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Part II

## Bureau of Consumer Financial Protection

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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); Final 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:** Final rule; official interpretations.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau) issues this final rule to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act's amendments to the Truth in Lending Act and the Real Estate Settlement Procedures Act. The final rule amends Regulation Z (Truth in Lending) by expanding the types of mortgage loans that are subject to the protections of the Home Ownership and Equity Protections Act of 1994 (HOEPA), revising and expanding the tests for coverage under HOEPA, and imposing additional restrictions on mortgages that are covered by HOEPA, including a pre-loan counseling requirement. The final rule also amends Regulation Z and Regulation X (Real Estate Settlement Procedures Act) by imposing certain other requirements related to homeownership counseling, including a requirement that consumers receive information about homeownership counseling providers.

**DATES:** The rule is effective January 10, 2014.**FOR FURTHER INFORMATION CONTACT:** Richard Arculin and Courtney Jean, Counsels; and Pavneet Singh, Senior Counsel, Office of Regulations, at (202) 435–7700.**SUPPLEMENTARY INFORMATION:****I. Summary of Final Rule**

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 coverage tests are subject to special disclosure requirements and restrictions on loan terms, and borrowers in high-cost

mortgages<sup>1</sup> have enhanced remedies for violations of the law. The provisions of TILA, including HOEPA, are implemented in the Bureau's Regulation Z.<sup>2</sup>

In response to the recent mortgage crisis, Congress amended HOEPA through the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in order to expand the coverage of HOEPA and add protections for high-cost mortgages, including a requirement that borrowers receive homeownership counseling before obtaining a high-cost mortgage. In addition, several provisions of the Dodd-Frank Act also require or encourage consumers to obtain homeownership counseling for other types of loans. The Bureau is finalizing this rule to implement the HOEPA and homeownership counseling-related requirements.

*Scope of HOEPA Coverage*

The final rule implements the Dodd-Frank Act's amendments that expanded the universe of loans potentially covered by HOEPA. Under the final rule, most types of mortgage loans secured by a consumer's principal dwelling, including purchase-money mortgages, 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. The final rule retains the exemption from HOEPA coverage for reverse mortgages. In addition, the final rule adds exemptions from HOEPA coverage for three types of loans that the Bureau believes do not present the same risk of abuse as other mortgage loans: loans to finance the initial construction of a dwelling, loans originated and financed by Housing Finance Agencies, and loans originated through the United States Department of Agriculture's (USDA) Rural Housing Service section 502 Direct Loan Program.

*Revised HOEPA Coverage Tests*

The final rule implements the Dodd-Frank Act's revisions to HOEPA's coverage tests by providing that a transaction is a high-cost mortgage if any of the following tests is met:

- The transaction's annual percentage rate (APR) exceeds the applicable average prime offer rate by more than

<sup>1</sup> Mortgages covered by the HOEPA amendments have been referred to as "HOEPA loans," "Section 32 loans," or "high-cost mortgages." The Dodd-Frank Act now refers to these loans as "high-cost mortgages." See Dodd-Frank Act section 1431; TILA section 103(bb). For simplicity and consistency, this final rule uses the term "high-cost mortgages" to refer to mortgages covered by the HOEPA amendments.

<sup>2</sup> 12 CFR part 1026.

6.5 percentage points for most first-lien mortgages, or by more than 8.5 percentage points for a first mortgage if the dwelling is personal property and the transaction is for less than \$50,000;

- The transaction's APR exceeds the applicable average prime offer rate by more than 8.5 percentage points for subordinate or junior mortgages;
- The transaction's points and fees exceed 5 percent of the total transaction amount or, for loans below \$20,000, the lesser of 8 percent of the total transaction amount or \$1,000 (with the dollar figures also adjusted annually for inflation); or
- The credit transaction documents permit the creditor to charge or collect a prepayment penalty more than 36 months after transaction closing or permit such fees or penalties to exceed, in the aggregate, more than 2 percent of the amount prepaid.

The final rule also provides guidance on how to apply the various coverage tests, such as how to determine the applicable average prime offer rate and how to calculate points and fees.

*Restrictions on Loan Terms*

The final rule also implements new Dodd-Frank Act restrictions and requirements concerning loan terms and origination practices for mortgages that fall within HOEPA's coverage test. For example:

- Balloon payments are generally banned, unless they are to account for the seasonal or irregular income of the borrower, they are part of a short-term bridge loan, or they are made by creditors meeting specified criteria, including operating predominantly in rural or underserved areas.
- Creditors are prohibited from charging prepayment penalties and financing points and fees.
- Late fees are restricted to four percent of the payment that is past due, fees for providing payoff statements are restricted, and fees for loan modification or payment deferral are banned.
- Creditors originating HELOCs are required to assess consumers' ability to repay. (Creditors originating high-cost, closed-end credit transactions already are required to assess consumers' ability to repay under the Bureau's 2013 Ability-to-repay (ATR) Final Rule addressing a Dodd-Frank Act requirement that creditors determine that a consumer is able to repay a mortgage loan.)

- Creditors and mortgage brokers are 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 are required to obtain confirmation from a federally certified or approved homeownership counselor that the consumer has received counseling on the advisability of the mortgage.

#### *Other Counseling-Related Requirements*

The final rule implements two additional Dodd-Frank Act homeownership counseling-related provisions that are not amendments to HOEPA.

- The final rule requires lenders to provide a list of homeownership counseling organizations to consumers within three business days after they apply for a mortgage loan, with the exclusion of reverse mortgages and mortgage loans secured by a timeshare. The final rule requires the lender to obtain the list from either a Web site that will be developed by the Bureau or data that will be made available by the Bureau or the Department of Housing and Urban Development (HUD) for compliance with this requirement.

- The final rule implements a new requirement under TILA that creditors must 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 loan that provides for or permits negative amortization to the borrower.

#### *Effective Date*

The rule is effective January 10, 2014.

## **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.<sup>3</sup> The statute did not apply to purchase-money mortgages or reverse mortgages but covered other closed-end mortgage credit, *e.g.*, refinances and closed-end home equity loans. 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 8 percent of the total loan amount or a dollar threshold.

For high-cost mortgages 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, including finance charges and fees paid by the consumer. Finally, HOEPA amended TILA section 131, 15 U.S.C. 1641, to provide for increased liability to purchasers of high cost mortgages. Purchasers and assignees of loans not covered by HOEPA generally are liable only for violations of TILA which are apparent on the face of the disclosure statements, whereas purchasers of high cost mortgages 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. *See* 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 high cost mortgages. *See* 66 FR 65604 (Dec. 20, 2001). In 2008, the Board exercised its authority under HOEPA to require certain consumer protections concerning a consumer's ability to repay, prepayment penalties, and escrow accounts for taxes and insurance for a new category of "higher-priced mortgage loans" with APRs that are lower than those prescribed for high cost mortgages but that nevertheless exceed the average prime offer rate by prescribed amounts. 73 FR 44522 (July 30, 2008) (the 2008 HOEPA Final Rule).

Historically, the Board's Regulation Z, 12 CFR part 226, has implemented TILA, including HOEPA. Pursuant to the Dodd-Frank Act, general rulemaking authority for TILA, including HOEPA, transferred from the Board to the Bureau on July 21, 2011. *See* sections 1061, 1096, and 1100A(2) of the Dodd-Frank Act. Accordingly, 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, conforming, and stylistic changes to

reflect the transfer of authority and certain other changes made by the Dodd-Frank Act. The Bureau's Regulation Z took effect on December 30, 2011. Sections 1026.31, 1026.32, and 1026.34 of the Bureau's Regulation Z implement the HOEPA provisions of TILA.

### *B. RESPA*

Congress enacted the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. 2601 *et seq.*, in 1974 to provide consumers with greater and timelier 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 applicants for federally related mortgage loans a home-buying information booklet containing information about the nature and costs of real estate settlement services and a good faith estimate of charges the borrower is likely to incur during the settlement process. *Id.* at 2604. The booklet and good faith estimate 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.* at 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.

<sup>3</sup> HOEPA amended TILA by adding new sections 103(aa) and 129, 15 U.S.C. 1602(aa) and 1639.

### 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.<sup>4</sup> The Dodd-Frank Act created the Bureau and consolidated various rulemaking and supervisory authorities in the new agency, including the authority to implement TILA (including HOEPA) and RESPA.<sup>5</sup> 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.<sup>6</sup> 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 negative amortization 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 finalizing this rule to implement the HOEPA and homeownership counseling-related requirements.

### D. The Market for High-Cost Mortgages

Since the enactment of HOEPA, originations of mortgages covered by HOEPA 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 coverage thresholds were set relatively high, HOEPA's assignee liability provisions make the loans relatively unattractive to secondary market investors, and general compliance burden and perceived stigma. Data collected under the Home Mortgage Disclosure Act (HMDA), 12 U.S.C. 2801 *et seq.*, further indicate that the percentage share of high-cost mortgages has generally been declining since 2004, the first year that HMDA reporters were required to identify high-cost mortgages. Between 2004 and 2011, high-cost mortgages typically comprised about 0.2 percent of HMDA-reporters' originations of refinance or home-improvement loans secured by a one-to-four family home (the class of mortgages generally covered by HOEPA). This percentage peaked at 0.45 percent in 2005 when, of about 8.0 million originations of such loans, there were approximately 36,000 high-cost mortgages reported in HMDA. The percentage fell to 0.05 percent by 2011 when nearly 2,400 high-cost mortgages were reported compared with roughly 4.5 million refinance or home-improvement loans secured by a one- to four-family home.

Similarly, the number of HMDA-reporting creditors that originate high-cost mortgages is relatively small. From 2004 through 2009, between 1,000 to 2,000 creditors that report under HMDA (between 12 to 22 percent of HMDA-reporters in a given year) reported extending high-cost mortgages. In each year between 2004 and 2011, the vast majority of creditors—roughly 80–90 percent of those that made any high-cost mortgages and 96 percent or more of all HMDA reporters—made fewer than 10 high-cost mortgages. In 2010, only about 650 creditors reported any high-cost mortgages. In 2011 fewer than 600 creditors, or roughly 8 percent of HMDA filers, reported originating any high-cost mortgages, and about 50 creditors accounted for over half of 2011 HOEPA originations. As discussed above, the Dodd-Frank Act expanded the types of loans potentially covered by HOEPA by including purchase-money mortgages and HELOCs and also lowering the coverage thresholds. 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 Bureau's implementation of the Dodd-Frank Act amendments on HOEPA lending.

### III. Summary of the Rulemaking Process

#### A. The Bureau's Proposal

The Bureau issued for public comment its proposal to amend Regulation Z to implement the Dodd-Frank Act amendments to HOEPA on July 9, 2012. This proposal was published in the **Federal Register** on August 15, 2012. *See* 77 FR 49090 (August 15, 2012) (2012 HOEPA Proposal or the proposal). The proposal also would have implemented certain homeownership counseling-related requirements that Congress adopted in the Dodd-Frank Act, that are not amendments to HOEPA.

The proposal would have implemented the Dodd-Frank Act's amendments that expanded the universe of loans potentially covered by HOEPA to include most types of mortgage loans secured by a consumer's principal dwelling. Reverse mortgages continued to be excluded. The proposal also would have implemented the Dodd-Frank Act's amendments to HOEPA's coverage tests, including adding a new threshold for prepayment penalties, and would have provided guidance on how to apply the coverage tests. In addition, the proposed rule also would have implemented new Dodd-Frank Act restrictions and requirements concerning loan terms and origination practices for high-cost mortgages.

With respect to homeownership counseling-related requirements that are not amendments to HOEPA, under the proposal, lenders generally would have been required to distribute a list of five homeownership counselors or counseling organizations to a consumer applying for a federally related mortgage loan within three business days after receiving the consumer's application. The proposal also would have implemented a new requirement that first-time borrowers receive homeownership counseling before taking out a negative amortization loan.

#### B. Comments and Outreach

The Bureau received over 150 comments on its proposal from, among others, consumer groups, industry trade associations, banks, community banks, credit unions, financial companies, State housing finance authorities, counseling associations and intermediaries, a State Attorney General's office, and individual consumers and academics. In addition, after the close of the original comment period, various interested parties including industry and consumer group commenters were required to submit written summaries of *ex parte*

<sup>4</sup> For more discussion of the mortgage market, the financial crisis, and mortgage origination generally, *see* the Bureau's 2013 ATR Final Rule.

<sup>5</sup> Sections 1011 and 1021 of title X of the Dodd-Frank Act, the "Consumer Financial Protection Act," Public Law 111–203, sec. 1001–1100H, 124 Stat. 1375 (2010) (codified at 12 U.S.C. 5491, 5511). The Consumer Financial Protection Act is substantially codified at 12 U.S.C. 5481–5603.

<sup>6</sup> As amended, the HOEPA provisions of TILA will be codified at 15 U.S.C. 1602(bb) and 1639. The Bureau notes that the Dodd-Frank Act amended existing TILA section 103(aa) and renumbered it 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 Act provision, which is in effect until the Dodd-Frank Act's amendments take effect, and TILA section 103(bb) to refer to the amended and renumbered provision.

communications with the Bureau, consistent with the Bureau's policy.<sup>7</sup> Materials submitted were filed in the record and are publicly available at <http://www.regulations.gov>. With the exception of comments addressing proposed mitigating measures to account for a more inclusive finance charge, these comments and ex parte communications are discussed below in the section-by-section analysis of the final rule.

As discussed in further detail below, the Bureau sought comment in its HOEPA proposal on whether to adopt certain adjustments or mitigating measures in its HOEPA implementing regulations if it were to adopt a broader definition of "finance charge" under Regulation Z. The Bureau has since published a notice in the **Federal Register** making clear that it will defer its decision whether to adopt the more inclusive finance charge proposal, and therefore any implementation thereof, until it finalizes the its proposal to TILA-RESPA Proposal, which is planned for later in 2013. 77 FR 54843 (Sept. 6, 2012). Accordingly, this final rule is deferring discussion of any comments addressing proposed mitigating measures to account for a more inclusive finance charge under HOEPA.

The Bureau has carefully considered the comments and ex parte communications and has decided to modify the proposal in certain respects and adopt the final rules as described below in the section-by-section analysis.

### C. Other Rulemakings

In addition to this final rule, the Bureau is adopting several other final rules and issuing one proposal, all relating to mortgage credit to implement requirements of title XIV of the Dodd-Frank Act. The Bureau is also issuing a final rule jointly with other Federal agencies to implement requirements for mortgage appraisals in title XIV. Each of the final rules follows a proposal issued in 2011 by the Board or in 2012 by the Bureau alone or jointly with other Federal agencies. Collectively, these proposed and final rules are referred to as the Title XIV Rulemakings.

- **Ability-to-Repay:** The Bureau is finalizing a rule, following a May 2011 proposal issued by the Board (the Board's 2011 ATR Proposal),<sup>8</sup> to implement provisions of the Dodd-Frank Act (1) requiring creditors to

determine that a consumer has a reasonable ability to repay covered mortgage loans and establishing standards for compliance, such as by making a "qualified mortgage," and (2) establishing certain limitations on prepayment penalties, pursuant to TILA section 129C as established by Dodd-Frank Act sections 1411, 1412, and 1414. 15 U.S.C. 1639c. The Bureau's final rule is referred to as the 2013 ATR Final Rule. Simultaneously with the 2013 ATR Final Rule, the Bureau is issuing a proposal to amend the final rule implementing the ability-to-repay requirements, including by the addition of exemptions for certain nonprofit creditors and certain homeownership stabilization programs and a definition of a "qualified mortgage" for certain loans made and held in portfolio by small creditors (the 2013 ATR Concurrent Proposal). The Bureau expects to act on the 2013 ATR Concurrent Proposal on an expedited basis, so that any exceptions or adjustments to the 2013 ATR Final Rule can take effect simultaneously with that rule.

