.32(b)(1)(iv) that is both included as points and fees under § 1026.32(b)(1) and financed by the creditor. Some examples follow, each using a $10,000 amount borrowed, a $300 appraisal fee, and $400 in points. A $500 premium for optional credit life insurance is used in one example.

i. If the consumer finances a $300 fee for a creditor-conducted appraisal and pays $400 in points at closing, the amount financed under § 1026.18(b) is $9,900 ($10,000 plus the $300 appraisal fee that is paid to and financed by the creditor, less $400 in prepaid finance charges). The $300 appraisal fee paid to the creditor is added to other points and fees under § 1026.32(b)(1)(iii). It is deducted from the amount financed ($9,900) to derive a total loan amount of $9,600.

ii. If the consumer pays the $300 fee for the creditor-conducted appraisal in cash at closing, the $300 is included in the points and fees calculation because it is paid to the creditor. However, because the $300 is not financed by the creditor, the fee is not part of the amount financed under § 1026.18(b). In this case, the amount financed is the same as the total loan amount: $9,600 ($10,000, less $400 in prepaid finance charges).

iii. If the consumer finances a $300 fee for an appraisal conducted by someone other than the creditor or an affiliate, the $300 fee is not included with other points and fees under § 1026.32(b)(1)(iii). The amount financed under § 1026.18(b) is $9,900 ($10,000 plus the $300 fee for an independently-conducted appraisal that is financed by the creditor, less the $400 paid in cash and deducted as prepaid finance charges).

iv. If the consumer finances a $300 fee for a creditor-conducted appraisal and a $500 single premium for optional credit life insurance, and pays $400 in points at closing, the amount financed under § 1026.18(b) is $10,400 ($10,000, plus the $300 appraisal fee that is paid to and financed by the creditor, plus the $500 insurance premium that is financed by the creditor, less $400 in prepaid finance charges). The $300 appraisal fee paid to the creditor is added to other points and fees under § 1026.32(b)(1)(iii), and the $500 insurance premium is added under 1026.32(b)(1)(iv). The $300 and $500 costs are deducted from the amount financed ($10,400) to derive a total loan amount of $9,600.

2.❳►*Annual adjustment of $1,000 amount.*◄❲*Annual adjustment of $400 amount.* A mortgage loan is covered by § 1026.32 if the total points and fees payable by the consumer at or before loan consummation exceed the greater of $400 or 8 percent of the total loan amount. The $400 figure❳ ►The $1,000 figure in § 1026.32(a)(1)(ii)(B)◄ is adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1. The Bureau will publish adjustments after the June figures become available each year. ❲The adjustment for the upcoming year will be included in any proposed commentary published in the fall, and incorporated into the commentary the following spring. The adjusted figures are:❳

►2. *Historical adjustment of $400 amount.* Prior to [DATE THAT THE FINAL RULE TAKES EFFECT], a mortgage loan was covered by § 1026.32 if the total points and fees payable by the consumer at or before loan consummation exceeded the greater of $400 or 8 percent of the total loan amount. The $400 figure was adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1, as follows:◄

i. For 1996, $412, reflecting a 3.00 percent increase in the CPI–U from June 1994 to June 1995, rounded to the nearest whole dollar.

ii. For 1997, $424, reflecting a 2.9 percent increase in the CPI–U from June 1995 to June 1996, rounded to the nearest whole dollar.

iii. For 1998, $435, reflecting a 2.5 percent increase in the CPI–U from June 1996 to June 1997, rounded to the nearest whole dollar.

iv. For 1999, $441, reflecting a 1.4 percent increase in the CPI–U from June 1997 to June 1998, rounded to the nearest whole dollar.

v. For 2000, $451, reflecting a 2.3 percent increase in the CPI–U from June 1998 to June 1999, rounded to the nearest whole dollar.

vi. For 2001, $465, reflecting a 3.1 percent increase in the CPI–U from June 1999 to June 2000, rounded to the nearest whole dollar.

vii. For 2002, $480, reflecting a 3.27 percent increase in the CPI–U from June 2000 to June 2001, rounded to the nearest whole dollar.

viii. For 2003, $488, reflecting a 1.64 percent increase in the CPI–U from June 2001 to June 2002, rounded to the nearest whole dollar.

ix. For 2004, $499, reflecting a 2.22 percent increase in the CPI–U from June 2002 to June 2003, rounded to the nearest whole dollar.

x. For 2005, $510, reflecting a 2.29 percent increase in the CPI–U from June 2003 to June 2004, rounded to the nearest whole dollar.

xi. For 2006, $528, reflecting a 3.51 percent increase in the CPI–U from June 2004 to June 2005, rounded to the nearest whole dollar.

xii. For 2007, $547, reflecting a 3.55 percent increase in the CPI–U from June 2005 to June 2006, rounded to the nearest whole dollar.

xiii. For 2008, $561, reflecting a 2.56 percent increase in the CPI–U from June 2006 to June 2007, rounded to the nearest whole dollar.

xiv. For 2009, $583, reflecting a 3.94 percent increase in the CPI–U from June 2007 to June 2008, rounded to the nearest whole dollar.

xv. For 2010, $579, reflecting a 0.74 percent decrease in the CPI–U from June 2008 to June 2009, rounded to the nearest whole dollar.

xvi. For 2011, $592, reflecting a 2.2 percent increase in the CPI–U from June 2009 to June 2010, rounded to the nearest whole dollar.

xvii. For 2012, $611, reflecting a 3.2 percent increase in the CPI–U from June 2010 to June 2011, rounded to the nearest whole dollar.

►*Paragraph 32(a)(1)(iii).*

1. *Maximum period and amount.* Section 1026.32(a)(1)(iii) provides that a closed-end mortgage loan or an open-end credit plan is a high-cost mortgage if, under the terms of the loan contract or open-end credit agreement, a creditor can charge either (i) a prepayment penalty more than 36 months after consummation or account opening, or (ii) total prepayment penalties that exceed two percent of any amount prepaid. Section 1026.32(a)(1)(iii) applies only for purposes of determining whether a transaction is subject to the high-cost mortgage requirements and restrictions in § 1026.32(c) and (d) and § 1026.34. However, if a transaction is subject to those requirements and restrictions by operation of any provision of § 1026.32(a)(1), including by operation of § 1026.32(a)(1)(iii), then the transaction may not include a prepayment penalty. See § 1026.32(d)(6). As a result, § 1026.32(a)(1)(iii) effectively establishes a maximum period during which a prepayment penalty may be imposed, and a maximum prepayment penalty amount that may be imposed, on a closed-end mortgage loan (other than a reverse mortgage) or open-end credit plan secured by a consumer's principal dwelling. Closed-end mortgage loans are subject to the additional prepayment penalty restrictions set forth in § 1026.43(g).

2. *Examples; open-end credit plans.* If the terms of an open-end credit agreement allow for a prepayment penalty that exceeds two percent of the initial credit limit for the plan, the agreement will be deemed to permit a creditor to charge a prepayment penalty that exceeds two percent of the ''amount prepaid'' within the meaning of § 1026.32(a)(1)(iii). The following examples illustrate how to calculate whether the terms of an open-end credit agreement comply with the maximum prepayment penalty period and amounts described in comment 32(a)(1)(iii).

i. Assume that the terms of a home-equity line of credit with an initial credit limit of $10,000 require the consumer to pay a $500 flat fee if the consumer terminates the plan less than 36 months after account opening. The $500 fee constitutes a prepayment penalty under § 1026.32(b)(8)(ii), and the penalty is greater than two percent of the $10,000 initial credit limit, which is $200. Under § 1026.32(a)(1)(iii), the plan is a high-cost mortgage subject to the requirements and restrictions set forth in §§ 1026.32 and 1026.34.

ii. Assume that the terms of a home-equity line of credit with an initial credit limit of $10,000 and a ten-year term require the consumer to pay a $200 flat fee if the consumer terminates the plan prior to its normal expiration. The $200 prepayment penalty does not exceed two percent of the initial credit limit, but the terms of the agreement permit the creditor to charge the fee more than 36 months after account opening. Thus, under § 1026.32(a)(1)(iii), the plan is a high-cost mortgage subject to the requirements and restrictions set forth in §§ 1026.32 and 1026.34.