- **Escrows:** The Bureau is finalizing a rule, following a March 2011 proposal issued by the Board (the Board's 2011 Escrows Proposal),<sup>9</sup> to implement certain provisions of the Dodd-Frank Act expanding on existing rules that require escrow accounts to be established for higher-priced mortgage loans and creating an exemption for certain loans held by creditors operating predominantly in rural or underserved areas, pursuant to TILA section 129D as established by Dodd-Frank Act sections 1461. 15 U.S.C. 1639d. The Bureau's final rule is referred to as the 2013 Escrows Final Rule.

- **Servicing:** Following its August 2012 proposals (the 2012 RESPA Servicing Proposal and 2012 TILA Servicing Proposal),<sup>10</sup> the Bureau is adopting final rules to implement Dodd-Frank Act requirements regarding force-placed insurance, error resolution, information requests, and payment crediting, as well as requirements for mortgage loan periodic statements and adjustable-rate mortgage reset disclosures, pursuant to section 6 of RESPA and sections 128, 128A, 129F, and 129G of TILA, as amended or established by Dodd-Frank Act sections 1418, 1420, 1463, and 1464. 12 U.S.C. 2605; 15 U.S.C. 1638, 1638a, 1639f, and 1639g. The Bureau also is finalizing rules on early intervention for troubled and delinquent borrowers, and loss

mitigation procedures, pursuant to the Bureau's authority under section 6 of RESPA, as amended by Dodd-Frank Act section 1463, to establish obligations for mortgage servicers that it finds to be appropriate to carry out the consumer protection purposes of RESPA, and its authority under section 19(a) of RESPA to prescribe rules necessary to achieve the purposes of RESPA. The Bureau's final rule under RESPA with respect to mortgage servicing also establishes requirements for general servicing standards policies and procedures and continuity of contact pursuant to its authority under section 19(a) of RESPA. The Bureau's final rules are referred to as the 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule, respectively.

- **Loan Originator Compensation:** Following its August 2012 proposal (the 2012 Loan Originator Proposal),<sup>11</sup> the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring certain creditors and loan originators to meet certain duties of care, including qualification requirements; requiring the establishment of certain compliance procedures by depository institutions; prohibiting 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; and establishing restrictions on mandatory arbitration and financing of single premium credit insurance, pursuant to TILA sections 129B and 129C as established by Dodd-Frank Act sections 1402, 1403, and 1414(a). 15 U.S.C. 1639b, 1639c. The Bureau's final rule is referred to as the 2013 Loan Originator Final Rule.

- **Appraisals:** The Bureau, jointly with other Federal agencies,<sup>12</sup> is issuing a final rule implementing Dodd-Frank Act requirements concerning appraisals for higher-risk mortgages, pursuant to TILA section 129H as established by Dodd-Frank Act section 1471. 15 U.S.C. 1639h. This rule follows the agencies' August 2012 joint proposal (the 2012 Interagency Appraisals Proposal).<sup>13</sup> The agencies' joint final rule is referred to as the 2013 Interagency Appraisals Final Rule. In addition, following its August 2012 proposal (the 2012 ECOA

<sup>7</sup> The Bureau's policy regarding ex parte communications can be found at [http://files.consumerfinance.gov/f/2011/08/Bulletin\\_20110819\\_ExPartePresentationsRulemaking\\_Proceedings.pdf](http://files.consumerfinance.gov/f/2011/08/Bulletin_20110819_ExPartePresentationsRulemaking_Proceedings.pdf).

<sup>8</sup> 76 FR 27390 (May 11, 2011).

<sup>9</sup> 76 FR 11598 (Mar. 2, 2011).

<sup>10</sup> 77 FR 57200 (Sept. 17, 2012) (RESPA); 77 FR 57318 (Sept. 17, 2012) (TILA).

<sup>11</sup> 77 FR 55272 (Sept. 7, 2012).

<sup>12</sup> Specifically, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Housing Finance Agency.

<sup>13</sup> 77 FR 54722 (Sept. 5, 2012).

Appraisals Proposal),<sup>14</sup> the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring 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, pursuant to section 701(e) of the Equal Credit Opportunity Act (ECOA) as amended by Dodd-Frank Act section 1474. 15 U.S.C. 1691(e). The Bureau's final rule is referred to as the 2013 ECOA Appraisals Final Rule.

The Bureau is not at this time finalizing proposals concerning various disclosure requirements that were added by title XIV of the Dodd-Frank Act, integration of mortgage disclosures under TILA and RESPA, or a simpler, more inclusive definition of the finance charge for purposes of disclosures for closed-end credit transactions under Regulation Z. The Bureau expects to finalize these proposals and to consider whether to adjust regulatory thresholds under the Title XIV Rulemakings in connection with any change in the calculation of the finance charge later in 2013, after it has completed quantitative testing, and any additional qualitative testing deemed appropriate, of the forms that it proposed in July 2012 to combine TILA mortgage disclosures with the good faith estimate (RESPA GFE) and settlement statement (RESPA settlement statement) required under the Real Estate Settlement Procedures Act, pursuant to Dodd-Frank Act section 1032(f) and sections 4(a) of RESPA and 105(b) of TILA, as amended by Dodd-Frank Act sections 1098 and 1100A, respectively (the 2012 TILA-RESPA Proposal).<sup>15</sup> Accordingly, the Bureau already has issued a final rule delaying implementation of various affected title XIV disclosure provisions.<sup>16</sup> The Bureau's approaches to coordinating the implementation of the Title XIV Rulemakings and to the finance charge proposal are discussed in turn below.

#### Coordinated Implementation of Title XIV Rulemakings

As noted in all of its foregoing proposals, the Bureau regards each of the Title XIV Rulemakings as affecting aspects of the mortgage industry and its regulations. Accordingly, as noted in its proposals, the Bureau is coordinating carefully the Title XIV Rulemakings, particularly with respect to their effective dates. The Dodd-Frank Act requirements to be implemented by the Title XIV Rulemakings 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. See Dodd-Frank Act section 1400(c), 15 U.S.C. 1601 note. In addition, some of the Title XIV Rulemakings are to take effect no later than one year after they are issued. *Id.*

The comments on the appropriate implementation date for this final rule are discussed in detail below in part VI of this notice. In general, however, consumer advocates requested that the Bureau put the protections in the Title XIV Rulemakings into effect as soon as practicable. In contrast, the Bureau received some industry comments indicating that implementing so many new requirements at the same time would create a significant cumulative burden for creditors. In addition, many commenters also acknowledged the advantages of implementing multiple revisions to the regulations in a coordinated fashion.<sup>17</sup> Thus, a tension exists between coordinating the adoption of the Title XIV Rulemakings and facilitating industry's implementation of such a large set of new requirements. Some have suggested that the Bureau resolve this tension by adopting a sequenced implementation, while others have requested that the Bureau simply provide a longer implementation period for all of the final rules.

The Bureau recognizes that many of the new provisions will require creditors to make changes to automated systems and, further, that most administrators of large systems are reluctant to make too many changes to their systems at once. At the same time, however, the Bureau notes that the Dodd-Frank Act established virtually all of these changes to institutions' compliance responsibilities, and contemplated that they be implemented in a relatively short period of time. And, as already noted, the extent of interaction among many of the Title XIV

Rulemakings necessitates that many of their provisions take effect together. Finally, notwithstanding commenters' expressed concerns for cumulative burden, the Bureau expects that creditors actually may realize some efficiencies from adapting their systems for compliance with multiple new, closely related requirements at once, especially if given sufficient overall time to do so.

Accordingly, the Bureau is requiring that, as a general matter, creditors and other affected persons begin complying with the final rules on January 10, 2014. As noted above, section 1400(c) of the Dodd-Frank Act requires that some provisions of the Title XIV Rulemakings take effect no later than one year after the Bureau issues them. Accordingly, the Bureau is establishing January 10, 2014, one year after issuance of the Bureau's 2013 ATR, Escrows, and HOEPA Final Rules (*i.e.*, the earliest of the title XIV final rules), as the baseline effective date for most of the Title XIV Rulemakings. The Bureau believes that, on balance, this approach will facilitate the implementation of the rules' overlapping provisions, while also affording creditors sufficient time to implement the more complex or resource-intensive new requirements.

The Bureau has identified certain rulemakings or selected aspects thereof, however, that do not present significant implementation burdens for industry. Accordingly, the Bureau is setting earlier effective dates for those final rules or certain aspects thereof, as applicable. Those effective dates are set forth and explained in the **Federal Register** notices for those final rules.

#### More Inclusive Finance Charge Proposal

As noted above, the Bureau proposed in the 2012 TILA-RESPA Proposal to make the definition of finance charge more inclusive, thus rendering the finance charge and annual percentage rate a more useful tool for consumers to compare the cost of credit across different alternatives. 77 FR 51116, 51143 (Aug. 23, 2012). Because the new definition would include additional costs that are not currently counted, it would cause the finance charges and APRs on many affected transactions to increase. This in turn could cause more such transactions to become subject to various compliance regimes under Regulation Z. Specifically, the finance charge is central to the calculation of a transaction's "points and fees," which in turn has been (and remains) a coverage threshold for the special protections afforded "high-cost mortgages" under HOEPA. Points and fees also will be subject to a 3-percent

<sup>14</sup> 77 FR 50390 (Aug. 21, 2012).

<sup>15</sup> 77 FR 51116 (Aug. 23, 2012).

<sup>16</sup> 77 FR 70105 (Nov. 23, 2012).

<sup>17</sup> Of the several final rules being adopted under the Title XIV Rulemakings, six entail amendments to Regulation Z, with the only exceptions being the 2013 RESPA Servicing Final Rule (Regulation X) and the 2013 ECOA Appraisals Final Rule (Regulation B); the 2013 HOEPA Final Rule also amends Regulation X, in addition to Regulation Z. The six Regulation Z final rules involve numerous instances of intersecting provisions, either by cross-references to each other's provisions or by adopting parallel provisions. Thus, adopting some of those amendments without also adopting certain other, closely related provisions would create significant technical issues, *e.g.*, new provisions containing cross-references to other provisions that do not yet exist, which could undermine the ability of creditors and other parties subject to the rules to understand their obligations and implement appropriate systems changes in an integrated and efficient manner.

limit for purposes of determining whether a transaction is a “qualified mortgage” under the 2013 ATR Final Rule. Meanwhile, the APR serves as a coverage threshold for HOEPA protections as well as for certain protections afforded “higher-priced mortgage loans” under § 1026.35, including the mandatory escrow account requirements being amended by the 2013 Escrows Final Rule. Finally, because the 2013 Interagency Appraisals Final Rule uses the same APR-based coverage test as is used for identifying higher-priced mortgage loans, the APR affects that rulemaking as well. Thus, the proposed more inclusive finance charge would have had the indirect effect of increasing coverage under HOEPA and the escrow and appraisal requirements for higher-priced mortgage loans, as well as decreasing the number of transactions that may be qualified mortgages—even holding actual loan terms constant—simply because of the increase in calculated finance charges, and consequently APRs, for closed-end credit transactions generally.

As noted above, these expanded coverage consequences were not the intent of the more inclusive finance charge proposal. Accordingly, as discussed more extensively in the 2011 Escrows Proposal, the 2012 HOEPA Proposal, the Board’s 2011 ATR Proposal, and the Interagency Appraisals Proposal, the Board and subsequently the Bureau (and other agencies) sought comment on certain adjustments to the affected regulatory thresholds to counteract this unintended effect. First, the Board and then the Bureau proposed to adopt a “transaction coverage rate” for use as the metric to determine coverage of these regimes in place of the APR. The transaction coverage rate would have been calculated solely for coverage determination purposes and would not have been disclosed to consumers, who still would have received only a disclosure of the expanded APR. The transaction coverage rate calculation would exclude from the prepaid finance charge all costs otherwise included for purposes of the APR calculation except charges retained by the creditor, any mortgage broker, or any affiliate of either. Similarly, the Board and Bureau proposed to reverse the effects of the more inclusive finance charge on the calculation of points and fees; the points and fees figure is calculated only as a HOEPA and qualified mortgage coverage metric and is not disclosed to consumers. The Bureau also sought comment on other potential mitigation measures, such as adjusting the numeric

thresholds for particular compliance regimes to account for the general shift in affected transactions’ APRs.

The Bureau’s 2012 TILA–RESPA Proposal sought comment on whether to finalize the more inclusive finance charge proposal in conjunction with the Title XIV Rulemakings or with the rest of the TILA–RESPA Proposal concerning the integration of mortgage disclosure forms. 77 FR 51116, 51125 (Aug. 23, 2012). Upon additional consideration and review of comments received, the Bureau decided to defer a decision whether to adopt the more inclusive finance charge proposal and any related adjustments to regulatory thresholds until it later finalizes the TILA–RESPA Proposal. 77 FR 54843 (Sept. 6, 2012); 77 FR 54844 (Sept. 6, 2012).<sup>18</sup> Accordingly, the 2013 Escrows, HOEPA, ATR, and Interagency Appraisals Final Rules all are deferring any action on their respective proposed adjustments to regulatory thresholds.

#### IV. Legal Authority

The final rule was issued on January 10, 2013, in accordance with 12 CFR 1074.1. The Bureau issued this final 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 the “consumer financial protection functions” previously vested in certain other Federal agencies, including the Board.<sup>19</sup> 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.”<sup>20</sup> TILA, HOEPA (which is codified as part of TILA), and RESPA are Federal consumer financial laws.<sup>21</sup> Accordingly, the Bureau has authority to issue regulations pursuant to TILA and RESPA, including the disclosure requirements added to those statutes by title XIV of the Dodd-Frank Act.

<sup>18</sup> These notices extended the comment period on the more inclusive finance charge and corresponding regulatory threshold adjustments under the 2012 TILA–RESPA and HOEPA Proposals. It did not change any other aspect of either proposal.

<sup>19</sup> Dodd-Frank Act section 1061(b), 12 U.S.C. 5581(b).

<sup>20</sup> 12 U.S.C. 5581(a)(1).

<sup>21</sup> 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).

#### A. RESPA

As amended by the Dodd-Frank Act, 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 TILA. 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). This stated purpose is tied to Congress’s finding that “economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit[.]” TILA section 102(a). Thus, strengthened competition among financial institutions is a goal of TILA, achieved

through the effectuation of TILA's purposes.

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 Bureau's authority under 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) grants the Bureau authority to make adjustments and exceptions to the requirements of TILA for all transactions subject to TILA, except with respect to the substantive provisions of 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 to 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 TILA section 129(c) through (i),<sup>22</sup> 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 homeownership and equity protections.

TILA section 129(p)(2) grants the Bureau 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 mortgage 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 section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).<sup>23</sup>

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 establishes 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 added 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 both 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). TILA, RESPA, and title X of the Dodd-Frank Act are Federal consumer financial laws. Accordingly, the Bureau is exercising its authority under Dodd-Frank Act section 1022(b)(1) to prescribe rules that carry out the purposes and objectives of TILA and title X and prevent evasion of those laws.

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

<sup>22</sup> The referenced provisions of TILA section 129 are: (c) (No prepayment penalty); (d) (Limitations after default); (e) (No balloon payments); (f) (No negative amortization); (g) (No prepaid payments); (h) (Prohibition on extending credit without regard to payment ability of consumer); and (i) (Requirements for payments under home improvement contracts).

<sup>23</sup> H. Conf. Rept. 103-652, at 162 (1994).



## V. Section-by-Section Analysis

### A. Regulation X

#### Section 1024.20 List of Homeownership Counseling Organizations

The Dodd-Frank Act amended RESPA to create a new requirement that lenders provide a list of homeownership counselors to applicants for federally related mortgage loans. Specifically, section 1450 the Dodd-Frank Act amended RESPA section 5(c) to require lenders to provide applicants 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.”<sup>24</sup>

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.”<sup>25</sup> Prior to the Dodd-Frank Act, HUD was charged with distributing the RESPA “special information booklet” to lenders to help purchase-money mortgage borrowers understand the nature and costs of real estate settlement services. The Dodd-Frank Act amended RESPA section 5(a) to direct the Bureau to distribute the “home buying information 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.

The proposal would have implemented the Dodd-Frank Act’s requirement that a lender provide lists of homeownership counselors to applicants for federally related mortgage loans. Proposed § 1024.20 generally would have required a lender to provide

an applicant for a federally related mortgage loan with a list of five homeownership counselors or counseling organizations in the location of the applicant, not later than three days after receiving an application. Proposed § 1024.20 also would have set forth additional requirements related to the content and delivery of the list. The Bureau is finalizing proposed § 1024.20 with certain changes, as discussed in further detail below.

#### 20(a) Provision of List

##### 20(a)(1)

##### Scope of Requirement

As noted above, new RESPA section 5(c) requires lenders to include a list of homeownership counselors located in the area of the lender with the home buying information booklet that is to be distributed to applicants. To implement RESPA section 5(c), the Bureau proposed in § 1024.20(a)(1) that the list of homeownership counselors or counseling agencies be provided to applicants for all federally related mortgage loans, except for Home Equity Conversion Mortgages (HECMs), as discussed in the section-by-section analysis of § 1024.20(c) below. Under RESPA and its implementing regulations, a federally related mortgage loan includes purchase-money mortgage loans, subordinate-lien mortgages, refinancings, closed-end home-equity mortgage loans, HELOCs, and reverse mortgages.<sup>26</sup> Thus, proposed § 1024.20(a)(1) would have required that lenders provide the list of homeownership counselors to applicants for numerous types of federally related mortgage loans beyond purchase-money mortgages.

As the Bureau noted in the preamble of the proposal, based on its reading of section 5 of RESPA as amended, and its understanding of the purposes of that section, the Bureau believes that the amendments to RESPA indicate that Congress intended the booklet and list of counselors to be provided to applicants for all federally related mortgage loans and not just purchase-money mortgage loans. The Bureau acknowledged that 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.” However, the Bureau also noted that RESPA sections 5(a) and (b), as

amended, indicate that the booklet and list of counselors are to be provided to applicants for all federally related mortgage loans. 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 mortgages. Under RESPA section 5(b), as amended by the Dodd-Frank Act, the booklet must include information specific to refinancings and HELOCs, as well as “the costs incident to a real estate settlement or a federally related mortgage loan.”

Additionally, the Bureau noted in the preamble of the proposal its view 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.

Thus, for the reasons noted above, the Bureau proposed in § 1024.20(a)(1) to interpret the scope of the homeownership counselor list requirement to apply to all federally related mortgage loans pursuant to section 19(a) of RESPA, which 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].”

The Bureau sought comment from the public on the costs and benefits of the provision of the list of homeownership counselors to applicants for refinancings and HELOCs. The Bureau also sought 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 on existing counseling resources. In particular, the Bureau solicited comment on the effect on counseling resources of providing the list beyond applicants for purchase-money mortgages.

A number of industry commenters stated that lenders should not be required to provide counselor lists to applicants for refinancings or HELOCs. One large bank commenter, for example, asserted that the congressional intent to limit the requirement to purchase-

<sup>24</sup> 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 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.

<sup>25</sup> 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.”

<sup>26</sup> 12 U.S.C. 2602(1); 12 CFR 1024.2.

money mortgages is clear. Some other commenters were concerned that applicants for refinancings or HELOCs would either ignore the list or be offended by the suggestion that they would benefit from counseling, because such applicants already understand how mortgages work. Comments from consumer groups and a State Attorney General's office, however, supported the requirement to provide the counselor list to applicants for refinancings and HELOCs. Such commenters noted, for example, that consumers may find themselves in financial distress only after tapping into their home equity through a refinancing or a HELOC, in some cases repeatedly.

The Bureau is generally finalizing in § 1024.20(a)(1) the requirement to provide a list of counseling providers to applicants of federally related mortgage loans as proposed, for the reasons noted above. The Bureau continues to believe that the statutory language as a whole indicates Congress's intent to require lenders to provide the counselor list to applicants of refinancings and HELOCs, as well as purchase-money mortgages. Moreover, the Bureau agrees with commenters that suggest applicants for refinancings or HELOCs may benefit from information about counseling, even though such applicants have previously obtained a mortgage. The Bureau is, however, also adopting certain exemptions from the requirement, as described in the discussion of § 1024.20(c) below.

#### Content of List

As discussed above, RESPA section 5(c) requires that the list of homeownership counselors be comprised of homeownership counselors certified pursuant to section 106(e) of the Housing and Urban Development Act of 1968 and located in the area of the lender. RESPA section 5(c) does not specify any particular information about homeownership counselors that must be provided on the required list. Proposed § 1024.20(a)(1) would have provided that the list include five homeownership counselors or homeownership counseling organizations located in the zip code of the applicant's current address or, if there were not the requisite five counselors or counseling organizations in that zip code, counselors or organizations within the zip code or zip codes closest to the loan applicant's current address. Proposed § 1024.20(a)(2) would have required lenders to include in the list only homeownership counselors or counseling organizations from either the

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 or otherwise approved by HUD. Proposed § 1024.20(a)(3) would have required that the list include: (1) Each counselor's or counseling 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.

The Bureau stated in the preamble of the proposal that it expected to develop a Web site portal to facilitate compliance with the counselor list requirement. As the Bureau explained, such a Web site portal 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 also stated its belief 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 solicited comment on the appropriate number of counselors or organizations to be included on the list and on whether there should be a limitation on the number of counselors from the same counseling agency. The Bureau also solicited comment on whether its planned Web site 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.

A significant number of industry commenters objected to the proposed requirement to create individualized lists for borrowers as overly burdensome. Some commenters raised concerns that having to create these individualized lists would expose them to risk in the event of an error in compiling the list. Many industry commenters suggested that lenders should instead be permitted to comply with the requirement by providing Bureau and HUD contact information for the consumer to obtain information about counselors. Other commenters

suggested it would be more beneficial to refer consumers to web databases containing all counselors in a state, or to provide a list based on an applicant's state rather than zip code. Commenters argued that changing the provision to allow compliance through a static list would minimize costs, create greater efficiency, and be more accurate. Some commenters argued that locating the nearest zip code to a consumer's home zip code would be overly burdensome. Several commenters objected to the requirement that the list be obtained from "the most current" lists of counselors or counseling organizations maintained by the Bureau or HUD, or suggested that "most current" should mean "monthly." A number of consumer group commenters, however, supported the requirement for an individualized list because such a list would be most beneficial to consumers. One such commenter also noted that requiring lenders to retrieve a fresh list for each applicant will ensure the lists received by consumers are the most up-to-date.

Industry commenters were generally very supportive of the Bureau's intention to create a Web site portal to facilitate compliance, particularly if the individualized list requirement were retained. Some industry commenters noted that the list requirement would not be difficult to comply with as proposed, if a Web site portal were available. A few commenters, while primarily supportive of a requirement to provide a static rather than an individualized list, alternatively favored the idea of the Web site portal to generate the list (including automatically selecting adjacent zip codes to an applicant's zip code, if necessary). Some commenters requested a safe harbor for lenders providing a list generated through the Web site portal. Commenters proposed a number of additions or variations to the Web site portal. A number of industry commenters stated the Bureau should provide lenders with the option to import the data from the Web site portal directly into their systems, to ease compliance burden. Several industry commenters noted it would be essential that the Web site portal generate a list for lenders based on a simple zip code query. A few commenters suggested that the Web site portal should provide a randomized list in response to a zip code query, to avoid favoritism. Some commenters suggested the Web site portal should be made available to the public and publicized by the Bureau (e.g., through a public campaign in coordination with homeownership

counseling organizations, counseling trade groups, and HUD), and that lenders should be required to make lists available through their Web sites, branch offices, and mortgage advertising. Several commenters stated that the Bureau should coordinate the development of its Web site portal with HUD, so lenders are not required to search two separate databases.

A number of industry commenters raised concerns about the requirement to provide a list of five counselors or counseling agencies, asserting that five is an arbitrary number and that it would be a difficult requirement to meet in certain geographic locations. Some commenters noted, for example, that Alaska has only three counseling agencies statewide, and that Wyoming has only four. One commenter suggested that lenders should not have to disclose counselors from different states, if there are not five counselors in the consumer's state. A few commenters suggested that the requirement be more flexible and require, for example, a list of "no fewer than three" counseling agencies.

Several consumer advocacy and housing counselor advocacy groups commented that only homeownership counseling agencies, rather than individual homeownership counselors, should be permitted to appear on the list. These commenters noted that providing a list of individual counselors to consumers is neither practical nor efficient, as an individual counselor may not be available. A few commenters suggested that the list include agencies offering remote counseling services. For example, an alliance of counseling organizations suggested the list be required to include a minimum number of national counseling agencies or intermediaries<sup>27</sup> outside of a consumer's zip code that can provide phone counseling.

Several consumer advocacy and housing counselor advocacy commenters requested that additional information be required to be provided on the list. For example, they asked that the lists be required to include a counseling agency's specialty (e.g., pre-purchase, refinance, home equity, rental, reverse mortgage, etc.) and any foreign language capacity. Another commenter requested that the list include a description of the services that

the counselor would provide and fees typically charged for such services.

Based on the comments received concerning compliance burden and the potential operational difficulties associated with developing lists as envisioned in the proposal, the Bureau is revising § 1024.20(a)(1) to require lenders to fulfill the list obligation through use of either a Bureau Web site or data made available by the Bureau or HUD. Specifically, final § 1024.20(a)(1) allows lenders to distribute lists of counseling organizations providing relevant counseling services in the applicant's location that are obtained up to 30 days in advance from either a Web site maintained by the Bureau or data made available by the Bureau or HUD for lenders to use in complying with the requirements of § 1024.20, provided that the data are used in accordance with instructions provided with the data. Because lenders will thus generate the required lists through either a Web site that will automatically provide the required content of the list based on certain inputs, or through data that is accompanied by instructions to generate lists consistent with the Web site, the final rule also eliminates proposed § 1024.20(a)(1)(i) and (ii) and proposed § 1024.20(a)(2) and (3) as unnecessary.

The Bureau intends to create a Web site portal, in close coordination with HUD, that will require lenders to input certain required information (such as, for example, the applicant's zip code and the type of mortgage product) in order to generate a list of homeownership counseling organizations that provide relevant counseling services in the loan applicant's location. While the Bureau understands the concerns raised by commenters about the burden of generating zip-code based lists for potential borrowers, the Bureau notes that the statutory requirement indicates that the list should be comprised of counselors "located in the area of the lender." The Bureau is interpreting this requirement to mean the location of the applicant who is being served by the lender. The Bureau continues to believe that a list of counseling resources available near the applicant's location will be most useful to the applicant.<sup>28</sup>

<sup>28</sup> The Bureau also relies on its exemption and modification authority under RESPA section 19(a) and the Dodd-Frank Act section 1405(b). The Bureau believes that interpreting "located in the area of the lender" to mean the location of the applicant who is being served by the lender will help facilitate the effective functioning of this new RESPA disclosure. It will also, therefore, help carry out the purposes of RESPA for more effective advance cost disclosures for consumers, by providing information to loan applicants regarding counseling resources available for assisting them in

The Bureau also believes that permitting lists to be generated based on larger geographic areas, such as an applicant's state, would frequently result in an applicant receiving a list that is overwhelmingly lengthy. The Bureau notes, for example, that HUD's Web site indicates that there are a significant number of states that are served by well over 20 homeownership counseling organizations. The Bureau notes, moreover, that the Web site portal will obviate the need for a lender to determine the closest zip codes to an applicant.

The Bureau recognizes the concerns of industry commenters that requiring greater data inputs from lenders to generate a list will increase the burden on the lender. The Bureau intends to require as few data inputs as practicable to generate a relevant list for the applicant, in order to minimize compliance burden. The Bureau agrees with commenters that the Web site portal it develops should be made directly available to consumers, and the Bureau does intend to publicize the Web site portal to make consumers better aware of the counseling resources available.

The Bureau also agrees with commenters who suggested the list should include only homeownership counseling organizations rather than individual counselors. The Bureau explained in the preamble of the proposal that it was proposing to allow the list to include counselors or counseling organizations certified or otherwise approved by HUD, pursuant to its exemption authority under section 19(a) of RESPA and its modification authority under section 1405(b) of the Dodd-Frank Act. The Bureau is finalizing § 1024.20(a)(1) to require that the list contain only counseling organizations, pursuant to the same exemption authority, and anticipates that the Web site portal it develops may generate lists that include counseling organizations that are either certified or otherwise approved by HUD.<sup>29</sup> Because

understanding their prospective mortgage loans and settlement costs. In addition, because the Bureau believes that lists organized by the location of the applicant will be most useful to the applicants, the Bureau believes this interpretation is in the interest of consumers and in the public interest.

<sup>29</sup> As the Bureau noted in the preamble of the proposal, the Bureau understands that HUD, other than for its counseling program for HECMs, currently only approves homeownership counseling agencies, rather than certifying these agencies or individual counselors, as it has not yet implemented section 1445 of the Dodd-Frank Act regarding certification of counseling providers. The Bureau also notes that permitting the list to include individual counselors could cause confusion for consumers, as an individual counselor may be

<sup>27</sup> National intermediary organizations generally provide funding, training, and oversight of affiliated local counseling agencies, but may also provide counseling services directly to consumers. Christopher E. Herbert et al., *Abt Assoc. Inc., The State of the Housing Counseling Industry*, at xi, 2 (U.S. Dep't of Hous. & Urban Dev. 2008).

the Web site portal will automatically create lists that include the relevant homeownership counseling organizations, the Bureau is not finalizing proposed § 1024.20(a)(2).

The Bureau believes that allowing lenders to obtain the list up to 30 days prior to providing it to the loan applicant strikes an appropriate balance between ensuring the information received by consumers is useful, and avoiding unnecessary burdens on lenders. The Bureau notes a lender may be able to keep counselor lists generated based on certain data inputs on file, and provide those stored lists to applicants as appropriate for up to 30 days, in order to avoid generating a new list for each applicant.

With respect to the information that will appear on the lists of counseling organizations, the Bureau notes that rather than specify particular information, such as the counseling organization's telephone number, that must appear on the list through regulation, the Bureau will design its Web site portal so that the appropriate information will automatically appear on the lists that are generated. The Bureau will also work to ensure that any data provided for compliance with the requirement is accompanied by instructions that will result in the creation of a list that is consistent with what would have been generated if the Web site portal had been used. Accordingly, the Bureau is not finalizing proposed § 1024.20(a)(3). The Bureau believes this will help ease compliance burden. The Bureau anticipates that the lists generated through its Web site portal or in accordance with its instructions will include contact information for the counseling organizations and may include additional information about the counseling organizations such as language capacity and areas of expertise.

unavailable. The Bureau is therefore exercising its exemption and modification authority under RESPA section 19(a) and the Dodd-Frank Act section 1405(b) to provide flexibility in order to facilitate the availability of competent counseling organizations for placement on the lists, so that counseling organizations that are either approved or certified by HUD may appear on the lists. Permitting the list to include HUD-approved or HUD-certified counseling organizations will help facilitate the effective functioning of this new RESPA disclosure. It will also, therefore, help carry out the purposes of RESPA for more effective advance cost disclosures for consumers, by providing information to loan applicants regarding counseling resources available for assisting them in understanding their prospective mortgage loans and settlement costs. 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 lists generated by the Bureau's Web site portal.

The Bureau also anticipates that the lists generated through its Web site portal will also include information enabling the consumer to access either the Bureau or the HUD list of homeownership counseling organizations, so that an applicant who receives the list can obtain information about additional counseling organizations if desired.