iii. Assume that, under the terms of a home-equity line of credit with an initial credit limit of $150,000, the creditor may charge the consumer any closing costs waived by the creditor if the consumer terminates the plan less than 36 months after account opening. Assume also that the creditor waived closing costs of $1,000. Bona fide third-party charges comprised $800 of the $1,000 in waived closing costs, and origination charges retained by the creditor or its affiliate comprised the remaining $200. Under § 1026.32(b)(8)(ii), the $800 in bona fide third-party charges is not a prepayment penalty, while the $200 for the creditor's own originations costs is a prepayment penalty. The total prepayment penalty of $200 is less than two percent of the initial $150,000 credit limit, and the penalty does not apply if the consumer terminates the plan more than 36 months after account opening. Thus, the plan is not a high-cost mortgage under § 1026.32(a)(1)(iii).◄

【*Paragraph*】 *32(a)(2)* ►*Determination of transaction coverage rate or annual percentage rate.*◄

1. 【*Exemption limited.* Section 1026.32(a)(2) lists certain transactions exempt from the provisions of § 1026.32. Nevertheless, those transactions may be subject to the provisions of § 1026.35, including any provisions of § 1026.32 to which § 1026.35 refers. *See* § 1026.35(a).】 ►*Determining interest rate for transaction coverage rate or annual percentage rate.* The guidance set forth in the commentary to § 1026.17(c)(1) addresses calculation of the annual percentage rates disclosures for discounted and premium variable-rate loans. Section 1026.32(a)(2) requires a different calculation of the annual percentage rate or transaction coverage rate, as applicable, solely to determine coverage under § 1026.32(a)(1)(i).

2. *Open-end credit plan.* The annual percentage rate for an open-end credit plan must be determined in accordance with § 1026.32(a)(2), regardless of whether there is an advance of funds at account opening. Section 1026.32(a)(2) does not require the calculation of the annual percentage rate for any extensions of credit subsequent to account opening. Any draw on the credit line subsequent to account opening is not treated as a separate transaction for purposes of determining annual percentage rate threshold coverage.

3. *Rates that vary.* i. Section 1026.32(a)(2)(ii) applies when the interest rate is determined by an index that is outside the creditor's control and the maximum margin is set forth in the agreement. A creditor must use the rules that apply to variable-rate transactions to determine the annual percentage rate even if the transaction also has a discounted fixed rate for a period of time, such as an initial interest rate if the rate that applies after the expiration of the fixed rate is variable. Accordingly, in determining the interest rate under § 1026.32(a)(2)(ii), a creditor must disregard the fixed initial interest rate and use the fully-indexed rate using the maximum margin that could apply. In determining the maximum margin, a creditor must consider the maximum margin that might apply, *e.g.,* a specified higher margin such as when a preferred rate is terminated, if the borrower's employment with the creditor ends.

ii. Section 1026.32(a)(2)(iii) applies when the interest rates applicable to a transaction may vary, except as described in § 1026.32(a)(2)(ii). For example, § 1026.32(a)(2)(iii) applies to a closed-end mortgage loan when interest rate changes are at the creditor's discretion, such as when the index is internally defined (for example, by that creditor's prime rate). Section 1026.32(a)(2)(iii) also applies where multiple fixed rates apply to a transaction, such as a stepped-rate mortgage. For example, assume the following rates will apply to a transaction: Three percent for the first six months, four percent for the next 10 years, and five percent for the remaining loan term. In this example, § 1026.32(a)(2)(iii) would be used to determine the interest rate and five percent would be the maximum interest rate applicable to the transaction.

4. *Fixed-rate and term-payment options.* If an open-end credit plan only has a fixed-rate during the draw period, a creditor must use the interest rate applicable to that feature to determine the annual percentage rate, as

required by § 1026.32(a)(2)(i). However, if an open-end credit plan has a variable-rate and offers a fixed-rate and term-payment option during the draw period, § 1026.32(a)(2) requires a creditor to use the terms applicable to the variable-rate feature for determining the annual percentage rate, as described in § 1026.32(a)(2)(ii).◀

32(b) Definitions.

Paragraph 32(b)(1)(i).

1. *General.* Section 1026.32(b)(1)(i) includes in the total ''points and fees'' items ❲defined as finance charges under §§ 1026.4(a) and 1026.(4)(b). Items excluded from the finance charge under other provisions of § 1026.4 are not included in the total ''points and fees'' under paragraph 32(b)(1)(i), but may be included in ''points and fees'' under paragraphs 32(b)(1)(ii) and 32(b)(1)(iii). Interest, including per-diem interest, is excluded from ''points and fees'' under § 1026.32(b)(1).❳▶included in the finance charge under § 1026.4(a) and (b), but excludes items described in § 1026.4(c) through (e) (except to the extent otherwise included by § 1026.32(b)(1)); interest, including per-diem interest; and certain mortgage insurance premiums, as discussed in comments 32(b)(1)(i)–2 through –4. For purposes of § 1026.32(b)(1)(i), ''items included in the finance charge under § 1026.4(a) and (b)'' means only those items included under § 1026.4(a) and (b), without reference to any other provisions of § 1026.4, including § 1026.4(g). To illustrate: A fee imposed by the creditor for an appraisal performed by an employee of the creditor meets the definition of ''finance charge'' under § 1026.4(a) as ''any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.'' However, § 1026.4(c)(7)(iv) lists appraisal fees. Therefore, under the general rule regarding the charges that must be counted as points and fees, a fee imposed by the creditor for an appraisal performed by an employee of the creditor would not be counted in points and fees. Section 1026.32(b)(1)(iii), however, expressly re-includes in points and fees items listed in § 1026.4(c)(7) (including appraisal fees) if the creditor receives compensation in connection with the charge. A creditor would receive compensation for an appraisal performed by its own employee. Thus, the appraisal fee in this example must be included in the calculation of points and fees.

2. *Upfront Federal and State mortgage insurance premiums and guaranty fees.* Under § 1026.32(b)(1)(i)(B)(*1*) and (*3*), upfront mortgage insurance premiums or guaranty fees in connection with a Federal or State agency program are not ''points and fees,'' even though they are finance charges under § 1026.4(a) and (b). For example, if a consumer is required to pay a $2,000 mortgage insurance premium before or at closing for a loan insured by the U.S. Federal Housing Administration, the $2,000 must be treated as a finance charge but is not counted in ''points and fees.''

3. *Upfront private mortgage insurance premiums.* i. Under § 1026.32(b)(1)(i)(B)*(2)* and *(3),* upfront private mortgage insurance premiums are not ''points and fees,'' even though they are finance charges under § 1026.4(a) and (b)—but only to the extent that the premium amount does not exceed the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)).

ii. In addition, to qualify for the exclusion from points and fees, upfront private mortgage insurance premiums must be required to be refunded on a pro rata basis and the refund must be automatically issued upon notification of the satisfaction of the underlying mortgage loan.

iii. To illustrate: Assume that a $3,000 upfront private mortgage insurance premium charged on a closed-end mortgage loan is required to be refunded on a pro rata basis and automatically issued upon notification of the satisfaction of the underlying mortgage loan. Assume also that the maximum upfront premium allowable under the National Housing Act is $2,000. In this case, the creditor could exclude $2,000 from ''points and fees'' but would have to include the $1,000 that exceeds the allowable premium under the National Housing Act. However, if the $3,000 upfront private mortgage insurance premium were not required to be refunded on a pro rata basis and automatically issued upon notification of the satisfaction of the underlying mortgage loan, the entire $3,000 premium must be included in ''points and fees.''

4. *Method of paying private mortgage insurance premiums.* Upfront private mortgage insurance premiums that do not qualify for an exclusion from ''points and fees'' under § 1026.32(b)(1)(i)(B)*(2)* must be included in ''points and fees'' for purposes of this section whether paid before or at closing, in cash or financed, and whether the insurance is optional or required. Such charges are also included whether the amount represents the entire premium or an initial payment.◀

Paragraph 32(b)(1)(ii).

1. ▶*Loan originator compensation—general*◀❲*Mortgage broker fees*❳. In determining ''points and fees'' for purposes of ▶§ 1026.32◀❲this section❳, compensation paid by a consumer ▶or creditor◀ to a ▶loan originator◀❲mortgage broker (directly or through the creditor for delivery to the broker)❳ is included in the calculation whether or not the amount is disclosed as a finance charge. ❲Mortgage broker fees that are not paid by the consumer are not included.❳ ▶Loan originator◀❲Mortgage broker❳ fees already included in the ▶points and fees◀ calculation as finance charges under § 1026.32(b)(1)(i) need not be counted again under § 1026.32(b)(1)(ii).