#### Timing of the List

As discussed above, RESPA section 5(c) requires that the list be included with the home buying information booklet that is to be distributed to applicants no later than three business days after the lender receives a loan application. Proposed § 1024.20(a)(1) would have required a lender to provide the list no later than three business days after the lender, mortgage broker, or dealer receives an application (or information sufficient to complete an application). The definition of "application" that would have applied appears in § 1024.2(b). The Bureau noted in the proposal that its 2012 TILA-RESPA Proposal proposed to adopt a new definition of "application" under Regulation Z, and it sought comment on whether to tie the provision of the list to this proposed definition instead of the definition in § 1024.2(b). Some industry commenters asked for greater flexibility with respect to the timing of the list requirement, so that a list could be provided later than three business days after the lender receives a loan application. A few consumer groups and a counseling association commenter objected to the timing of the list requirement on the basis that counseling should occur earlier in the shopping process, not at application. The Bureau received one comment in support of linking the timing requirement for the list with the good faith estimate required by RESPA. A few commenters noted that regardless of whether the list had to be provided at the same time as the RESPA good faith estimate, it should only have to be provided once per loan, even if a loan estimate had to be revised.

The Bureau believes that the counselor list should be provided no later than the same time period as other applicable disclosures, in order to be most beneficial to consumers. The Bureau agrees with consumer group commenters that obtaining information about counseling at a point earlier than application could be beneficial to consumers. The Bureau notes, however, that the statutory requirement provides that the list of homeownership counselors be provided with the home buying booklet. The Bureau agrees with

commenters that stated a lender should only be required to provide a single list in conjunction with an application, and notes that the final rule does not require that more than one list be provided. In addition, because the Bureau has not yet finalized the 2012 TILA-RESPA Proposal, the Bureau declines to provide a different definition of application in the final rule. The Bureau is therefore finalizing the timing requirement in § 1024.20(a)(1) as proposed, consistent with the timing requirement of the booklet.

#### 20(a)(2)

RESPA section 5(c) does not specify whether the required list of homeownership counselors can be combined with other disclosures. To afford lenders flexibility and ease compliance burden, proposed § 1024.20(a)(4) would have allowed the list to be combined with other mortgage loan disclosures, unless otherwise prohibited. The Bureau did not receive any comments addressing this provision, and is finalizing it substantially as proposed, except that it is renumbering the provision as § 1024.20(a)(2).

#### 20(a)(3)

Under RESPA section 5(c), a lender must provide a list of homeownership counselors to an applicant. To afford flexibility and help ease compliance burden, proposed § 1024.20(a)(5) would have allowed a mortgage broker or dealer to provide the list to those applicants from whom it receives or for whom it prepares applications. Under proposed § 1024.20(a)(5), 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.

The Bureau received one comment objecting to the language that a mortgage broker or dealer "may" provide the list to a loan applicant from whom it receives for whom it prepares an application. This commenter suggested that this language be changed to "must," to reflect that mortgage brokers and dealers are required to provide the list to their loan applicants.

As discussed above however, under the language of proposed § 1024.20(a)(5) the lender would have been responsible for ensuring that the list of counseling organizations is provided to the loan applicant in accordance with the requirements of § 1024.20(a)(5). As a result, the provision would have required that a loan applicant receive

the list, with the lender maintaining ultimate responsibility for ensuring that it is provided, regardless of who provides the list. Accordingly, the Bureau is finalizing proposed § 1024.20(a)(5) substantially as proposed, except that it is renumbering the provision as § 1024.20(a)(3).

#### 20(a)(4)

RESPA section 5(c) does not specify how the required list must be delivered. Proposed § 1024.20(a)(6) would have set out the requirements for providing the list to the loan applicant, *i.e.*, in person, by mail, or by other means of delivery. As proposed, the list could have been 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 (E-Sign Act), 15 U.S.C. 7001 *et seq.*

A few industry commenters asserted that because the list requirement permits electronic delivery under the E-Sign Act, the list should not be referred to as “written.” One consumer group commenter encouraged the Bureau to remove language permitting the electronic delivery of disclosures, arguing that this could lead to a greater chance the disclosure would not be received (*e.g.*, if the lender used the incorrect email address).

The Bureau does not believe that the requirement that the list be “written” conflicts with the provisions relating to delivery in electronic form pursuant to the E-Sign Act. In fact, the E-Sign Act itself specifically provides that the use of an electronic record to provide information can satisfy a requirement that certain information required to be made available to a consumer be provided in writing, subject to consumer consent provisions.<sup>30</sup> Moreover, the Bureau believes it is important to retain the requirement that the list be in writing to provide for a retainable copy of the counseling organization names and contact information. In addition, the Bureau notes that permitting the electronic delivery of the disclosure is consistent with existing § 1024.23 of Regulation X, which provides for the applicability of the E-Sign Act to RESPA. For these reasons, the Bureau is finalizing § 1024.20(a)(6) substantially as proposed, but is renumbering it as § 1024.20(a)(4) for organizational purposes.

#### 20(a)(5)

Proposed § 1024.20(a)(7) would have provided that 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. The Bureau did not receive any comments addressing this provision. The Bureau is therefore finalizing § 1024.20(a)(7) substantially as proposed, but is renumbering it as § 1024.20(a)(5).

#### 20(a)(6)

Proposed § 1024.20(a)(8) would have provided flexibility related to the requirements for providing the list when there are multiple lenders and multiple applicants in a mortgage loan transaction. Under proposed § 1024.20(a)(8), if a mortgage loan transaction involved more than one lender, only one list was to be given to the loan applicant, and the lenders were to agree among themselves which lender would provide the list. Proposed § 1024.20(a)(8) also would have provided that if there were more than one loan applicant, the required list could be provided to any loan applicant that would have primary liability on the loan obligation.

Industry commenters stated that it should be permissible for multiple lenders to provide the list for operational convenience. The Bureau notes that proposed § 1024.20(a)(8) is consistent with Regulation Z § 1026.31(e), which also addresses disclosure requirements in the case of multiple creditors. The Bureau believes this consistency is appropriate, and that it could be confusing for consumers to receive multiple copies of a counselor list disclosure. Accordingly, the Bureau is finalizing § 1024.20(a)(8) as proposed, except for making minor edits for clarity and consistency and renumbering the provision as § 1024.20(a)(6).

#### 20(b) Open-End Lines of Credit (Home-Equity Plans) Under Regulation Z

As noted above, RESPA section 5(c) requires that the list be included with the home buying information booklet that is to be distributed to applicants no later than three business days after the lender receives a loan application, and the Bureau proposed in § 1024.20(a)(1) to interpret the scope of the homeownership counselor list requirement to apply to all federally related loans, including HELOCs (except as described in the discussion of § 1024.20(c) below). Proposed § 1024.20(b) would have permitted a lender or broker, for an open-end credit plan subject to the requirements of § 1024.20, to comply with the timing and delivery requirement of either § 1024.20(a), or with the timing and

delivery requirements set out in Regulation Z § 1026.40(b) for open-end disclosures. Several commenters noted that they appreciated this flexibility and asked the Bureau to retain this approach in the final rule. The Bureau agrees with commenters that the flexibility to provide the list under the timing requirements of § 1026.40(b) should be retained. The Bureau believes allowing this flexibility in timing will meet the purposes of the list requirement as well as help ease compliance burden. The Bureau is therefore adopting § 1024.20(b) as proposed, with minor edits for clarity and consistency.

#### 20(c) Exemptions

##### 20(c)(1) Reverse Mortgage Transactions

RESPA section 5(c) requires lenders to include a list of homeownership counselors with the home buying information booklet that is to be distributed to applicants. As noted above, the Bureau generally proposed in § 1024.20(a)(1) to interpret the scope of the homeownership counselor list requirement to apply to applicants of all federally related mortgage loans pursuant to section 19(a) of RESPA. Proposed § 1024.20(c) would have exempted a lender from providing 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 by § 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 below in the section-by-section analysis of Regulation Z, § 1026.34(a)(5), the Bureau’s final 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),<sup>31</sup> which is a part of HUD. HUD imposes various requirements related to HECM counseling, including requiring FHA-approved HECM mortgagees to provide HECM applicants with a list of HUD-approved HECM counseling agencies. The Bureau noted in the preamble of the proposal its concern that a duplicative list requirement could cause confusion for consumers and unnecessary burden for lenders. Accordingly, the Bureau proposed to 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 § 1024.20.

<sup>30</sup> 15 U.S.C. 7001(c).

<sup>31</sup> 12 U.S.C. 1715z–20(d)(2)(B).

A trade association for the reverse mortgage industry argued that lenders should not be obligated to provide a counselor list to applicants for HECM mortgages through § 1024.20. This commenter stated that HECM lenders are already required to provide a lengthier list of counselors specializing in reverse mortgage counseling. The commenter pointed out that in most instances a HECM lender cannot even complete a HECM application until they receive a HECM counseling certificate, except in limited circumstances under which HECM applicants can waive counseling requirements (e.g., for some types of refinancings from a HECM to another HECM). The commenter also argued that lenders should not have to provide applicants for non-HECM reverse mortgages the counseling list if the lender meets the HECM counseling disclosure requirements.

The Bureau agrees that lenders should not have to provide a list of counselors to HECM applicants because the list is of limited value for such applicants, given that the majority of such applicants would already have been required to receive counseling prior to submitting an application for a HECM. In addition, upon further consideration, the Bureau believes that lenders should not have to provide applicants for any reverse mortgages subject to Regulation Z § 1026.33(a) with a list of housing counselors. Given that counseling for HECMs and other reverse mortgages is typically provided by specially trained counselors, the Bureau believes that any additional counseling requirements related to these products would be better addressed separately. As noted above, HECM mortgagees are already required to provide HECM applicants with a list of HUD-approved HECM counseling agencies. The Bureau notes that it anticipates undertaking a rulemaking in the future to address how title XIV requirements apply to reverse mortgages and to consider other consumer protection issues in the reverse mortgage market.<sup>32</sup> That rulemaking will provide an opportunity to consider further issues related to counseling or counseling information on reverse mortgages. Because the Bureau concludes that requiring lenders to provide a list of counselors to reverse mortgage borrowers under § 1024.20 is largely duplicative of HECM requirements and may not provide additional, useful information for

borrowers of other types of reverse mortgages, final § 1024.20(c)(1) provides an exemption for reverse mortgages pursuant to the Bureau's authority under RESPA section 19(a).

#### 20(c)(2) Timeshare Plans

The Bureau generally proposed in § 1024.20(a)(1) to interpret the scope of the homeownership counselor list requirement to apply to applicants of all federally related loans pursuant to section 19(a) of RESPA, which would include applicants for a mortgage secured by a consumer's interest in a timeshare. The Bureau did not propose any type of exemption from the list requirement for this category of applicants. Timeshare industry commenters argued that the requirement for a list of counselors should not apply to lenders receiving an application for a mortgage secured by a consumer's interest in a timeshare. They asserted an exception is warranted for mortgages secured by timeshares because of their belief that there was no Congressional intent to require counseling for timeshare buyers due to unique characteristics of the timeshare industry, the lack of predatory lending in this market, the lower risk to consumers associated with default of a mortgage secured by a timeshare,<sup>33</sup> the protections provided by State law, and the timeshare business model that relies upon purchase and financing documents being executed simultaneously.

The Bureau agrees that lenders should not be obligated to provide a list of homeownership counselors to applicants for mortgages secured by a timeshare, and is therefore exercising its authority under section 19(a) of RESPA to provide an exemption for these transactions in final § 1024.20(c)(2). Although the Bureau believes that some form of counseling may be beneficial to such consumers, the Bureau is concerned that counselors at counseling agencies approved by HUD to counsel consumers on standard mortgage financing may not be trained to provide useful counseling addressing timeshare purchases. For that reason, the Bureau is concerned that the benefit of the list of counselors to a consumer purchasing a timeshare could be quite low. The Bureau has therefore determined that exempting timeshare purchases from the list requirement is reasonable, because it is unclear whether the list would provide helpful information to consumers. Accordingly, the final rule

does not require a lender to provide an applicant for a mortgage loan secured by a timeshare, as described under 11 U.S.C. 101(53D), with the list of homeownership counseling organizations required under § 1024.20.

#### 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, including high-cost mortgages. The Bureau would have revised § 1026.1(d)(5) for consistency with the Bureau's proposed amendments to §§ 1026.32 and 1026.34 for high-cost mortgages. Specifically, the Bureau proposed to revise § 1026.1(d)(5) to include the term "open-end credit plan" and to remove the term "closed-end" where appropriate. In addition, the Bureau proposed to include a reference to the new prepayment penalty coverage test for high-cost mortgages added by the Dodd-Frank Act. The Bureau did not receive any comments on proposed § 1026.1(d)(5) and is finalizing the provision as proposed, with one non-substantive change to reflect the Dodd-Frank Act's adoption of the term "high-cost mortgage" to refer to a transaction that meets any of the coverage tests set forth in § 1026.32(a).

##### Section 1026.31 General Rules

##### 31(c) Timing of Disclosure

##### 31(c)(1) Disclosures for High-Cost Mortgages

Since the enactment of the original HOEPA legislation in 1994, TILA section 129(a) has set forth the information that creditors must provide in the additional disclosure for high-cost mortgages, and TILA section 129(b) has described the timing requirements for this disclosure. Specifically, under TILA section 129(b)(1), the disclosure must be provided not less than three business days prior to consummation of the transaction. Pursuant to TILA section 129(b)(2)(A), if the terms of the transaction change after the disclosures have been provided in a way that makes the disclosure inaccurate, then a new disclosure must be given. TILA section 129(b)(2)(B) provides that such new disclosures may be given by telephone if the consumer initiated the change and if, at consummation, the new disclosure is provided in writing and the consumer and creditor certify that the telephone disclosure was given at least three days

<sup>32</sup> Consumer Financial Protection Bureau, Reverse Mortgage Report, at 10–11 (June 2012), available at [http://files.consumerfinance.gov/a/assets/documents/201206\\_cfpb\\_Reverse\\_Mortgage\\_Report.pdf](http://files.consumerfinance.gov/a/assets/documents/201206_cfpb_Reverse_Mortgage_Report.pdf).

<sup>33</sup> Commenters stated that typically if a consumer defaults, the only consequence is that the consumer loses the timeshare interest.

before consummation. TILA section 129(b)(2)(C) permitted the Board (now the Bureau) to prescribe regulations authorizing the modification or waiver of rights under TILA section 129(b) if such modification was necessary to permit consumers to meet a bona fide financial emergency.

TILA section 129(b) is implemented in existing § 1026.31(c)(1). Section 1026.31(c)(1) provides that the high-cost mortgage disclosure shall be provided at least three business days prior to consummation, and § 1026.31(c)(1)(i) sets forth the general rule for providing a new disclosure in the case of a change in terms. Section 1026.31(c)(1)(ii) permits the new disclosure for a change in terms to be provided by telephone in certain circumstances, and § 1026.31(c)(1)(iii) sets forth the conditions pursuant to which a consumer is permitted to modify or waive the three-day waiting period for a disclosure for a bona fide personal financial emergency.

The Dodd-Frank Act did not amend TILA section 129(b)(2) concerning the timing requirements for high-cost mortgage disclosures, except to clarify that authority under TILA section 129(b)(2)(C) to permit a modification or waiver of rights for bona fide personal financial emergencies transferred from the Board to the Bureau. The Bureau thus proposed only limited revisions to § 1026.31(c)(1) and related commentary that would have reflected the expanded types of loans potentially subject to HOEPA coverage as a result of the Dodd-Frank Act. For example, the proposal would have included 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 HELOCs.

The Bureau received one comment concerning proposed § 1026.31(c)(1). The commenter, a consumer advocacy organization, urged the Bureau to eliminate the language in § 1026.31(c)(1)(ii) permitting telephone disclosures when a consumer initiates a change in the transaction after the creditor has provided the high-cost mortgage disclosure, and that change results in different terms. The commenter argued that permitting telephone disclosures would encourage sloppiness and inconsistency in the delivery of information and argued that the consumer would not be able to remember the information conveyed. As noted above, § 1026.31(c)(1)(ii) permitting telephone disclosures in the case of a change in terms implements a long-existing provision of TILA. The Bureau would need to use its authority

under TILA section 105(a) to remove this provision. Given that the Dodd-Frank Act neither removed nor revised this provision, the Bureau declines to make such a change at this time. With respect to the commenter’s specific concerns, the Bureau notes that § 1026.31(c)(1)(ii) requires a written disclosure at consummation or account opening that reflects any changed terms, along with a certification by the consumer and creditor that telephone disclosures reflecting those terms were made at the appropriate time prior to consummation or account opening.