▶2. *Loan originator compensation—examples.*

i. In determining ''points and fees'' under § 1026.32, loan originator compensation includes the dollar value of compensation paid to a loan originator for a closed-end mortgage loan, such as a bonus, commission, yield spread premium, award of merchandise, services, trips, or similar prizes, or hourly pay for the actual number of hours worked on a particular transaction. Compensation paid to a loan originator for a closed-end mortgage loan must be included in the ''points and fees'' calculation for that loan whenever paid, whether before, at, or after closing, as long as that compensation amount can be determined at the time of closing. Thus, loan originator compensation for a closed-end mortgage loan includes compensation that will be paid as part of a periodic bonus, commission, or gift, if a portion of the dollar value of the bonus, commission, or gift can be attributed to that loan. The following examples illustrate the rule:

A. Assume that, according to a creditor's compensation policies, the creditor awards its loan officers a bonus every year based on the number of loan applications taken by the loan officer that result in consummated transactions during that year, and that each consummated transaction increases the bonus by $100. In this case, the $100 bonus must be counted in the amount of loan originator compensation that the creditor includes in ''points and fees.''

B. Assume that, according to a creditor's compensation policies, the creditor awards its loan officers a year-end bonus equal to a flat dollar amount for each of the consummated transactions originated by the loan officer during that year. Assume also that the per-transaction dollar amount is determined at the end of the year, based on the total dollar value of consummated transactions originated by the loan officer. If at the time a mortgage transaction is consummated the loan officer has originated total volume that qualifies the loan officer to receive a $300 bonus per transaction, the $300 bonus is loan originator compensation that must be included in ''points and fees'' for the transaction.

C. Assume that, according to a creditor's compensation policies, the creditor awards its loan officers a bonus every year based on the number of consummated transactions originated by the loan officer during that year. Assume also that for the first 10 transactions originated by the loan officer in a given year, no bonus is awarded; for the next 10 transactions originated by the loan officer up to 20, a bonus of $100 per transaction is awarded; and for each transaction originated after the first 20, a bonus of $200 per transaction is awarded. In this case, for the first 10 transactions originated by a loan officer during a given year, no amount of loan originator compensation need be included in ''points and fees.'' For any mortgage transaction made after the first 10, up to the 20th transaction, $100 must be included in ''points and fees.'' For any mortgage transaction made after the first 20, $200 must be included in ''points and fees.''

ii. In determining ''points and fees'' under this section, loan originator compensation excludes compensation that cannot be attributed to a particular transaction at the time of origination, including, for example:

A. Compensation based on the long-term performance of the loan originator's loans.

B. Compensation based on the overall quality of a loan originator's loan files.

C. The base salary of a loan originator who is also the employee of the creditor, not accounting for any bonuses, commissions, pay raises, or other financial awards based solely on a particular transaction or the number or amount of closed-end mortgage loans originated by the loan originator.

3. *Name of fee.* Loan originator compensation includes amounts the loan originator retains and is not dependent on the label or name of any fee imposed in connection with the transaction. For example, if a loan originator imposes a ''processing fee'' and retains the fee, the fee is loan originator compensation under § 1026.32(b)(1)(ii) whether the originator expends the fee to process the consumer's application or uses it for other expenses, such as overhead.

Paragraph 32(b)(1)(iii).

1. *Other charges.*◀【2. *Example.*】 Section 1026.32(b)(1)(iii) defines ''points and fees'' to include all items listed in § 1026.4(c)(7), other than amounts held for the future payment of taxes. An item listed in § 1026.4(c)(7) may be excluded from the ''points and fees'' calculation, however, if the charge is reasonable, the creditor receives no direct or indirect compensation from the charge, and the charge is not paid to an affiliate of the creditor. For example, a reasonable fee paid by the consumer to an independent, third-party appraiser may be excluded from the ''points and fees'' calculation (assuming no compensation is paid to the creditor ►or its affiliate◀). ►By contrast, a◀【A】 fee paid by the consumer for an appraisal performed by the creditor must be included in the calculation【, even though the fee may be excluded from the finance charge if it is bona fide and reasonable in amount】.

Paragraph 32(b)(1)(iv).

1. ►*Credit insurance and debt cancellation or suspension coverage.*◀【*Premium amount.*】 In determining ''points and fees'' for purposes of ►§ 1026.32◀【this section】, premiums 【paid at or before closing】 for credit insurance ►or any debt cancellation or suspension agreement or contract are included in points and fees if they are paid at or before consummation, whether they are paid in cash or, if permitted by applicable law, financed. Such charges are also included whether the amount represents the entire premium for the coverage or an initial payment.◀【are included whether they are paid in cash or financed, and whether the amount represents the entire premium for the coverage or an initial payment.】

►2. *Credit property insurance.* Credit property insurance includes insurance against loss of or damage to personal property, such as a houseboat or manufactured home. Credit property insurance covers the creditor's security interest in the property. Credit property insurance does not include homeowners insurance, which, unlike credit property insurance, typically covers not only the dwelling but its contents, and designates the consumer, not the creditor, as the beneficiary.

Paragraph 32(b)(3)(i).

1. *Finance charge.* The points and fees calculation under § 1026.32(b)(3) generally does not include items that are included in the finance charge but that are payable after account opening, such as minimum monthly finance charges or charges based on either account activity or inactivity. Transaction fees also generally are not included in the points and fees calculation, except as provided in § 1026.32(b)(3)(vi).

Paragraph 32(b)(3)(ii).

1. *Other charges.* See comment 32(b)(1)(iii)–1 for further guidance concerning the inclusion of items listed in § 1026.4(c)(7) in points and fees for open-end credit plans.

Paragraph 32(b)(3)(iii).

1. *Credit insurance and debt cancellation or suspension coverage.* See comments 32(b)(1)(iv)–1 and –2 for further guidance concerning the inclusion of premiums for credit insurance and debt cancellation or suspension coverage in points and fees for open-end credit plans.

Paragraph 32(b)(3)(v).

1. *Participation fees.* Fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis, must be included in the points and fees calculation for purposes of § 1026.32. These fees include annual fees or other periodic fees that must be paid as a condition of access to the plan itself. See commentary to § 1026.4(c)(4) for a description of these fees. For purposes of the points and fees calculation, the creditor must assume that any annual fee is charged each year for the original term of the plan. For example, assume that the terms of an open-end credit plan with a ten-year term permit the creditor to impose an annual fee of $50 for the consumer to maintain access to the plan. Section 1026.32(b)(3)(v) requires the creditor to include in points and fees the $500 that the consumer will pay in annual fees over the ten-year term of the plan.

Paragraph 32(b)(3)(vi).

1. *Transaction fees to draw down the credit line.* Section 1026.32(b)(3)(vi) requires creditors in open-end credit plans to include in points and fees any transaction fee, including any per-transaction fee, that will be charged for a draw on the credit line. Section 1026.32(b)(3)(vi) requires the creditor to assume that the consumer will make at least one draw during the term of the credit plan. Thus, if the terms of the open-end credit plan permit the creditor to charge a $10 transaction fee each time the consumer draws on the credit line, § 1026.32(b)(3)(vi) requires the creditor to include one $10 charge in the points and fees calculation.

2. *Fixed-rate loan option.* If the terms of an open-end credit plan permit a consumer to draw on the credit line using either a variable-rate feature or a fixed-rate feature, § 1026.32(b)(3)(vi) requires the creditor to use the terms applicable to the variable-rate feature for determining the transaction fee that must be included in the points and fees calculation.

Paragraph 32(b)(4).

1. *Fees or charges waived at or before account opening.* Under § 1026.32(b)(4), a charge that the creditor waives at or before account opening may be excluded from points and fees for an open-end credit plan unless the creditor may impose the charge after account opening. For example, a charge that a creditor waives at or before account opening must be included in points and fees as a prepayment penalty under § 1026.32(b)(3)(iv) if the creditor can impose the charge if the consumer terminates the open-end credit plan prior to the end of its term. To illustrate, assume that, in opening an open-end credit plan with a ten-year term, a creditor waives a $300 processing fee. Also assume that the terms of the open-end credit plan provide that the consumer must repay the fee if the consumer terminates the plan within three years after account opening. The waived processing fee is a prepayment penalty as defined in § 1026.32(b)(8)(ii), because it is a fee that the creditor may impose and retain if the consumer terminates the plan prior to the end of its term. Under § 1026.32(b)(4), the creditor must include the waived processing fee in points and fees under § 1026.32(b)(3)(iv).