The commenter similarly urged the Bureau to eliminate the language in § 1026.31(c)(1)(iii) permitting the consumer to modify the three-day waiting period for a bona fide personal financial emergency. The commenter stated that the urgency for financing for some consumers should not supplant protections for other consumers. The Bureau declines to remove or amend § 1026.31(c)(1)(iii). The Board prescribed § 1026.31(c)(1)(iii) pursuant to its authority under TILA section 129(b)(2)(C) when it first implemented HOEPA by final rule in 1995.<sup>34</sup> The Bureau understands that there may be concerns about creditors abusing the waiver provision in certain circumstances, however the Bureau believes that the provision may benefit consumers who, for example, are facing imminent foreclosure. Absent specific information indicating that a change is warranted, the Bureau declines to modify this long-standing provision. The Bureau thus finalizes its amendments to § 1026.31(c)(1) generally as proposed (*i.e.*, to reflect the provision’s expanded application to HELOCs), with only minor revisions for clarity.

In addition, the Bureau is revising comment 31(c)(1)(i)–2 for clarification purposes and consistency with final § 1026.34(a)(10). Upon further consideration of these provisions, the Bureau recognizes that the prohibition of financing points and fees in § 1026.34(a)(10) prohibits the financing of any points and fees, as defined in § 1026.32(b)(1) and (2), for all high-cost mortgages. This prohibition includes the financing of premiums or other charges for the optional products such as credit insurance described in proposed comment 31(c)(1)(i)–2. Section 1026.34(a)(10) permits, however, the financing of charges not included in the definition of points and fees. For example, § 1026.34(a)(10) permits the financing of bona fide third-party charges, such as fees charged by a third-

party counselor in connection with the consumer’s receipt of pre-loan counseling for a high-cost mortgage under § 1025.34(a)(5). Accordingly, proposed comment 31(c)(1)(i)–2 is revised for clarification purposes and consistency with these other provisions.

#### 31(h) Corrections and Unintentional Violations.

Section 1433(f) of the Dodd-Frank Act added new section 129(v) to TILA, 15 U.S.C. 1639(v), which prescribes certain conditions under which a creditor or assignee of a high-cost mortgage that has failed to comply with a HOEPA requirement, despite acting in good faith, will not be deemed to have violated the requirement. Section 129(v) permits the creditor or assignee to use this provision when either of the two following sets of conditions is satisfied: (1) “Within 30 days of the loan closing and prior to the institution of any action, the consumer is notified of or discovers the violation, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the consumer—(A) make the loan satisfy the requirements of this chapter; or (B) in the case of a high-cost mortgage, change the terms of the loan in a manner beneficial to the consumer so that the loan will no longer be a high-cost mortgage”; or (2) “within 60 days of the creditor’s discovery or receipt of notification of an unintentional violation or bona fide error and prior to the institution of any action, the consumer is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the consumer—(A) make the loan satisfy the requirements of this chapter; or (B) in the case of a high-cost mortgage, change the terms of the loan in a manner beneficial so that the loan will no longer be a high-cost mortgage.”<sup>35</sup> The Bureau did not propose to issue regulatory guidance concerning this provision. The Bureau solicited 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.

The Bureau did not receive comments from industry suggesting that creditors or assignees would be likely to invoke the provision. However, the Bureau received a number of comments from industry and consumer groups that suggested the Bureau provide guidance on certain statutory terms. Both industry

<sup>34</sup> See 60 FR 15463, 15464–65 (Mar. 24, 1995).

<sup>35</sup> 15 U.S.C. 1639(v).

and consumer groups asked for a definition of the statutory term “good faith” and also sought guidance on whether the statutory requirement that notice of an unintentional error be given “prior to the institution of any action” applies only to lawsuits initiated by the consumer, or should be construed more broadly to include enforcement actions and various types of informal disputes between the borrower and creditor. Consumer groups also sought guidance and clarification as to how a creditor’s use of the statute to correct an unintentional violation will interplay with TILA rescission rights.<sup>36</sup>

In addition, both industry and consumer groups sought guidance on the operation of the 30- and 60-day periods set forth in sections 129(v)(1) and (2), respectively. These commenters expressed concern that the statute, as drafted, could be interpreted to require a creditor or assignee seeking the benefit of section 129(v) to provide notice to the consumer, receive the election of the consumer’s preferred adjustment, and implement the consumer’s election within the 30- or 60-day period. Industry and consumer groups stated that such a timeframe would be unworkable, and industry commenters suggested this would result in creditors and assignees not using the provision.

Both industry and consumer groups offered suggestions for a more workable operational framework. Specifically, industry commenters suggested that the 30- and 60-day time limits should refer only to the time in which the creditor or assignee must notify the consumer about the violation, but additional time should be afforded for the creditor to offer a choice of adjustments to the consumer, for the consumer to elect an adjustment, and the creditor to implement the consumer’s elected adjustment. Consumer groups also noted that a consumer may need substantial time to consider a creditor’s proposed adjustment in order to make an informed choice, and generally suggested that an additional 30 to 60 days from the time of notice be given to consumers to make an election of adjustment. Similarly, industry commenters suggested an additional time period of 30 to 60 days be afforded to the creditor or assignee to implement the consumer’s elected adjustment and pay any restitution that may be appropriate.

The Bureau recognizes that section 129(v) is a complex provision, and agrees with public commenters that several of the features and terms of the provision are ambiguous. However, it is

not yet clear what role section 129(v) will play in HOEPA’s scheme of regulation, particularly in light of the Dodd-Frank Act’s comprehensive amendments to HOEPA, and the lack of comments from industry suggesting that creditors or assignees will be likely to invoke this provision. The Bureau therefore declines at this point to issue detailed interpretive guidance regarding section 129(v).

However, the Bureau agrees with industry and consumer groups that it is important to clarify how the 30- and 60-day periods operate. Comments suggested that implementing the consumer’s choice of adjustment—which may require the creditor or assignee to make changes to the documentation, disclosure, or terms of a transaction—may itself take more than 30 days. It is thus not feasible to require creditors and assignees invoking the provision to also provide notice of the violation to the consumer and allow the consumer appropriate time to consider and elect an adjustment and to provide notice of that election to the creditor within that same 30 or 60 day period.

The Bureau is adopting a new provision at § 1026.31(h) and accompanying comment 31(h)–1 interpreting section 129(v) to address these issues. Section 1026.31(h) states that a creditor or assignee in a high-cost mortgage who, when acting in good faith, failed to comply with a requirement under section 129 of the Act will not be deemed to have violated such requirement if the creditor or assignee satisfies specified conditions. Those conditions include providing notice to the consumer within 30 or 60 days (as appropriate) of the prescribed triggering conditions and implementing the consumer’s chosen adjustments and providing appropriate restitution within a reasonable time.

In adopting new provision § 1026.31(h), the Bureau is interpreting the language of section 129(v) to provide greater clarity with respect to these timeframes, which will assist creditors, assignees, and consumers seeking to use section 129(v). In the Bureau’s view, section 129(v) is ambiguous regarding whether the “within 30 [or 60] days” timing requirement encompasses all the events that must occur for a creditor or assignee to claim the provision’s benefit—including the implementation of the consumer’s choice of adjustment—or only the first step, the consumer’s notification or discovery of the violation. The Bureau believes Congress’s intent was to make it possible, under appropriate circumstances, for creditors and assignees to satisfy the conditions of

section 129(v). If securing the protection of section 129(v) required a creditor or assignee to complete within 30 or 60 days tasks that cannot reasonably be done in that time, creditors or assignees might never seek to use the provision. The Bureau thus believes that, to effectuate Congress’s intent, section 129(v) should be interpreted, if possible, so that creditors and assignees can feasibly meet its conditions. The Bureau agrees with industry and consumer groups that it would be unworkable for a creditor to complete within 30 or 60 days all the steps to qualify for section 129(v) relief. Accordingly, the Bureau interprets the language of section 129(v) to mean that the 30- and 60-day statutory periods set forth the timeframe for providing notice of the violation to the consumer, but does not also require that the consumer elect an adjustment and that the creditor or assignee implement that adjustment, along with appropriate restitution, within the same timeframe.

With respect to the remaining statutory conditions—the consumer’s election of an adjustment, the creditor or assignee’s implementation of that adjustment, and the creditor or assignee’s paying of any appropriate restitution—the Bureau believes that Congress intended this provision to encourage creditors and assignees who have acted in good faith to remediate their violations of HOEPA, and that additional time is necessary for them to do so.

However, the Bureau stresses that, for a creditor or assignee to enjoy the benefit of section 129(v), the required adjustment must still be completed in a reasonable time. While the Bureau interprets the specified 30- or 60-day period to cover only notice of a violation to the consumer, the Bureau does not believe Congress intended to allow the remaining steps in section 129(v) to take an arbitrarily long time. The Bureau believes Congress intended a creditor or assignee to make the appropriate restitution and complete the required section 129(v) modification within a reasonable time period.<sup>37</sup> In the Bureau’s view, allowing a reasonable time for a creditor or assignee to carry out the steps necessary to benefit from section 129(v) would effectuate Congress’s purpose of encouraging creditors and assignees who have acted

<sup>37</sup> When a statute is silent about how long a given action may take, Congress may be understood to have implicitly required the action to be completed in a reasonable time. See Norman J. Singer & J.D. Shambie Singer, 2B Sutherland Statutes and Statutory Construction, § 55.3 (7th ed.) (“If a statute imposes a duty but is silent as to when it is to be performed, a reasonable time is implied.”).

<sup>36</sup> See 15 U.S.C. 1635 and 1639(n).



in good faith to remediate their violations of HOEPA. If a creditor could take any amount of time to fulfill the section 129(v) conditions, the creditor might wait without completing the required modification unless and until it faced liability for its violation.

Section 1026.31(h) reflects this interpretation by requiring both appropriate restitution and the required adjustments to a loan to be completed within a reasonable time. What length of time is reasonable may depend on the circumstances, including the nature of the violation at stake. The Bureau therefore declines to provide detailed guidance on what periods would be reasonable. However, as the accompanying new comment 31(h)–1 notes, the Bureau generally regards 30 days after the consumer sends notice of the chosen adjustment as reasonable.

Comment 31(h)–1 also provides a clarifying interpretation of the notice and election procedures. Section 129(v) is also ambiguous as to how consumers are to be notified that they have a choice of remedy and how they are to inform creditors of their choice. The Bureau believes that Congress intended for consumers to have a reasonable opportunity to make a choice under section 129(v). In the Bureau's view, this purpose is effectuated by interpreting section 129(v) to require a creditor or assignee to provide adequate notice of the choices available to the consumer. Specifically, comment 31(h)–1 notes that the initial notice sent to the consumer should be in writing, should offer the consumer the proposed adjustments, and should state the time within which the consumer must choose an adjustment. Comment 31(h)–1 further explains that the Bureau regards 60 days as generally sufficient to provide adequate notice of the consumer's right to make an election.

Finally, the Bureau is clarifying in § 1026.31(h) and its accompanying commentary certain statutory terminology for consistency with existing Regulation Z terminology, and to reflect the Dodd-Frank Act's expansion of loans potentially subject to HOEPA coverage to include open-end credit plans. Thus, § 1026.31(h) and its accompanying commentary use the terms "consummation or account opening" and "loan or credit plan" to clarify that § 1026.31(h) applies to both closed-end and open-end credit.

Section 1026.32 Requirements for High-Cost Mortgages

32(a) Coverage

32(a)(1)

Prior to the Dodd-Frank Act, the statutory protections for high cost mortgages generally were limited to closed-end refinancings and home-equity mortgage loans with APRs or points and fees that exceeded the thresholds prescribed by TILA section 103(aa), as implemented by existing § 1026.32(a)(1). The Dodd-Frank Act expanded HOEPA's coverage by providing in TILA section 103(bb)(1) that the term "high-cost mortgage" means any consumer credit transaction that is secured by the consumer's principal dwelling, other than a reverse mortgage transaction, if any of the prescribed high-cost mortgage thresholds are met. As discussed in the section-by-section analysis of § 1026.32(a)(1)(i) through (iii), below, the Dodd-Frank Act adjusted HOEPA's existing APR and points and fees thresholds and added a third HOEPA coverage test based on a transaction's prepayment penalties.

The proposal would have revised § 1026.32(a)(1) to implement TILA's amended definition of "high-cost mortgage" by removing the coverage exclusions for residential mortgage transactions (*i.e.*, purchase-money mortgage loans) and HELOCs while retaining the exclusion of reverse mortgage transactions. Specifically, the proposal would have defined "high-cost mortgage" in § 1026.32(a)(1) 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 high-cost APR, points and fees, or prepayment penalty coverage tests is met. Proposed comment 32(a)(1)–1 would have clarified that a high-cost mortgage includes both a closed- and open-end credit transaction secured by the consumer's principal dwelling. The comment also would have clarified that, for purposes of determining coverage under § 1026.32, an open-end credit transaction is limited to account opening; an individual advance of funds or a draw on the credit line subsequent to account opening does not constitute a "transaction" for this purpose. As noted in the proposal, the Bureau believes that such a clarification is needed to permit creditors to determine whether a HELOC is a high-cost mortgage once (*i.e.*, at account opening), rather than having to evaluate the HELOC for high-cost mortgage coverage

each time the consumer draws on the credit line.

The Bureau received numerous comments concerning the proposed expanded scope of loan types covered by HOEPA. The Bureau addresses those coverage-related comments in the section-by-section analysis of § 1026.32(a)(2) below. One commenter expressed an overall concern that the Bureau is not coordinating its 2013 HOEPA Final Rule with the implementation of other title XIV provisions, and suggested that HOEPA's protections were not necessary given these other provisions. As discussed in Part III of this preamble, the Bureau is carefully coordinating its rules. The Bureau notes that the Dodd-Frank Act's amendments to HOEPA are self-effectuating in the absence of regulations.

The Bureau received no comments concerning other aspects of proposed § 1026.32(a)(1) or comment 32(a)(1)–1 and adopts them generally as proposed, except that the Bureau retains for organizational purposes the existing structure of § 1026.32(a)(1), including its cross-reference to § 1026.32(a)(2) for exemptions from HOEPA coverage.

32(a)(1)(i)

Prior to the Dodd-Frank Act, TILA section 103(aa)(1)(A) provided that a transaction was covered by HOEPA if the APR at consummation of the transaction would exceed by more than 10 percentage points the yield on Treasury securities having comparable periods of maturity (measured as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit was received by the creditor). Pursuant to its authority under TILA section 103(aa)(2) (re-designated by the Dodd-Frank Act as section 103(bb)(2)), the Board in 2001 lowered the APR threshold for first-lien transactions to 8 percentage points above the yield on comparable Treasury securities and retained the higher APR threshold of 10 percentage points above the yield on comparable Treasury securities for subordinate-lien transactions, thus creating a two-tiered APR test for HOEPA coverage.<sup>38</sup> The APR thresholds are implemented in existing § 1026.32(a)(1)(i).

TILA section 103(bb)(1)(A)(i), as added by section 1431 of the Dodd-Frank Act, essentially codifies the two-tiered APR test for HOEPA coverage adopted by the Board in 2001, with certain changes. Specifically, TILA section 103(bb)(1)(A)(i):

<sup>38</sup> 66 FR 65604, 65617 (Dec. 20, 2001).

- Changes the APR benchmark from the yield on comparable Treasury securities to the “average prime offer rate,” as defined in TILA section 129C(b)(2)(B);
  - Revises the percentage-point thresholds for first- and subordinate-lien transactions; and
  - Creates a separate, higher percentage-point threshold for smaller-dollar-amount, first-lien transactions secured by personal property.
- These changes, as implemented by the final rule, are discussed below, following a discussion of (1) the Bureau’s proposal to use the “transaction coverage rate” as an alternative to the APR for purposes of determining HOEPA coverage under § 1026.32(a)(1)(i), and (2) general comments concerning the use of the APR for testing for HOEPA coverage.

#### Annual Percentage Rate versus Transaction Coverage Rate

The Bureau proposed two alternatives in proposed § 1026.32(a)(1)(i) to implement the revised APR thresholds for HOEPA coverage under TILA section 103(bb)(1)(A)(i). Alternative 1 would have used the APR as the metric to be compared to the average prime offer rate for determining HOEPA coverage for both closed- and open-end credit transactions. Alternative 2 would have been substantially identical to Alternative 1, but it would have substituted a “transaction coverage rate” for the APR as the metric to be compared to the average prime offer rate for closed-end credit transactions. The Bureau proposed Alternative 2 in connection with the Bureau’s 2012 TILA–RESPA Integration Proposal, which would have broadened the general definition of finance charge for closed-end transactions under Regulation Z.<sup>39</sup> In its HOEPA proposal, the Bureau solicited comment on whether to adopt Alternative 1 or Alternative 2 for closed-end transactions. The Bureau also noted that it would not adopt Alternative 2 if it did not change the definition of finance charge in connection with the 2012 TILA–RESPA Integration Proposal. Proposed comment 32(a)(1)(i)–1 would have clarified how to determine the “transaction coverage rate” for closed-end transactions if Alternative 2 were adopted.

As discussed in part II above, in August 2012, the Bureau extended the notice-and-comment period for comments relating to the proposed adoption of the more inclusive finance

charge, including related aspects of the HOEPA proposal such as the transaction coverage rate. At that time, the Bureau noted that it would not be finalizing the more inclusive finance charge in January 2013.<sup>40</sup> The Bureau therefore does not address in this rulemaking the numerous public comments that it received concerning the proposed alternatives for the APR coverage test. The Bureau instead will address such comments in connection with its finalization of the 2012 TILA–RESPA Integration Proposal, thus resolving that issue together with the Bureau’s determination whether to adopt the more inclusive finance charge. The final rule thus adopts Alternative 1 (*i.e.*, use of APR) in § 1026.32(a)(1)(i).

#### Use of the Annual Percentage Rate for HOEPA Coverage

The Bureau received several comments generally discussing the use of the APR for determining HOEPA coverage. One State housing finance authority commenter suggested that the Bureau replace the APR-based coverage test for both closed- and open-end transactions with a simpler, interest rate-based test that would be easier to explain to consumers and would eliminate regional variations due to closing charges. Given that TILA clearly contemplates an APR-based coverage test for determining the applicability of HOEPA protections, as well as other types of special protections, the Bureau declines to adopt an interest rate-based test for high-cost mortgages in this rulemaking.<sup>41</sup>

The Bureau also declines to adopt in the final rule, as suggested by one consumer advocacy commenter, a requirement that non-interest finance charge items be included in the APR calculation for HELOCs for purposes of determining HOEPA coverage. As noted, the Dodd-Frank Act expanded HOEPA coverage to HELOCs in TILA section 103(bb)(1)(A). In doing so, Congress did not set forth any special standards for applying the APR coverage test to open-end credit. Under the HOEPA proposal, HELOC creditors thus would have tested HELOCs for HOEPA coverage by using the standard APR that creditors calculate for HELOC disclosures. Specifically, unlike for closed-end transactions, where the APR reflects costs other than interest, HELOC APRs

include only interest.<sup>42</sup> One consumer group commenter urged the Bureau to make the APR coverage test more consistent between closed- and open-end credit by adopting a more inclusive APR calculation for HELOCs. The commenter argued that, under the Bureau’s proposal, a creditor could impose astronomical closing costs on a HELOC without meeting the APR coverage test, because such charges are not included in the APR calculation for HELOCs. The commenter expressed concern that the difference in the APR calculation for HELOCs versus closed-end transactions will unduly encourage creditors to steer consumers toward HELOCs, and particularly to HELOCs with excessively high closing costs.

The Bureau acknowledges that Regulation Z requires a different calculation of APR for closed-end transactions (interest rate plus other charges) than for HELOCs (interest rate only) for disclosure purposes. Using these existing APRs for HOEPA coverage necessarily means that non-interest charges will be reflected in the APR for closed-end, but not for open-end, transactions. The Bureau declines at this time, however, to adopt a different APR for HELOCs. First, the Bureau notes that creditors have been required to use the (interest rate) APR for HELOC disclosures for more than twenty years, and this APR is consistent with the APR used for other open-end credit.<sup>43</sup> Moreover, notwithstanding the commenter’s concern, the Bureau believes that the HOEPA points and fees coverage test should constrain HELOC creditors from imposing excessively high closing costs. As discussed in the section-by-section analysis of § 1026.32(b)(2) below, the final rule adopts a points and fees definition that is the same in all material respects for closed- and open-end credit. Finally, the Bureau believes that introducing a new APR calculation for HELOC creditors solely for determining HOEPA coverage could impose additional compliance costs that would need to be carefully

<sup>42</sup> TILA section 128(a)(3) and (4) requires disclosure of the finance charge and the finance charge expressed as an “annual percentage rate,” for which the interest rate (along with other items in the finance charge) is a factor in the calculation. See § 1026.18(d) and (e). TILA section 127A(a), in contrast, provides that HELOC creditors must disclose the annual percentage rate along with a statement that the rate does not include costs other than interest. Thus, pursuant to §§ 1026.14(b) and .40, the APR to be disclosed for a HELOC—as for other types of open-end credit—is the periodic rate multiplied by the number of periods in a year under § 1026.40.

<sup>43</sup> See, *e.g.*, 54 FR 24670 (June 9, 1989) (adopting HELOC disclosure rules to implement the Home Equity Loan Consumer Protection Act of 1988); § 1026.14(b).

<sup>39</sup> See 77 FR 49091, 49100–03 (Aug. 15, 2012) (discussing the transaction coverage rate).

<sup>40</sup> See 77 FR 54843 (Sept. 6, 2012) (discussing the TILA–RESPA Integration Proposal); 77 FR 54844 (Sept. 6, 2012) (discussing the HOEPA Proposal).

<sup>41</sup> See TILA sections 129C(a)(6)(D)(ii) and 129C(c)(1)(B)(ii) (ability-to- repay and qualified mortgage requirements), 129D(b)(3) (escrow requirements), and 129H(f)(2) (appraisal requirements).

analyzed. Thus, the Bureau believes that comments concerning the disparity between the APR for closed- and open-end credit transactions are better considered as part of a broader reevaluation of the HELOC provisions of Regulation Z, rather than in the context of this rulemaking to implement section 1431 of the Dodd-Frank Act.<sup>44</sup>

#### Average Prime Offer Rate as Benchmark

As noted above, the Dodd-Frank Act amended HOEPA by changing the benchmark against which the APR must be measured to determine HOEPA coverage from the yield on comparable Treasury securities to the average prime offer rate, defined in TILA section 129C(b)(2)(B) to mean the average prime offer rate for a comparable transaction as of the date on which the interest rate for the transaction is set, as published by the Bureau. TILA section 129C(b)(2)(B) essentially codifies the definition of average prime offer rate adopted by the Board in its 2008 HOEPA Final Rule and implemented in § 1026.35.<sup>45</sup>

Section 1026.35 prohibits certain acts or practices in connection with higher-priced mortgage loans. Higher-priced mortgage loans, in contrast to high-cost mortgages, are closed-end credit transactions with APRs that, in general, exceed the average prime offer rate for a comparable transaction as of the date the interest rate for the transaction is set by more than 1.5 or 3.5 percentage points for first- and subordinate-lien transactions, respectively.<sup>46</sup>

Section 1026.35(a)(2) provides that the average prime offer rate means an APR that is derived from the average interest rates, points and “other loan pricing terms” currently offered to consumers by a representative sample of creditors for fixed- and variable-rate closed-end credit transactions with low-risk pricing characteristics. Section 1026.35(a)(2) also indicates that a table with the average prime offer rates for a broad range of types of closed-end credit transactions is published on the internet

<sup>44</sup> In this regard, the Bureau notes that it has inherited from the Board a proposal to amend the requirements for HELOC disclosures under current § 1026.40 (§ 226.5b in the Board’s proposal). See 74 FR 43428 (Aug. 26, 2009). The Bureau anticipates finalizing the Board’s proposal in the future.

<sup>45</sup> See 73 FR 44522, 44534–36 (July 30, 2008).

<sup>46</sup> Existing § 1026.35 contains repayment ability requirements and other restrictions for higher-priced mortgage loans. The Bureau’s 2013 ATR Final Rule is removing those requirements in connection with its implementation in § 1026.43 of the Dodd-Frank Act’s ability-to-repay and qualified mortgage provisions. However, § 1026.35 is being retained for escrow- and appraisal-related requirements for higher-priced mortgage loans, which are being implemented in the Bureau’s 2013 Escrows Final Rule and the 2013 interagency appraisals rulemaking, respectively.

and updated at least weekly. Existing comments 35(a)(2)–1 through –4 provide further details concerning the calculation and use of the average prime offer rate.<sup>47</sup> In relevant part:

- Comment 35(a)(2)–1 states that data reported in the Freddie Mac Primary Mortgage Market Survey® (PMMS) is used to calculate the average prime offer rates reported in the internet table.<sup>48</sup> For variable-rate transactions, the “other loan pricing terms” (*i.e.*, other than interest rates and points) that are used to calculate the average prime offer rates include commonly used indices, margins, and initial fixed-rate periods.

- Comment 35(a)(2)–2 notes that the published average prime offer rate tables indicate how to identify a “comparable transaction” for purposes of calculating the APR to average prime offer rate spread that is required to determine higher-priced mortgage loan coverage under § 1026.35.<sup>49</sup>

- Comment 35(a)(2)–3 provides that, for purposes of determining higher-priced mortgage loan coverage under § 1026.35, a transaction’s APR is compared to the average prime offer rate as of the date the transaction’s interest rate is set (or “locked”) before

<sup>47</sup> In proposing to cross-reference Regulation Z’s existing guidance for average prime offer rates relating to higher-priced mortgage loans, the HOEPA proposal noted that Regulation Z’s existing comments 35(a)(2)–1 through –4 likely would be renumbered as comments 35(a)(2)(ii)–1 through –4 for organizational purposes if and when the Bureau adopted the transaction coverage rate in § 1026.35 in connection with a more inclusive finance charge definition. As discussed, the Bureau has postponed action with respect to the proposed more inclusive finance charge. However, as described in connection with the Bureau’s 2013 Escrows Final Rule, the Bureau is renumbering existing commentary to § 1026.35 concerning the average prime offer rate for other reasons. The cross-references in commentary to § 1026.32(a)(2) in this final rule reflect the numbering that is being adopted in the 2013 Escrows Final Rule, rather than the numbering of existing commentary to section 1026.35.

<sup>48</sup> The PMMS contains pricing data for four types of closed-end transactions: one-year ARM, ¾ ARM, 30-year fixed-rate, and 15-year fixed-rate. The pricing data for those transactions is used to estimate average prime offer rates for the other fixed- and variable-rate loan products listed in the internet table.

<sup>49</sup> The referenced guidance is available at <http://www.ffiec.gov/ratespread>. The first factor to consider in determining a “comparable transaction” is whether the transaction under consideration is fixed-rate or variable-rate. (One table contains average prime offer rates for fixed-rate transactions, and one table contains average prime offer rates for variable-rate transactions.) The other information necessary for determining the most comparable transaction is (1) the date that the interest rate for the transaction was set; and (2) the term of the transaction. In the case of a fixed-rate transaction, the term is the transaction’s term to maturity. In the case of a variable-rate transaction, the term is the initial fixed-rate period, rounded to the nearest number of whole years (or, if the initial fixed-rate period is less than one year, the term is one year).

consummation. The comment specifies that if a creditor sets the interest rate initially and then sets it at a different level before consummation, the creditor should use the last date the interest rate is set before consummation.

- Comment 35(a)(2)–4 restates that the average prime offer rate tables, along with the methodology for calculating average prime offer rates, are published on the internet.

Proposed § 1026.32(a)(1)(i) would have implemented the change in the benchmark for HOEPA’s APR coverage test from the yield on comparable Treasury securities to the average prime offer rate. Proposed comment 32(a)(1)(i)–2 would have clarified that creditors should determine the applicable average prime offer rate for closed-end transactions for purposes of § 1026.32(a)(1)(i) pursuant to the same guidance set forth in § 1026.35(a)(2) and commentary thereto. Proposed comment 32(a)(1)(i)–3 would have provided additional guidance for using the methodology set forth in § 1026.35(a)(2) to determine the applicable average prime offer rate for HELOCs. The Bureau believes that additional guidance for HELOCs is warranted because, as discussed in the preamble to the proposal, the average prime offer rate currently is calculated only for closed-end transactions. The Bureau is not aware of any publicly available and authoritative surveys of pricing data for HELOCs from which to calculate a separate average prime offer rate for open-end credit.<sup>50</sup> Proposed comment 32(a)(1)(i)–3 therefore would have instructed creditors to test HELOCs for HOEPA coverage by comparing the HELOC’s APR (calculated in accordance with proposed § 1026.32(a)(2)<sup>51</sup>) to the average prime offer rate for “the most closely comparable closed-end loan” based on applicable loan characteristics and other loan pricing terms. Proposed comment 32(a)(1)(i)–3 would have provided illustrative examples to facilitate compliance.

The proposal explained why the Bureau believes that it is reasonable to require HELOC creditors to use the average prime offer rate for the most closely-comparable closed-end loan when determining HELOC coverage. The Bureau noted its belief that market

<sup>50</sup> As already noted, the methodology for deriving the average prime offer rate is based on Freddie Mac’s Primary Mortgage Market Survey®, which does not provide any data on HELOCs. More detailed discussions of the average prime offer rate is provided in the Board’s 2008 HOEPA Final Rule and other publicly-available sources. See 73 FR 44522, 44533–36 (July 30, 2008); <http://www.ffiec.gov/ratespread/default.aspx>.

<sup>51</sup> Section 1026.32(a)(3) as adopted in the final rule was proposed as § 1026.32(a)(2).

rates for HELOCs generally are based on a prime lending rate, such as the average prime rate as published in the Wall Street Journal.<sup>52</sup> When the Bureau compared the prime rate published by the Board over a 12-year period to average prime offer rates for annually-adjusting, closed-end credit transactions (*i.e.*, one-year adjustable rate mortgages (ARMs)) for the same period, the Bureau found that the rates generally were comparable. Thus, the Bureau believes that using the average prime offer rate for the most closely-comparable closed-end loan is a reasonable benchmark for HOEPA's APR test for HELOCs. The Bureau further believes that requiring HELOC creditors to use this benchmark will facilitate compliance because HELOC creditors may use existing rate-spread calculators on the FFIEC's Web site to determine HOEPA coverage. Finally, the Bureau believes that requiring HELOC creditors to use the closed-end, average prime offer rate tables is appropriate under TILA section 103(bb)(1)(A)(i), which requires a comparison of a mortgage transaction's APR to the average prime offer rate without distinguishing between closed-end and open-end credit. The Bureau nevertheless solicited data or comment on all aspects of determining the average prime offer rate for HELOCs. In particular, the Bureau solicited comment on whether a benchmark other than the average prime offer rate for the most closely-comparable closed-end loan would better meet the objectives of HOEPA's APR coverage test for HELOCs and facilitate compliance.