Paragraph 32(b)(5).

32(b)(5)(i) Bona fide third-party charges.

1. Section 1026.36(a)(1) and comment 36(a)–1 provide guidance about the term *loan originator* as used in § 1026.32(b)(5)(i).

2. *Example.* Assume that, prior to loan consummation, a creditor pays $400 for an appraisal conducted by a third-party not affiliated with the creditor. At consummation, the creditor charges the consumer $400 and retains that amount as reimbursement for the fee that the creditor paid to the third-party appraiser. For purposes of determining whether the transaction is a high-cost mortgage, the creditor need not include in points and fees the $400 it retains as reimbursement.

3. *Private mortgage insurance.* For purposes of determining whether a closed-end mortgage loan is a high-cost mortgage, the exclusion for bona fide third party charges not retained by the creditor, loan originator, or an affiliate of either is limited by § 1026.32(b)(1)(i)(B) in the general definition of points and fees. Section 1026.32(b)(1)(i)(B) requires inclusion in points and fees for closed-end mortgage loans of premiums or other charges payable at or before consummation for any private guaranty or insurance protecting the creditor against the consumer's default or other credit loss to the extent that the premium or charge exceeds the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)). These premiums or charges must also be included if the premiums or charges are not required to be refundable on a pro-rated basis, or the refund is not required to be automatically issued upon notification of the satisfaction of the underlying mortgage loan. Under these circumstances, even if the premiums or other charges are not retained by the creditor, loan originator, or an affiliate of either, they must be included in the points and fees calculation for purposes of determining whether a transaction is a high-cost mortgage. See comments 32(b)(1)(i)–3 and –4 for further discussion of including upfront private mortgage insurance premiums in the points and fees calculation for closed-end mortgage loans.

32(b)(5)(ii) Bona fide discount points.

1. *Average prime offer rate.* For purposes of § 1026.32(b)(5)(ii)(A)(*1*) and (B)(*1*), the

average prime offer rate used is the same average prime offer rate that applies to a comparable transaction as of the date the discounted interest rate for the transaction is set. See comment 32(a)(1)(i)–1 for guidance on determining the applicable average prime offer rate for a comparable transaction for a closed-end mortgage loan. See comment 32(a)(1)(i)–2 for guidance on determining the applicable average prime offer rate for a comparable transaction for an open-end credit plan. See comments 43(e)(3)(ii)–3 and –4 for examples of how to calculate bona fide discount points for closed-end mortgage loans secured by real property.

32(b)(6) Total loan amount.

32(b)(6)(i) Closed-end mortgage loans.

1. *Total loan amount; example.* The following example illustrates how to calculate the total loan amount for closed-end mortgage loans. Assume that the face amount of a closed-end mortgage note is $100,000. If the consumer pays a $300 fee for a creditor-conducted appraisal by having it deducted from loan proceeds and pays $400 in points in cash at consummation, the total loan amount is $99,700. Because the $300 appraisal fee is paid to the creditor, it is included in points and fees under § 1026.32(b)(1)(iii). Because it is included in points and fees and is financed by the creditor, it is deducted from the face amount of the note ($100,000) to derive a total loan amount of $99,700, pursuant to § 1026.32(b)(6)(i).

32(b)(8) Prepayment penalty.

1. *Examples of prepayment penalties; closed-end mortgage loans.* For purposes of § 1026.32(b)(8)(i), the following are examples of prepayment penalties:

i. A charge determined by treating the loan balance as outstanding for a period of time after prepayment in full and applying the interest rate to such ''balance,'' even if the charge results from interest accrual amortization used for other payments in the transaction under the terms of the loan contract. ''Interest accrual amortization'' refers to the method by which the amount of interest due for each period (*e.g.,* month) in a transaction's term is determined. For example, ''monthly interest accrual amortization'' treats each payment as made on the scheduled, monthly due date even if it is actually paid early or late (until the expiration of any grace period). Thus, under the terms of a loan contract providing for monthly interest accrual amortization, if the amount of interest due on May 1 for the preceding month of April is $3,000, the loan contract will require payment of $3,000 in interest for the month of April whether the payment is made on April 20, on May 1, or on May 10. In this example, if the consumer prepays the loan in full on April 20 and if the accrued interest as of that date is $2,000, then assessment of a charge of $3,000 constitutes a prepayment penalty of $1,000 because the amount of interest actually earned through April 20 is only $2,000.

ii. A fee, such as an origination or other loan closing cost, that is waived by the creditor on the condition that the consumer does not prepay the loan.

iii. A minimum finance charge in a simple interest transaction.

iv. Computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d). For purposes of computing a refund of unearned interest, if using the actuarial method defined by applicable State law results in a refund that is greater than the refund calculated by using the method described in section 933(d) of the Housing and Community Development Act of 1992, creditors should use the State law definition in determining if a refund is a prepayment penalty.

2. *Examples of prepayment penalties; open-end credit plans.* For purposes of § 1026.32(b)(8)(ii), the term *prepayment penalty* includes a charge, including a waived closing cost, imposed by the creditor if the consumer terminates the open-end credit plan prior to the end of its term. This includes a charge imposed if the consumer terminates the plan outright or, for example, if the consumer terminates the plan in connection with obtaining a new loan or plan with the current holder of the existing plan, a servicer acting on behalf of the current holder, or an affiliate of either. However, the term *prepayment penalty* does not include a waived bona fide third-party charge imposed by the creditor if the consumer terminates the open-end credit plan during the first 36 months after account opening.

3. *Fees that are not prepayment penalties.* For purposes of § 1026.32(b)(8)(i) and (ii), fees which are not prepayment penalties include, for example:

i. Fees imposed for preparing and providing documents when a loan is paid in full or when an open-end credit plan is terminated, if such fees are imposed whether or not the loan is prepaid or the consumer terminates the plan prior to the end of its term. Examples include a loan payoff statement, a reconveyance document, or another document releasing the creditor's security interest in the dwelling that secures the loan or line of credit.

ii. Loan guarantee fees.

iii. In the case of an open-end credit plan, fees that are not prepayment penalties also include any fee that the creditor may impose in lieu of termination and acceleration under comment 40(f)(2)–2.◄

32(c) Disclosures.

* * * * *

►*32(c)(2) Annual percentage rate.*

1. *Disclosing annual percentage rate for open-end high-cost mortgages.* In disclosing the annual percentage rate for an open-end, high-cost mortgage under § 1026.32(c)(2), creditors must comply with § 1026.6(a)(1). If a fixed-rate, discounted introductory or initial interest rate is offered on the transaction, § 1026.32(c)(2) requires a creditor to disclose the annual percentage rate of the fixed-rate, discounted introductory or initial interest rate feature, and the rate that would apply when the feature expires.◄

32(c)(3) Regular payment; ►*minimum periodic payment example;*◄*balloon payment.*

1. ►*Balloon payment.* Except as provided in § 1026.32(d)(1)(ii) and (iii), a mortgage transaction subject to this section may not include a payment schedule that results in a balloon payment.

Paragraph 32(c)(3)(i)

1.◄ *General.* The regular payment is the amount due from the borrower at regular intervals, such as monthly, bimonthly, quarterly, or annually. There must be at least two payments, and the payments must be in an amount and at such intervals that they fully amortize the amount owed. In disclosing the regular payment, creditors may rely on the rules set forth in § 1026.18(g); however, the amounts for voluntary items, such as credit life insurance, may be included in the regular payment disclosure only if the consumer has previously agreed to the amounts.

i. If the loan has more than one payment level, the regular payment for each level must be disclosed. For example:

A. In a 30-year graduated payment mortgage where there will be payments of $300 for the first 120 months, $400 for the next 120 months, and $500 for the last 120 months, each payment amount must be disclosed, along with the length of time that the payment will be in effect.

B. If interest and principal are paid at different times, the regular amount for each must be disclosed.

C. In discounted or premium variable-rate transactions where the creditor sets the initial interest rate and later rate adjustments are determined by an index or formula, the creditor must disclose both the initial payment based on the discount or premium and the payment that will be in effect thereafter. Additional explanatory material which does not detract from the required disclosures may accompany the disclosed amounts. For example, if a monthly payment is $250 for the first six months and then increases based on an index and margin, the creditor could use language such as the following: ''Your regular monthly payment will be $250 for six months. After six months your regular monthly payment will be based on an index and margin, which currently would make your payment $350. Your actual payment at that time may be higher or lower.''

1. *Calculating ''worst-case'' payment example.* ►For a closed-end mortgage loan, creditors◄[Creditors] may rely on instructions in § 1026.19(b)(2)(viii)(B) for calculating the maximum possible increases in rates in the shortest possible timeframe, based on the face amount of the note (not the hypothetical loan amount of $10,000 required by § 1026.19(b)(2)(viii)(B)). The creditor must provide a maximum payment for each payment level, where a payment schedule provides for more than one payment level and more than one maximum payment amount is possible. ►For an open-end credit plan, the maximum monthly payment must be based on the following assumptions:

i. The consumer borrows the full credit line at account opening with no additional extensions of credit.

ii. The consumer makes only minimum periodic payments during the draw period and any repayment period.

iii. If the annual percentage rate may increase during the plan, the maximum annual percentage rate that is included in the contract, as required by § 1026.30, applies to the plan at account opening.◄

32(c)(5) Amount borrowed►; credit limit◄.

1. *Optional insurance; debt-cancellation coverage.* ►For closed-end mortgage loans, this◄【This】 disclosure is required when the amount borrowed in a refinancing includes premiums or other charges for credit life, accident, health, or loss-of-income insurance, or debt-cancellation coverage (whether or not the debt-cancellation coverage is insurance under applicable law) that provides for cancellation of all or part of the consumer's liability in the event of the loss of life, health, or income or in the case of accident. See comment 4(d)(3)–2 and comment app. G and H–2 regarding terminology for debt-cancellation coverage.

32(d) Limitations.

1. *Additional prohibitions applicable under other sections.* Section 1026.34 sets forth certain prohibitions in connection with ►high-cost mortgages◄【mortgage credit subject to § 1026.32】, in addition to the limitations in § 1026.32(d). Further, § 1026.35(b) prohibits certain practices in connection with ►closed-end◄ transactions that meet the coverage test in § 1026.35(a). Because the coverage test in § 1026.35(a) is generally broader than the coverage test in § 1026.32(a), most 【§ 1026.32】 ►closed-end high-cost mortgages◄ 【mortgage loans】 are also subject to the prohibitions set forth in § 1026.35(b) (such as escrows), in addition to the limitations in § 1026.32(d).

32(d)(1)(i) Balloon payment.

Alternative 1—Paragraph 32(d)(1)(i)

1. *Regular periodic payments.* The repayment schedule for a 【§ 1026.32】►high-cost◄ mortgage loan 【with a term of less than five years】 must fully amortize the outstanding principal balance through ''regular periodic payments.'' A payment is a ''regular periodic payment'' if it is not more than twice the 【amount of other payments】►average of earlier scheduled payments. For purposes of open-end credit plans, the term ''regular periodic payment'' or ''periodic payment'' means the required minimum periodic payment.◄

Alternative 2—Paragraph 32(d)(1)(i)

1. *Regular periodic payments.* The repayment schedule for a 【§ 1026.32】►high-cost◄ mortgage loan 【with a term of less than five years】 must fully amortize the outstanding principal balance through ''regular periodic payments.'' A payment is a ''regular periodic payment'' if it is not more than 【twice】 ►two times◄ the amount of other payments. ►For purposes of open-end credit plans, the term ''regular periodic payment'' or ''periodic payment'' means the required minimum periodic payment.

2. *No repayment period.* If the terms of an open-end credit plan do not provide for a repayment period, the repayment schedule must fully amortize any outstanding principal balance in the draw period through regular periodic payments. However, the limitation on balloon payments in § 1026.32(d)(1)(i) does not preclude increases in regular periodic payments that result solely from the initial draw or additional draws on the credit line during the draw period.◄

32(d)(2) Negative amortization.

1. *Negative amortization.* The prohibition against negative amortization in a ►high-cost mortgage◄[mortgage covered by § 1026.32] does not preclude reasonable increases in the principal balance that result from events permitted by the legal obligation unrelated to the payment schedule. For example, when a consumer fails to obtain property insurance and the creditor purchases insurance, the creditor may add a reasonable premium to the consumer's principal balance, to the extent permitted by the legal obligation.

* * * * *

32(d)(6) ►[Reserved.]◄【*Prepayment penalties.*

1. *State law.* For purposes of computing a refund of unearned interest, if using the actuarial method defined by applicable state law results in a refund that is greater than the refund calculated by using the method described in section 933(d) of the Housing and Community Development Act of 1992, creditors should use the state law definition in determining if a refund is a prepayment penalty.】

32(d)(7) ►[Reserved.]◄【*Prepayment penalty exception.*

Paragraph 32(d)(7)(iii).

1. *Calculating debt-to-income ratio.* ''Debt'' does not include amounts paid by the borrower in cash at closing or amounts from the loan proceeds that directly repay an existing debt. Creditors may consider combined debt-to-income ratios for transactions involving joint applicants. For more information about obligations and inflows that may constitute ''debt'' or ''income'' for purposes of § 1026.32(d)(7)(iii), see comment 34(a)(4)–6 and comment 34(a)(4)(iii)(C)–1.

2. *Verification.* Creditors shall verify income in the manner described in § 1026.34(a)(4)(ii) and the related comments. Creditors may verify debt with a credit report. However, a credit report may not reflect certain obligations undertaken just before or at consummation of the transaction and secured by the same dwelling that secures the transaction. Section 1026.34(a)(4) may require creditors to consider such obligations; see comment 34(a)(4)–3 and comment 34(a)(4)(ii)(C)–1.

3. *Interaction with Regulation B.* Section 1026.32(d)(7)(iii) does not require or permit the creditor to make inquiries or verifications that would be prohibited by Regulation B, 12 CFR part 1002.

Paragraph 32(d)(7)(iv).

1. *Payment change.* Section 1026.32(d)(7) sets forth the conditions under which a mortgage transaction subject to this section may have a prepayment penalty. Section 1026.32(d)(7)(iv) lists as a condition that the amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation. The following examples show whether prepayment penalties are permitted or prohibited under § 1026.32(d)(7)(iv) in particular circumstances.

i. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is January 1, 2014. A prepayment penalty is permitted with this mortgage transaction provided that the other § 1026.32(d)(7) conditions are met, that is: provided that the prepayment penalty is permitted by other applicable law, the penalty expires on or before December 31, 2011, the penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or its affiliate, and at consummation the consumer's total monthly debts do not exceed 50 percent of the consumer's monthly gross income, as verified.

ii. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is December 31, 2013. A prepayment penalty is prohibited with this mortgage transaction because the payment may change within the four-year period following consummation.

iii. Initial payments for a graduated-payment transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is January 1, 2014. A prepayment penalty is permitted with this mortgage transaction provided that the other § 1026.32(d)(7) conditions are met, that is: provided that the prepayment penalty is permitted by other applicable law, the penalty expires on or before December 31, 2011, the penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or its affiliate, and at consummation the consumer's total monthly debts do not exceed 50 percent of the consumer's monthly gross income, as verified.

iv. Initial payments for a step-rate transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is December 31, 2013. A prepayment penalty is prohibited with this mortgage transaction because the payment may change within the four-year period following consummation.

2. *Payment changes excluded.* Payment changes due to the following circumstances are not considered payment changes for purposes of this section:

i. A change in the amount of a periodic payment that is allocated to principal or interest that does not change the total amount of the periodic payment.

ii. The borrower's actual unanticipated late payment, delinquency, or default; and

iii. The borrower's voluntary payment of additional amounts (for example when a consumer chooses to make a payment of interest and principal on a loan that only requires the consumer to pay interest).】

32(d)(8) ►Acceleration of debt◄【Due-on-demand clause】.

Paragraph ►32(d)(8)(i)◄【32(d)(8)(ii)】.