Commenters generally did not object to changing the benchmark for HOEPA's APR coverage test from the yield on Treasury securities to the average prime offer rate.<sup>53</sup> Indeed, several industry commenters specifically supported the change, noting that the average prime offer rate tracks market prices better than the yield on Treasury securities. One such industry commenter noted that, under recent market conditions, the maximum APR for HOEPA coverage for a first-lien, 10-year, fixed-rate mortgage would be higher under the HOEPA Proposal (*i.e.*, 6.5 percentage points over the average prime offer rate) than under existing § 1026.32(a)(1)(i) (*i.e.*, eight percentage points over the yield on comparable Treasuries).

<sup>52</sup> Pursuant to § 1026.40(f)(1), a variable-rate HELOC can vary *only* in accordance with a publicly-available index that is outside of the creditor's control, such as the Wall Street Journal prime rate.

<sup>53</sup> As noted below, however, several industry commenters objected to using the same average prime offer rate for closed- and open-end credit transactions.

Specifically, the commenter stated that, under the HOEPA Proposal, the maximum APR for HOEPA coverage for this transaction would be 10.42 percent, whereas the maximum APR under existing § 1026.32(a)(1)(i) would be 9.70 percent.

Another industry commenter observed that using the average prime offer rate as the benchmark will not be difficult because the average prime offer rate has been used for some time as the benchmark for determining coverage under Regulation Z's higher-priced mortgage loan rules in existing § 1026.35. The commenter, however, suggested that the Bureau work with the FFIEC to ensure that the rate-spread calculator currently employed for purposes of determining higher-priced mortgage loan coverage would be adjusted and usable for purposes of determining HOEPA coverage.

Two commenters urged the Bureau to harmonize the methodologies for calculating the average prime offer rate and the APR for adjustable-rate mortgages under § 1026.32(a)(3). These commenters stated that, for example, if the APR for an adjustable-rate transaction for purposes of determining HOEPA coverage is determined under § 1026.32(a)(3) based on the higher of the initial interest rate or the fully-indexed rate, then the applicable average prime offer rate should be calculated in the same way to ensure that there is a more accurate comparison for purposes of the HOEPA coverage calculation.

Several industry commenters, while not objecting to the use of an average prime offer rate benchmark for HELOCs, urged the Bureau to specify in the final rule (or work to develop) a separate methodology for calculating the average prime offer rate for open-end credit transactions. The commenters stated that it is not sensible to apply the average prime offer rate for closed-end credit transactions to HELOCs, because closed- and open-end mortgage products have different risks, pricing, and loan characteristics. The commenters did not suggest an alternative benchmark or any alternatives for calculating an average prime offer rate for HELOCs. One commenter suggested, however, that if the Bureau adopted "the most closely comparable closed-end loan" standard as proposed, then the Bureau should specify how a creditor that originates a HELOC that could be comparable to multiple, different closed-end loans should determine which closed-end loan is the most closely comparable. Finally, one commenter requested guidance concerning the comparable maturity date for an "evergreen" HELOC

(*i.e.*, a HELOC with no scheduled maturity date) for which the interest rate may be fixed or adjustable.

The Bureau is adopting the change in the APR benchmark from the yield on Treasury securities to the average prime offer rate as set forth in proposed § 1026.32(a)(1)(i). The Bureau is finalizing proposed comments 32(a)(1)(i)-2 and -3 as comments 32(a)(1)(i)-1 and -2, respectively, for organizational purposes.<sup>54</sup> The Bureau makes certain other non-substantive changes to the proposed commentary for purposes of clarification. Specifically, the comments are reorganized, a cross-reference to comment 35(a)(2)-3 is added to comment 32(a)(1)(i)-2,<sup>55</sup> and comment 32(a)(1)(i)-3 is added to cross reference guidance in comment 35(a)(1)-2 on determining the date as of which creditors should compare a transaction's APR to the average prime offer rate. Finally, as discussed further below, additional guidance concerning how a HELOC creditor should determine the most closely comparable closed-end mortgage loan is added to comment 32(a)(1)(i)-2.

In response to commenters' suggestions that the FFIEC rate-spread calculator be adapted for use in determining HOEPA coverage, the Bureau does not anticipate difficulties in using the calculator for this purpose. The calculator exists on the FFIEC Web site primarily for use in determining the "rate spread" that must be reported, if any, under HMDA and Regulation C, 12 CFR part 1003. Specifically Regulation C § 1003.4(a)(12) requires HMDA reporters to report the spread between a loan's APR and the applicable average prime offer rate (determined identically to the determination for higher-priced mortgage loans under § 1026.35) if that spread exceeds 1.5 percentage points for a first-lien loan or 3.5 percentage points for a subordinate-lien loan. Those spreads match the spreads that historically have applied for higher-priced mortgage loan coverage

<sup>54</sup> In light of the adoption of Alternative 1 rather than Alternative 2, as discussed above, there is no need at present to finalize proposed comment 32(a)(1)(i)-1, which would have provided guidance concerning the transaction coverage rate. Consequently, proposed comments 32(a)(1)(i)-2 and -3 concerning the average prime offer rate are finalized (with the additional clarifying changes noted herein) as comments 32(a)(1)(i)-1 and -2, respectively.

<sup>55</sup> This cross-reference is to a new comment that the Bureau is finalizing in its 2013 Escrows Final Rule. The new comment clarifies that "average prime offer rate" as used in § 1026.35 has the same meaning as in Regulation C, 12 CFR part 1003, and it notes that additional guidance concerning the average prime offer rate is located both in the official commentary to Regulation C as well as on the FFIEC's Web site.

determinations under § 1026.35(a)(2), allowing creditors to use the calculator to determine whether a transaction is a higher-priced mortgage loan.<sup>56</sup> Creditors may accomplish this by noting whether the calculator yields a rate spread for reporting under HMDA (which means the transaction is a higher-priced mortgage loan) or “N/A” for HMDA reporting purposes (which means the transaction is not a higher-priced mortgage loan). From there, it is a simple step further to note whether any rate spread the calculator yields for HMDA reporting purposes exceeds 6.5 or 8.5 percentage points over the average prime offer rate, as applicable, to know whether the transaction is a high-cost mortgage under § 1026.32(a)(1)(i).

The Bureau acknowledges, as noted by a commenter, that the APR calculation required by § 1026.32(a)(3) for determining HOEPA coverage for a variable-rate transaction generally requires a creditor to use the fully-indexed rate, whereas blended APRs (*i.e.*, APRs that take low introductory rates into consideration) are used to calculate average prime offer rates. The Bureau nevertheless finalizes the rule as proposed. The Bureau believes that APRs (and thus average prime offer rates) calculated pursuant to the blended method are unlikely in most cases to be significantly lower than APRs calculated using the fully-indexed rate.<sup>57</sup> Moreover, the methodology for calculating the average prime offer rate was well-established when Congress passed the Dodd-Frank Act and affirmatively (1) incorporated the average prime offer rate as the benchmark for the APR trigger; and (2) required the use of the fully-indexed rate for determining the APR for variable-rate transactions.

Finally, the Bureau does not at this time adopt a separate methodology for determining the average prime offer rate for HELOCs. Based on available data, the Bureau continues to believe that using the average prime offer rate for the most closely-comparable, closed-end credit transaction is a reasonable benchmark for HOEPA’s APR test for HELOCs. The fact that HELOCs are tied to a prime rate which, over a 12-year

period, was generally comparable to the average prime offer rate for one-year ARMs informs the Bureau’s conclusion. In addition, as discussed above, the average prime offer rate tables are published with a rate-spread calculator that determines the average prime offer rate for the most comparable closed-end credit transaction and automatically compares it to a transaction’s APR and lien status to determine the transaction’s APR’s spread over the applicable average prime offer rate. This calculator can easily be used by creditors originating HELOCs.

Specifically, as described in further detail in comment 32(a)(1)(i)–2, a HELOC creditor should use the published rate-spread calculator to identify the average prime offer rate for the most closely-comparable closed-end credit transaction by inputting the same terms that would be required to determine the most comparable transaction for any closed-end origination. These terms are: (1) Whether the HELOC is fixed- or variable-rate; (2) if the HELOC is fixed-rate, the term to maturity; (3) if the HELOC is variable-rate, the duration of any initial, fixed-rate period; and (4) the date that the interest rate for the transaction is set. Finally, comment 32(a)(1)(i)–2 clarifies that a creditor originating a fixed-rate, evergreen HELOC should enter a term of 30 years.<sup>58</sup> The Bureau believes that 30 years is a reasonable proxy for the term of an evergreen HELOC given that 30 years is the longest term to maturity for conventional mortgage loans.<sup>59</sup>

#### 32(a)(1)(i)(A)

As added by the Dodd-Frank Act, TILA section 103(bb)(1)(A)(i)(I) states that a consumer credit transaction secured by a first mortgage on a consumer’s principal dwelling is a high-cost mortgage if the APR at consummation of the transaction will exceed the average prime offer rate for a comparable transaction by more than 6.5 percentage points (or 8.5 percentage points, if the dwelling is personal property and the transaction is for less than \$50,000). Thus, under TILA section 103(bb)(1)(A)(i)(I), the APR percentage-point threshold for HOEPA coverage for most first-lien transactions (*i.e.*, all first-lien, real property-secured transactions,

as well as first-lien, personal property-secured transactions for \$50,000 or more) is 6.5 percentage points over the average prime offer rate.

Proposed § 1026.32(a)(1)(i)(A) (under either proposed Alternative 1 or Alternative 2) would have implemented the statutory 6.5 percentage-point APR threshold by generally mirroring the statutory language but also providing for certain non-substantive changes 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, proposed § 1026.32(a)(1)(i)(A) would have referred to a “first-lien transaction” instead of a “first mortgage.”

As noted in part IV above, TILA section 103(bb)(2)(A) and (B) provides the Bureau with authority to adjust HOEPA’s APR percentage-point thresholds 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 did not propose any adjustments to the 6.5 percentage-point APR threshold prescribed by the Dodd-Frank Act for either closed- or open-end transactions. However, the Bureau solicited comment and data on whether any such adjustment would better protect consumers from the risks associated with high-cost mortgages or would be warranted by the need for credit, particularly for HELOCs.

*General.* Consumer groups generally did not comment on the revised APR percentage-point threshold in proposed § 1026.32(a)(1)(i)(A). One consumer group commenter, however, advocated that the Bureau adopt a threshold of 3.5 percentage points above the average prime offer rate. The commenter noted that, in the current rate environment, most first-lien transactions would not be covered under the revised APR test until their APRs reached approximately 10 percent. This commenter stated that the threshold as proposed would allow unreasonably high rates to be imposed on vulnerable borrowers.

Industry commenters and one State housing finance authority generally expressed concern that the revised APR percentage-point threshold in proposed § 1026.32(a)(1)(i)(A) would inhibit access to credit and suggested various adjustments.<sup>60</sup> For example, several

<sup>56</sup> The higher-priced mortgage loan thresholds in § 1026.35(a)(1) are being revised through a separate rulemaking to incorporate a separate, higher threshold of 2.5 percentage points above the average prime offer rate for first-lien “jumbo” transactions pursuant to Dodd-Frank Act section 1471.

<sup>57</sup> Specifically, such a difference would occur only if an introductory rate lasted for an extraordinarily long portion of a transaction’s overall term, or if the introductory rate differed very substantially from the fully-indexed rate. See comment 17(c)(1)–10.i.

<sup>58</sup> In the case of a variable-rate evergreen HELOC (as for all other closed- and open-end, variable-rate mortgage products) creditors should look to the length of any initial, fixed-rate period.

<sup>59</sup> The published average prime offer rate tables contain average rates for fixed-rate loans with terms of up to 50 years. Historically, however, the average rates for loans with fixed-rate terms of 30 years have been the same as the average rates for loans with fixed-rate terms of longer than 30 years.

<sup>60</sup> Commenters generally did not distinguish between the revised APR percentage-point thresholds for first- and subordinate-lien transactions. For purposes of this section-by-section analysis, however, the two thresholds are discussed separately.

industry commenters urged the Bureau either to increase the threshold or to leave it at its existing (pre-Dodd-Frank Act) level. These commenters generally asserted that the existing threshold has worked well to date, that the Bureau has provided no empirical evidence demonstrating that the threshold needs to be adjusted, and that the enhanced HOEPA protections that the Bureau is finalizing in this rulemaking obviate any need to reduce the threshold. One industry commenter argued that increased coverage under the revised HOEPA coverage tests generally would interfere with the goal of the Bureau's 2012 TILA-RESPA Proposal by eliminating a consumer's ability to shop for and obtain a mortgage near HOEPA's amended thresholds.

The Bureau adopts the 6.5 percentage-point APR threshold for most first-lien transactions in § 1026.32(a)(1)(i)(A) as proposed. The Bureau has authority under TILA section 103(bb)(2)(A) to increase or decrease this APR threshold from the level set forth in the statute to a level between 6 and 10 percentage points above the average prime offer rate. However, prior to making such an adjustment, the Bureau must find that an increase or decrease from the statutory level is consistent with consumer protection and warranted by the need for credit. As noted, both consumer group and industry commenters suggested various adjustments to the threshold or suggested that the existing threshold should not be adjusted in light of protections. None of these commenters, however, provided data or other specific information to indicate how much of an adjustment from the level prescribed by Congress is warranted by a need for access to credit or to protect consumers from abusive lending.

As to the consumer group comment suggesting that the Bureau decrease the APR threshold by several percentage points, the Bureau notes that, under TILA section 103(bb)(2)(B)(i), it does not have authority to reduce the threshold below 6 percentage points above the average prime offer rate. Even for adjustments that would lower the APR threshold within the permitted range (*i.e.*, from the statutory 6.5 percentage points to an adjusted 6 percentage points above the average prime offer rate), the Bureau does not believe that it has sufficient information at this time to justify such a departure based on the need to protect consumers from abusive lending.

As to industry commenters' general argument that the Bureau should maintain the threshold at its existing (pre-Dodd-Frank) level or increase it,

the Bureau believes that implementing the APR percentage-point threshold at its statutorily-prescribed level, without any adjustment, is particularly appropriate at this time given the simultaneous change in the benchmark for HOEPA coverage from the yield on Treasury securities to the average prime offer rate. The Bureau believes there are several advantages of using the average prime offer rate rather than the yield on Treasury securities including, as one industry commenter noted, that the average prime offer rate more closely tracks movements in mortgage rates than do yields on Treasury securities.<sup>61</sup> With this change to the benchmark, then, it is not clear that revising the threshold from an eight percentage-point spread to a 6.5 percentage-point spread will result in unwarranted HOEPA coverage. Indeed, as noted in the section-by-section analysis of § 1026.32(a)(1)(i) above, one industry commenter observed that the maximum APR for HOEPA coverage may, depending on market conditions, be higher in certain circumstances under the final rule than under existing § 1026.32(a)(1)(i). Of course, if the Bureau observes an increase in coverage to a degree that interferes with access to credit, the Bureau has authority to increase the threshold as appropriate at that time.

*Manufactured housing.* Manufactured housing industry commenters in particular raised a number of objections to the APR thresholds.<sup>62</sup> They noted that interest rates for manufactured home loans tend to be higher than for traditional mortgages for a variety of legitimate reasons. For example, the commenters stated that such loans tend to carry more credit risk and have not benefited from secondary market funding to the same degree as site-built housing, thus increasing creditors' cost of funds. According to one commenter, an APR of 14.73 percent therefore is necessary to offer a manufactured home loan on a profitable basis. Industry

<sup>61</sup> See also the Board's 2008 HOEPA Final Rule, 73 FR 44522, 44534-36 (July 30, 2008) (adopting the average prime offer rate rather than the yield on Treasury securities for the higher-priced mortgage loan coverage test primarily because (1) the spread between Treasuries and mortgage rates can be volatile, even over a relatively short time frame, such that loans with the same risk characteristics but originated at different times may not be treated the same for coverage purposes and (2) matching a mortgage loan to a comparable Treasury security based on the length of the loan's contract maturity creates distortions because few loans reach their full maturity).