1. *Failure to meet repayment terms.* A creditor may terminate a loan ►or open-end credit agreement◄ and accelerate the balance when the consumer fails to meet the repayment terms ►resulting in a default in payment under the agreement◄【provided for in the agreement】; a creditor may do so, however, only if the consumer actually fails

to make payments ►resulting in a default in the agreement◄. For example, a creditor may not terminate and accelerate if the consumer, in error, sends a payment to the wrong location, such as a branch rather than the main office of the creditor. If a consumer files for or is placed in bankruptcy, the creditor may terminate and accelerate under ►§ 1026.32(d)(8)(i)◄[this provision] if the consumer fails to meet the repayment terms ►resulting in a default◄ of the agreement. Section ►1026.32(d)(8)(i)◄[1026.32(d)(8)(ii)] does not override any State or other law that requires a creditor to notify a borrower of a right to cure, or otherwise places a duty on the creditor before it can terminate a loan ►or open-end credit agreement◄ and accelerate the balance.

Paragraph 32(d)(8)(iii).

1. ►*Material violation of agreement.* A creditor may terminate a loan or open-end credit agreement and accelerate the balance based on a material violation of some other provision of the agreement unrelated to the payment schedule. See comments 32(d)(8)(iii)–2 and –3 for examples of material violations of an agreement that would permit a creditor to terminate and accelerate.◄[*Impairment of security.* A creditor may terminate a loan and accelerate the balance if the consumer's action or inaction adversely affects the creditor's security for the loan, or any right of the creditor in that security. Action or inaction by third parties does not, in itself, permit the creditor to terminate and accelerate.]

2. [*Examples.*]►*Material impairment of security for the loan.* A creditor may terminate a loan or open-end credit agreement and accelerate the balance based on a material violation of the agreement if the consumer's action or inaction adversely affects the creditor's security for the loan or open-end credit plan, or any right of the creditor in that security. Action or inaction by third parties does not, in itself, permit the creditor to terminate a loan or open-end credit agreement and accelerate the balance.◄

i. ►*Examples.*◄ A creditor may terminate and accelerate, for example, if:

A. [The consumer transfers title to the property or sells the property without the permission of the creditor.

B.] The consumer fails to maintain required insurance on the dwelling.

[C.]►B.◄ The consumer fails to pay taxes on the property.

[D.]►C.◄ The consumer permits the filing of a lien senior to that held by the creditor.

[E.] ►D.◄ [The sole consumer obligated on the credit dies.

F. The property is taken through eminent domain.

G]. A prior lienholder forecloses.

ii. By contrast, the filing of a judgment against the consumer would ►be cause for◄[permit] termination and acceleration only if the amount of the judgment and collateral subject to the judgment is such that the creditor's security is adversely ►and materially◄ affected ►in violation of the loan or open-end credit agreement◄. If the consumer commits waste or otherwise destructively uses or fails to maintain the property ►, including demolishing or removing structures from the property,◄ such that the action adversely affects the security ►in a material way◄, the loan ►or open-end credit agreement◄ may be terminated and the balance accelerated. Illegal use of the property by the consumer would permit termination and acceleration if it subjects the property to seizure. [If one of two consumers obligated on a loan dies, the creditor may terminate the loan and accelerate the balance if the security is adversely affected.] If the consumer moves out of the dwelling that secures the loan and that action adversely affects the security ►in a material way◄, the creditor may terminate a loan ►or open-end credit agreement◄ and accelerate the balance.

►3. *Fraud or material misrepresentation.* A creditor may terminate a loan or open-end credit agreement and accelerate the balance based on a material violation of the agreement if the consumer violates the agreement through fraud or material misrepresentation in connection with the loan or open-end credit agreement. What constitutes fraud or misrepresentation is determined by applicable State law.◄

Section 1026.34—Prohibited Acts or Practices in Connection with High-Cost Mortgages

34(a) Prohibited acts or practices for high-cost mortgages.

34(a)(1) Home-improvement contracts.

* * * * *

34(a)(2) Notice to ►assignee.◄[Assignee]

* * * * *

34(a)(3) Refinancings within one-year period.

* * * * *

2. *Application of the one-year refinancing prohibition to creditors and assignees.* The prohibition in § 1026.34(a)(3) applies where ►a high-cost mortgage◄[loan extension of credit subject to § 1026.32] is refinanced into another ►high-cost mortgage◄[loan subject to § 1026.32]. The prohibition is illustrated by the following examples. Assume that Creditor A makes a ►high-cost mortgage◄[loan subject to § 1026.32] on January 15, 2003, secured by a first lien; this loan is assigned to Creditor B on February 15, 2003:

i. Creditor A is prohibited from refinancing the January 2003 loan (or any other ►high-cost mortgage◄[loan subject to § 1026.32] to the same borrower) into a ►high-cost mortgage◄[loan subject to § 1026.32], until January 15, 2004. Creditor B is restricted until January 15, 2004, or such date prior to January 15, 2004 that Creditor B ceases to hold or service the loan. During the prohibition period, Creditors A and B may make a subordinate lien loan that does not refinance a ►high-cost mortgage◄[loan subject to § 1026.32]. Assume that on April 1, 2003, Creditor A makes but does not assign a second-lien ►high-cost mortgage◄[loan subject to § 1026.32]. In that case, Creditor A would be prohibited from refinancing either the first-lien or second-lien loans (or any other ►high-cost mortgage◄ loans to that borrower [subject to § 1026.32]) into another ►high-cost mortgage◄[loan subject to § 1026.32] until April 1, 2004.

ii. The loan made by Creditor A on January 15, 2003 (and assigned to Creditor B) may be refinanced by Creditor C at any time. If Creditor C refinances this loan on March 1, 2003 into a new ►high-cost mortgage◄[loan subject to § 1026.32], Creditor A is prohibited from refinancing the loan made by Creditor C (or any other ►high-cost mortgage◄[loan subject to § 1026.32] to the same borrower) into another ►high-cost mortgage◄[loan subject to § 1026.32] until January 15, 2004. Creditor C is similarly prohibited from refinancing any ►high-cost mortgage◄[loan subject to § 1026.32] to that borrower into another until March 1, 2004. (The limitations of § 1026.34(a)(3) no longer apply to Creditor B after Creditor C refinanced the January 2003 loan and Creditor B ceased to hold or service the loan.)

34(a)(4) Repayment ability ►for high-cost mortgages◄.

1. *Application of repayment ability rule.* The § 1026.34(a)(4) prohibition against making loans without regard to consumers' repayment ability applies to ►open-end, high-cost mortgages◄[mortgage loans described in § 1026.32(a)]. ►The § 1026.43 repayment ability provisions apply to closed-end, high-cost mortgages. Accordingly, in connection with a closed-end, high-cost mortgage, § 1026.34(a)(4) requires a creditor to comply with the repayment ability requirements set forth in § 1026.43.◄[In addition, the § 1026.34(a)(4) prohibition applies to higher-priced mortgage loans described in § 1026.35(a). *See* § 1026.35(b)(1).]

2. *General prohibition.* Section 1026.34(a)(4) prohibits a creditor from ►extending credit under a high-cost, open-end credit plan ◄[extending credit subject to § 1026.32 to a consumer] based on the value of the consumer's collateral without regard to the consumer's repayment ability as of ►account opening◄[consummation], including the consumer's current and reasonably expected income, employment, assets other than the collateral, current obligations, and property tax and insurance obligations. A creditor may base its determination of repayment ability on current or reasonably expected income from employment or other sources, on assets other than the collateral, or both.

3. *Other dwelling-secured obligations.* For purposes of § 1026.34(a)(4), current obligations include another credit obligation of which the creditor has knowledge undertaken prior to or at ►account opening◄[consummation of the transaction] and secured by the same dwelling that secures the ►high-cost mortgage◄ transaction[subject to § 1026.32 or § 1026.35]. [For example, where a transaction subject to § 1026.35 is a first-lien transaction for the purchase of a home, a creditor must consider a ''piggyback'' second-lien transaction of which it has knowledge that is used to finance part of the down payment on the house.]

4. *Discounted introductory rates and non-amortizing or negatively-amortizing payments.* A credit agreement may determine

a consumer's initial payments using a temporarily discounted interest rate or permit the consumer to make initial payments that are non-amortizing ❚or negatively amortizing❚. (Negative amortization is permissible for loans covered by § 1026.35(a), but not § 1026.32). In such cases the creditor may determine repayment ability using the assumptions provided in § 1026.34(a)(4)(iv).

5. *Repayment ability as of* ►*account opening*◄❚*consummation*❚. Section 1026.34(a)(4) prohibits a creditor from disregarding repayment ability based on the facts and circumstances known to the creditor as of ►account opening◄❚consummation❚. In general, a creditor does not violate this provision if a consumer defaults because of a significant reduction in income (for example, a job loss) or a significant obligation (for example, an obligation arising from a major medical expense) that occurs after ►account opening◄❚consummation❚. However, if a creditor has knowledge as of ►account opening◄❚consummation❚ of reductions in income, for example, if a consumer's written application states that the consumer plans to retire within twelve months without obtaining new employment, or states that the consumer will transition from full-time to part-time employment, the creditor must consider that information.

* * * * *

Paragraph 34(a)(4)(ii)(B).

1. * * *

2. *Materially greater than.* Amounts of income or assets relied on are not materially greater than amounts that could have been verified at ❚consummation❚►account opening◄ if relying on the verifiable amounts would not have altered a reasonable creditor's decision to extend credit or the terms of the credit.

Paragraph 34(a)(4)(ii)(C).

1. *In general.* A credit report may be used to verify current obligations. A credit report, however, might not reflect an obligation that a consumer has listed on an application. The creditor is responsible for considering such an obligation, but the creditor is not required to independently verify the obligation. Similarly, a creditor is responsible for considering certain obligations undertaken just before or at ►account opening◄❚consummation of the transaction❚ and secured by the same dwelling that secures the transaction (for example, a ''piggy back'' loan), of which the creditor knows, even if not reflected on a credit report. *See* comment 34(a)(4)–3.

34(a)(4)(iii) Presumption of compliance.

1. *In general.* A creditor is presumed to have complied with § 1026.34(a)(4) if the creditor follows the three underwriting procedures specified in paragraph 34(a)(4)(iii) for verifying repayment ability, determining the payment obligation, and measuring the relationship of obligations to income. The procedures for verifying repayment ability are required under ►§ 1026.34(a)(4)(ii)◄ ❚paragraph 34(a)(4)(ii)❚; the other procedures are not required but, if followed along with the required procedures, create a presumption that the creditor has complied with § 1026.34(a)(4). The consumer may rebut the presumption with evidence that the creditor nonetheless disregarded repayment ability despite following these procedures. For example, evidence of a very high debt-to-income ratio and a very limited residual income could be sufficient to rebut the presumption, depending on all of the facts and circumstances. If a creditor fails to follow one of the non-required procedures set forth in ►§ 1026.34(a)(4)(iii)◄ ❚paragraph 34(a)(4)(iii)❚, then the creditor's compliance is determined based on all of the facts and circumstances without there being a presumption of either compliance or violation.

Paragraph 34(a)(4)(iii)(B)

1. *Determination of payment schedule.* To retain a presumption of compliance under § 1026.34(a)(4)(iii), a creditor must determine the consumer's ability to pay the principal and interest obligation based on the maximum scheduled payment ❚in the first seven years following consummation❚. In general, a creditor should determine a payment schedule for purposes of § 1026.34(a)(4)(iii)(B) based on the guidance in the commentary to ❚§ 1026.17(c)(1)❚ ►§ 1026.32(c)(3)◄. ❚Examples of how to determine the maximum scheduled payment in the first seven years are provided as follows (all payment amounts are rounded):

i. *Balloon-payment loan; fixed interest rate.* A loan in an amount of $100,000 with a fixed interest rate of 8.0 percent (no points) has a 7-year term but is amortized over 30 years. The monthly payment scheduled for 7 years is $733 with a balloon payment of remaining principal due at the end of 7 years. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $733.

ii. *Fixed-rate loan with interest-only payment for five years.* A loan in an amount of $100,000 with a fixed interest rate of 8.0 percent (no points) has a 30-year term. The monthly payment of $667 scheduled for the first 5 years would cover only the interest due. After the fifth year, the scheduled payment would increase to $772, an amount that fully amortizes the principal balance over the remaining 25 years. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $772.

iii. *Fixed-rate loan with interest-only payment for seven years.* A loan in an amount of $100,000 with a fixed interest rate of 8.0 percent (no points) has a 30-year term. The monthly payment of $667 scheduled for the first 7 years would cover only the interest due. After the seventh year, the scheduled payment would increase to $793, an amount that fully amortizes the principal balance over the remaining 23 years. The creditor will retain the presumption of compliance if it assesses repayment ability based on the interest-only payment of $667.

iv. *Variable-rate loan with discount for five years.* A loan in an amount of $100,000 has a 30-year term. The loan agreement provides for a fixed interest rate of 7.0 percent for an initial period of 5 years. Accordingly, the payment scheduled for the first 5 years is $665. The agreement provides that, after 5 years, the interest rate will adjust each year based on a specified index and margin. As of consummation, the sum of the index value and margin (the fully-indexed rate) is 8.0 percent. Accordingly, the payment scheduled for the remaining 25 years is $727. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $727.

v. *Variable-rate loan with discount for seven years.* A loan in an amount of $100,000 has a 30-year term. The loan agreement provides for a fixed interest rate of 7.125 percent for an initial period of 7 years. Accordingly, the payment scheduled for the first 7 years is $674. After 7 years, the agreement provides that the interest rate will adjust each year based on a specified index and margin. As of consummation, the sum of the index value and margin (the fully-indexed rate) is 8.0 percent. Accordingly, the payment scheduled for the remaining years is $725. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $674.

vi. *Step-rate loan.* A loan in an amount of $100,000 has a 30-year term. The agreement provides that the interest rate will be 5 percent for two years, 6 percent for three years, and 7 percent thereafter. Accordingly, the payment amounts are $537 for two years, $597 for three years, and $654 thereafter. To retain the presumption of compliance, the creditor must assess repayment ability based on the payment of $654.❚

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►*34(a)(5) Pre-loan counseling.*

1. *State housing finance authority.* For purposes of § 1026.34(a)(5), a ''State housing finance authority'' has the same meaning as ''State housing finance agency'' provided in 24 CFR 214.3.

34(a)(5)(i) Certification of counseling required.

1. *HUD-approved counselor.* For purposes of § 1026.34(a)(5), counselors approved by the Secretary of the U.S. Department of Housing and Urban Development are homeownership counselors certified pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)), or as otherwise determined by the Secretary.

2. *Processing applications.* Prior to receiving certification of counseling, a creditor may not extend a high-cost mortgage, but may engage in other activities, such as processing an application that will result in the extension of a high-cost mortgage (by, for example, ordering an appraisal or title search).

3. *Form of certification.* The written certification of counseling required by § 1026.34(a)(5)(i) may be received by mail, email, facsimile, or any other method, so long as the certification is in a retainable form.

34(a)(5)(ii) Timing of counseling.

1. *Disclosures for open-end credit plans.* Section 1026.34(a)(5)(ii) permits receipt of either the good faith estimate required by RESPA or the disclosures required under § 1026.40 to allow counseling to occur. Pursuant to 12 CFR 1024.7(h), the disclosures required by § 1026.40 can be provided in lieu of a good faith estimate for open-end credit plans.

2. *Initial disclosure.* Counseling may occur after receipt of either an initial good faith estimate required by RESPA or a disclosure form pursuant to § 1026.40, regardless of whether a revised good faith estimate or revised disclosure form pursuant to § 1026.40 is subsequently provided to the consumer.

34(a)(5)(iv) Content of certification.

1. *Statement of counseling on advisability.* A statement that a consumer has received counseling on the advisability of the high-cost mortgage means that the consumer has received counseling about key terms of the mortgage transaction, as set out in either the RESPA good faith estimate or the disclosures provided to the consumer pursuant to § 1026.40; the consumer's budget, including the consumer's income, assets, financial obligations, and expenses; and the affordability of the mortgage transaction for the consumer. Examples of such terms of the mortgage transaction include the initial interest rate, the initial monthly payment, whether the payment may increase, how the minimum periodic payment will be determined, and fees imposed by the creditor, as may be reflected in the applicable disclosure. A statement that a consumer has received counseling on the advisability of the high-cost mortgage does not require the counselor to have made a judgment or determination as to the appropriateness of the mortgage transaction for the consumer.

2. *Statement of verification.* A statement that a counselor has verified that the consumer has received the disclosures required by either § 1026.32(c) or by RESPA for the high-cost mortgage means that a counselor has confirmed, orally, in writing, or by some other means, receipt of such disclosures with the consumer.

34(a)(5)(v) Counseling fees.

1. *Financing.* Section 1026.34(a)(5)(v) does not prohibit a creditor from financing the counseling fee as part of the transaction for a high-cost mortgage, if the fee is a bona fide third-party charge as provided by § 1026.32(b)(5)(i).

34(a)(5)(vi) Steering prohibited.

1. An example of an action that constitutes steering would be when a creditor repeatedly highlights or otherwise distinguishes the same counselor in the notices the creditor provides to consumers pursuant to § 1026.34(a)(5)(vii).

2. Section 1026.34(a)(5)(vi) does not prohibit a creditor from providing a consumer with objective information related to counselors or counseling organizations in response to a consumer's inquiry. An example of an action that would not constitute steering would be when a consumer asks the creditor for information about the fees charged by a counselor, and the creditor responds by providing the consumer information about fees charged by the counselor to other consumers that previously obtained counseling pursuant to § 1026.34(a)(5).

34(a)(5)(vii) List of counselors.

1. *Multiple creditors; multiple consumers.* In the event of a high-cost mortgage transaction that involves multiple creditors or multiple consumers, see §§ 1026.5(d) and 1026.17(d) and related commentary for guidance.

34(a)(6) Recommended default.

1. *Facts and circumstances.* Whether a creditor or mortgage broker ''recommends or encourages'' default for purposes of § 1026.34(a)(6) depends on all of the relevant facts and circumstances.

2. *Examples.* i. A creditor or mortgage broker ''recommends or encourages'' default when the creditor or mortgage broker advises the consumer to stop making payments on an existing loan knowing that the consumer's cessation of payments will cause the consumer to default on the existing loan.

ii. A creditor or mortgage broker does not ''recommend or encourage'' default if the creditor or mortgage broker advises a consumer, in good faith, to stop payment on an existing loan that is intended to be paid prior to the loan entering into default by the proceeds of a high-cost mortgage upon the consummation of that high-cost mortgage, if the consummation is delayed for reasons outside the control of the creditor or mortgage broker.

34(a)(8) Late fees.

34(a)(8)(i) General.

1. For purposes of § 1026.34(a)(8), in connection with an open-end credit plan, the amount of the payment past due is the required minimum periodic payment as provided under the terms of the open-end credit agreement.

34(a)(8)(iii) Multiple late charges assessed on payment subsequently paid.

1. Section 1026.34(a)(8)(iii) prohibits the pyramiding of late fees or charges in connection with a high-cost mortgage payment. For example, assume that a consumer's regular periodic payment of $500 is due on the 1st of each month. On August 25, the consumer makes a $500 payment which was due on August 1, and as a result, a $10 late charge is assessed. On September 1, the consumer makes another $500 payment for the regular periodic payment due on September 1, but does not pay the $10 late charge assessed on the August payment. Under § 1026.34(a)(8)(iii), it is impermissible to allocate $10 of the consumer's September 1 payment to cover the late charge, such that the September payment becomes delinquent. In short, because the $500 payment made on September 1 is a full payment for the applicable period and is paid by its due date or within any applicable grace period, no late charge may be imposed on the account in connection with the September payment.

34(a)(8)(iv) Failure to make required payment.

1. Under § 1026.34(a)(8)(iv), if a consumer fails to make one or more required payments and then resumes making payments but fails to bring the account current, it is permissible, if permitted by the terms of the loan contract or open-end credit agreement, to apply the consumer's payments first to the past due payment(s) and to impose a late charge on each subsequent required payment until the account is brought current. To illustrate: Assume that a consumer's regular periodic payment of $500 is due on the 1st of each month, or before the expiration of a 15-day grace period. Also assume that the consumer fails to make a timely installment payment by August 1 (or within the applicable grace period), and a $10 late charge therefore is imposed. The consumer resumes making monthly payments on September 1. Under § 1026.34(a)(8)(iv), if permitted by the terms of the loan contract, the creditor may apply the $500 payment made on September 1 to satisfy the missed $500 payment that was due on August 1. If the consumer makes no other payment prior to the end of the grace period for the payment that was due on September 1, the creditor may also impose a $10 late fee for the payment that was due on September 1.

34(a)(10) Financing of points and fees.

1. *Points and fees.* For purposes of § 1026.34(a)(10), ''points and fees'' means those items that are required to be included in the calculation of points and fees under § 1026.32(b)(1) and (3). Thus, for example, in connection with the extension of credit under a high-cost mortgage, a creditor may finance a fee charged by a third-party counselor in connection with the consumer's receipt of pre-loan counseling under § 1026.34(a)(5), because, pursuant to § 1026.32(b)(5)(i), such a fee is excluded from the calculation of points and fees as a bona fide third-party charge.

2. *Examples of financing points and fees.* For purposes of § 1026.34(a)(10), points and fees are financed if, for example, they are added to the loan balance or financed through a separate note, if the note is payable to the creditor or to an affiliate of the creditor. In the case of an open-end credit plan, a creditor also finances points and fees if the creditor advances funds from the credit line to cover the fees.◄

34(b) Prohibited acts or practices for dwelling-secured loans; **[***open-end credit***]** ►*structuring loans to evade high cost mortgage requirements*◄

1. ►*Examples.* A creditor structures a transaction in violation of § 1026.34(b) if, for example:

i. The creditor structures a loan that would otherwise be a high-cost mortgage as two loans, for example, to divide the loan fees in order to avoid the points and fees threshold for high-cost mortgages in § 1026.32(a)(1)(ii).

ii. The creditor structures a high-cost mortgage as an open-end home-equity line of credit that is in fact a closed-end home-equity loan in order to evade the requirement under § 1026.32(b)(1) to include loan originator compensation in the points and fees calculation for closed-end mortgage loans.

2. ◄*Amount of credit extended.* Where a loan is documented as open-end credit but the features and terms or other circumstances demonstrate that it does not meet the definition of open-end credit, the loan is subject to the rules for closed-end credit►.◄ **[**, including § 1026.32 if the rate or fee trigger is met. In**]** ►Thus, in determining the ''total loan amount'' for purposes of◄ applying the triggers under § 1026.32, **[**the ''amount financed,'' including the ''principal loan amount'' must be determined. In making the determination**]**, the amount of credit that would have been extended if the loan had been documented as a closed-end loan is a factual determination to be made in each case. Factors to be considered include the amount of money the consumer originally requested, the amount of the first advance or

the highest outstanding balance, or the amount of the credit line. The full amount of the credit line is considered only to the extent that it is reasonable to expect that the consumer might use the full amount of credit.

Section 1026.36—Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling

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►*36(k) Negative amortization counseling.*

36(k)(1) Counseling required.

1. *HUD-certified or -approved counselor or counseling organization.* For purposes of § 1026.36(k), organizations or counselors certified or approved by the U.S. Department of Housing and Urban Development (HUD) to provide the homeownership counseling required by § 1026.36(k) include counselors and counseling organizations that are certified or approved pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) or 24 CFR part 214, unless HUD determines otherwise.

2. *Homeownership counseling.* The counseling required under § 1026.36(k) must include information regarding the risks and consequences of negative amortization.

3. *Documentation.* Examples of documentation that demonstrate a consumer has received the counseling required under § 1026.36(k) include a certificate of counseling, letter, or email from a HUD-certified or -approved counselor or counseling organization indicating that the consumer has received homeownership counseling.

4. *Processing applications.* Prior to receiving documentation that a consumer has received the counseling required under § 1026.36(k), a creditor may not extend credit to a first-time borrower in connection with a closed-end transaction secured by a dwelling that may result in negative amortization, but may engage in other activities, such as processing an application for such a transaction (by, for example, ordering an appraisal or title search).

36(k)(3) Steering prohibited.

1. See comments 34(a)(5)(vi)-1 and -2 for guidance concerning steering.

36(k)(4) List of counselors.

1. *Multiple creditors; multiple consumers.* In the event of a closed-end transaction secured by a dwelling that may result in negative amortization that involves multiple creditors or multiple first-time borrows, see § 1026.17(d) and related commentary for guidance.◄

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Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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