<sup>62</sup> Manufactured housing industry commenters also suggested various exemptions for manufactured home loans from HOEPA. Those comments are discussed in detail below in the section-by-section analysis of § 1026.32(a)(2).

commenters estimated that, under the HOEPA proposal, between 32 and 48 percent of their recent manufactured home loan originations would have been covered by the APR thresholds if the Bureau adopted the thresholds as proposed. In contrast, these commenters stated that, if the Bureau adopted an APR threshold of 10 percentage points above the average prime offer rate for all home purchase transactions secured in whole or in part by manufactured housing, then only between 12 and 15 percent of manufactured home loans would be covered under the APR test. They also stated that, if the Bureau adopted an APR threshold of 12 percentage points above the average prime offer rate for all manufactured home loans, then only between 2 and 3 percent of manufactured home loans would be covered.

The Bureau acknowledges the concerns raised by manufactured housing industry commenters concerning HOEPA coverage. In the Bureau's view, however, Congress weighed the interests of consumers and creditors concerning the costs and risks associated with manufactured housing loans by specifying a higher APR threshold of 8.5 percentage points above the average prime offer rate for personal property-secured loans with a loan amount of \$50,000 or less. (At today's rates, for a 10- or 15-year, fixed-rate loan, the 8.5 percentage-point threshold translates into an APR of approximately 12.5 or 11.25 percent, respectively.) The Bureau thus declines to depart from the APR thresholds prescribed by Congress. The Bureau's analysis was informed by the following considerations.

First, the Bureau understands that manufactured homes may be titled either as personal property (in which case the consumer receives a personal property, or chattel, loan) or as real property (in which case the consumer receives a mortgage). Whether a manufactured home is titled as personal or real property does not perfectly correlate to whether the consumer owns the land on which the home is situated. Indeed, according to 2011 U.S. Census data, even though a majority (77 percent) of new manufactured homes placed during 2011 were titled as personal property, only 26 percent were placed inside manufactured home (*i.e.*, land-lease) communities, with the balance being placed on owned land.<sup>63</sup> Instead, as noted by consumer group commenters, the laws in most States

<sup>63</sup> See Selected Characteristics of New Manufactured Homes Placed by Region, 2011, at <http://www.census.gov/construction/mhs/pdf/char11.pdf>.

provide an option for titling the manufactured home either as personal or real property.

In seeking relief from the APR thresholds, industry commenters noted that the average price of a new manufactured home is approximately \$60,600 and that the majority of their originations were secured by homes titled as personal property. The commenters, however, did not specify what portion of their loans would be subject to HOEPA coverage under the 6.5 percentage-point APR threshold, as opposed to the 8.5 percentage-point threshold for smaller-dollar, personal property-secured transactions. Instead, they requested that the Bureau adopt an across-the-board APR threshold of 10 or 12 percentage points above the average prime offer rate for all manufactured housing. (At today's rates, these thresholds translate into APRs of roughly 13 and 15 percent for a 15-year, fixed-rate loan.)

The Bureau understands that, as the commenters described, there tend to be greater costs associated with originating loans secured by manufactured housing, particularly when such loans secured solely by personal property. However, the Bureau does not have authority under HOEPA to increase the APR threshold for first-lien transactions to more than 10 percentage points above the average prime offer rate. Moreover, the higher threshold set forth by Congress for smaller-dollar, personal property loans appears to be consistent with the lower range of estimates of the increased rates that are associated with personal property loans.<sup>64</sup>

For first-lien loans other than those eligible for the higher threshold, the Bureau has been unable to determine from the commenters' estimates what portion of the existing APRs for manufactured home loans is attributable to the factors cited by the commenters, such as credit risk and lack of a robust secondary market.<sup>65</sup>

<sup>64</sup> See, e.g., Ronald A. Wirtz, *Home, sweet (manufactured?) home*, *Fedgazette* (July 2005), available at [http://www.minneapolisfed.org/publications\\_papers/pub\\_display.cfm?id=1479](http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=1479) (interest rates for chattel loans run 2 to 5 percentage points higher than for real estate loans).

<sup>65</sup> With respect to the lack of a secondary market in particular, this has not always been the case for manufactured home loans. From the late 1980s through the mid-2000s, the manufactured housing industry underwent a boom-and-bust cycle that was a precursor to the larger mortgage market meltdown. Securitization of manufactured home loans increased from \$184 million in 1987 to \$15 billion in 1999, before declining to virtually zero in 2009. See Ann M. Burkhardt, *Bringing Manufactured Housing into the Real Estate Financing System*, 37 *Pepp. L. Rev.* 427, 438–41 (2010). The Bureau understands that the Federal Housing Finance Agency (FHFA) currently is evaluating methods to

The Bureau notes that in the current market, 10- or 15-year, fixed-rate manufactured home loans secured by real property (or by personal property where the loan amount is \$50,000 or more) would not fall within HOEPA's APR coverage threshold unless they had APRs of greater than approximately 10.5 or 9.25 percent, respectively. The Bureau does not believe that it has sufficient data to determine whether an adjustment to this statutory threshold is needed to compensate for legitimate cost factors, or how large such an adjustment should be.

Moreover, the Bureau is not certain that manufactured home creditors would cease originating loans even if a portion of those loans exceed the high-cost mortgage APR threshold. Some industry commenters argued that they would not originate high-cost mortgages because complying with the restrictions and requirements (particularly the pre-loan counseling requirement) would be cost prohibitive. At the same time, however, industry commenters stated that manufactured home loans typically do not contain the types of loan terms that would be prohibited for high-cost mortgages. In addition, while the pre-loan counseling requirement will entail recordkeeping and data retention costs, the Bureau notes that creditors are not required to cover the cost of counseling.

In sum, prior to adjusting the APR percentage point threshold for all manufactured home loans, the Bureau would need additional information showing why it is cost-prohibitive in today's market for a manufactured home lender to originate a first-lien, real property-secured manufactured home (or a personal property-secured loan for greater than \$50,000) with an APR of approximately 10.5 percent or less. For all of these reasons, the final rule adopts § 1026.32(a)(1)(i)(A) as proposed.

#### 32(a)(1)(i)(B)

As added by the Dodd-Frank Act, TILA section 103(bb)(1)(A)(i)(I) provides that, for first-lien transactions on a consumer's principal dwelling where the loan amount is less than \$50,000 and is secured by personal property, a transaction is a high-cost mortgage if the APR at consummation will exceed the average prime offer rate for a comparable transaction by more than

strengthen the secondary market support for real property-secured manufactured home loans. See, e.g., 75 FR 32099 (June 7, 2010) (FHFA notice of proposed rulemaking to implement section 1129 of the Housing and Economic Recovery Act of 2008 (HERA), which established a duty for Fannie Mae and Freddie Mac to serve three specified underserved markets, including manufactured housing).

8.5 percentage points. As discussed in the section-by-section analysis of § 1026.32(a)(1)(i)(A) above, the APR threshold in TILA section 103(bb)(1)(A)(i)(I) for smaller first-lien loans secured by personal property thus establishes a higher threshold for such loans than the 6.5 percentage-point APR threshold for other first-lien transactions.

Proposed § 1026.32(a)(1)(i)(B) would have implemented the APR threshold for smaller first-lien loans secured by personal property. Proposed § 1026.32(a)(1)(i)(B) generally would have mirrored the statutory language with certain non-substantive changes 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, proposed § 1026.32(a)(1)(i)(B) would have referred to a "first-lien transaction" instead of a "first mortgage." In addition, proposed § 1026.32(a)(1)(i)(B) would have referred to the transaction's "total loan amount" rather than its "total transaction amount." Proposed comment 32(a)(1)(i)–4 would have stated that the phrase "total loan amount" as used in § 1026.32(a)(1)(i)(B) should be interpreted consistently with the guidance for "total loan amount" set forth in proposed § 1026.32(b)(6) and comment 32(b)(6)–1.<sup>66</sup>

The HOEPA proposal noted that first-lien transactions secured by personal property (which may often be manufactured housing loans) may have higher APRs than other first-lien transactions. The Bureau thus specifically solicited comment and data on the higher APR percentage point threshold in proposed § 1026.32(a)(1)(i)(B), including on whether any adjustment either to the percentage point threshold or to the dollar amount cut-off for the threshold (*i.e.*, \$50,000) would better protect consumers or is warranted by the need for credit.

The Bureau received several public comments concerning the higher APR percentage-point threshold in proposed § 1026.32(a)(1)(i)(B). Industry commenters generally did not distinguish between the 6.5 and 8.5 percentage-point APR thresholds for first-lien transactions, and those comments are addressed in the section-by-section analysis of § 1026.32(a)(1)(i)(A) above. However, at least one industry commenter requested

<sup>66</sup> Proposed § 1026.32(b)(6) and comment 32(b)(6)–1 are re-numbered as § 1026.32(b)(4) and comment 32(b)(4)–1 in the Bureau's 2013 ATR and HOEPA Final Rules.

that the Bureau adjust the \$50,000 cut-off for the 8.5 percentage-point threshold to \$125,000.

Consumer groups generally urged the Bureau not to adopt the higher, statutory APR threshold as proposed in § 1026.32(a)(1)(i)(B) unless and until the Bureau finds after further research that the higher threshold is necessary. Several of these commenters argued that the higher threshold is not sensible because it applies to loans that are most likely to be obtained by the most vulnerable and lowest-income consumers. In addition, certain commenters argued that the higher threshold could incentivize manufactured home creditors to steer consumers to title their manufactured homes as personal property in the approximately 42 States that permit a manufactured home owner to title the home as either personal or real property. The commenters stated that steering of this type would be harmful to consumers because loans secured by personal property tend to be more expensive than mortgages secured by real property, and loans secured by personal property also have fewer legal protections than other mortgages.<sup>67</sup> Many of the consumer group commenters argued that, to promote a level playing field for low-income consumers and to prevent steering, all first-lien transactions should have the same APR threshold, irrespective of the amount borrowed and collateral type.

In contrast, one consumer group commenter, while agreeing with concerns about steering, nevertheless believed that the higher APR for smaller-dollar-amount, personal property-secured loans was warranted given market conditions and creditors' cost of funds. This commenter opposed any increase in the higher APR threshold beyond what is provided in the statute. This commenter based its recommendation on anecdotal evidence obtained by consulting with a sample of single-family manufactured home loan originators,<sup>68</sup> all of whom opposed raising the APR threshold higher than 8.5 percentage points above the average prime offer rate.

<sup>67</sup> For example, State laws governing foreclosure procedures typically provide fewer protections to homes titled as personal property than to homes titled as real property, and RESPA only partially applies to personal property-secured loans.

<sup>68</sup> The commenter did not state how many entities it sampled in its survey. Based on information that the commenter provided, respondents included a nonprofit lender in rural Montana, a nonprofit affordable housing developer in upstate New York, a Community Development Financial Institution in New Hampshire, and a credit union that makes manufactured home loans.

As provided by TILA section 103(bb)(1)(i)(A)(I), the final rule adopts in § 1026.32(a)(1)(i)(B) the higher APR threshold of 8.5 percentage points over the average prime offer rate for first-lien loans secured by personal property and with a loan amount of less than \$50,000. The Bureau understands that this separate threshold was designed to reflect costs associated with smaller-dollar, personal property loans.

The Bureau shares commenters' concerns that a higher percentage-point threshold for personal property-secured loans could, if set too high, exacerbate incentives for creditors to steer consumers into titling their homes as personal property. The Bureau understands that such steering can and does currently occur in the market. Indeed, the National Conference of Commissioners on Uniform State Laws approved in July 2012 a Uniform Manufactured Housing Act that would simplify and streamline State laws to convert manufactured homes titled as personal property to real property and would prohibit manufactured home sellers from steering consumers to chattel loans rather than mortgages.<sup>69</sup> As noted, personal property-secured loans tend to offer consumers fewer legal protections, so a rule that permits HOEPA coverage to turn on how the loan is titled, and that therefore potentially incentivizes steering to personal property-secured loans, could be disadvantageous to some consumers. However, because personal property-secured loans generally have had costs roughly 2 to 5 percent higher than mortgages (as noted in the section-by-section analysis of § 1026.32(a)(1)(i)(A) above) the Bureau does not believe that implementing the 2 percentage-point higher threshold for such loans will exacerbate any steering that may already be occurring in the market. On balance, then, the Bureau believes that it is

<sup>69</sup> See National Conference of Commissioners on Uniform State Laws, *Uniform Manufactured Housing Act* (July 2012), at [http://uniformlaws.org/Act.aspx?title=Manufactured Housing Act](http://uniformlaws.org/Act.aspx?title=Manufactured%20Housing%20Act). As noted in a comment to the uniform law, whether a manufactured home is titled as real or personal property "can affect the buyer's financing and legal rights in the home, such as homestead protection and marital property rights, and taxation of the home. \* \* \* Under the current system of manufactured home financing, sellers, including retailers, have incentives to steer buyers to chattel loans, rather than to mortgage loans. However, when a mortgage loan is available, it often is the better option for the buyer. Though the closing costs for a mortgage loan can be higher than for a chattel loan, the lower interest rate and longer term for a mortgage loan translate to substantially lower monthly payments. Financing with a mortgage loan also provides the owner of a manufactured home with the same legal protections as the owner of a site-built home. Therefore, subsection (b) prohibits seller steering."

appropriate to effectuate the higher APR threshold for smaller-dollar, personal-property secured loans in light of the higher costs occurring in the market for such loans. In light of the fact that Congress set forth a clear line for this threshold, and in the absence of specific evidence demonstrating another line that would better protect consumers while maintaining access to credit, the Bureau declines to adjust the statutory threshold.

The Bureau adopts proposed comment 32(a)(1)(i)-4 explaining how to determine the "loan amount" for purposes of the \$50,000 cut-off, but renumbers it as comment 32(a)(1)(i)(B)-1 for organizational purposes. In the final rule, the Bureau also clarifies that the \$50,000 refers to the face amount of the note, rather than (as proposed) the "total loan amount." The "total loan amount" is a defined term used in connection with calculating whether a transaction meets the percentage point thresholds in the points and fees coverage test. As discussed in the section-by-section analysis of § 1026.32(a)(1)(ii) below, the points and fees coverage test adopts the face of amount of the note as the relevant metric for determining whether a loan is above or below the \$20,000 cut-off between the 5 percent and 8 percent points and fees tests. The face amount of the note is adopted in that context for consistency with the approach adopted in the points and fees provisions of the 2013 ATR Final Rule. The Bureau believes that a consistent approach to determining whether a transaction is above or below a particular dollar-value threshold will facilitate compliance with Regulation Z. Thus, upon further consideration, the Bureau specifies in the 2013 HOEPA Final Rule that the face amount of the note also is the appropriate amount for a creditor to reference in determining whether to apply the 6.5 or 8.5 APR percentage-point threshold for HOEPA coverage.

#### 32(a)(1)(i)(C)

TILA section 103(bb)(1)(A)(i)(II) provides that a consumer credit transaction secured by a subordinate or junior mortgage on the consumer's principal dwelling is a high-cost mortgage if the APR at consummation of the transaction will exceed the average prime offer rate for a comparable transaction by more than 8.5 percentage points. Proposed § 1026.32(a)(1)(i)(C) would have implemented the revised APR percentage point threshold for subordinate-lien transactions with one minor terminology change (referencing a "subordinate-lien transaction" rather than a "subordinate or junior



mortgage”) for consistency with Regulation Z.

Industry and consumer group commenters generally made the same comments concerning proposed § 1026.32(a)(1)(i)(C) that they did for § 1026.32(a)(1)(i)(A). That is, industry commenters generally expressed concern about the revised APR percentage-point threshold, argued that the existing (pre-Dodd-Frank Act) threshold is sufficient for consumer protection, and stated that revising the threshold would result in unwarranted coverage of loans as high-cost mortgages. Consumer group commenters generally suggested that the Bureau lower the proposed APR percentage-point threshold. One consumer group commenter, for example, advocated that the Bureau adopt an APR threshold of 5.5 percentage points above the average prime offer rate for subordinate-lien transactions.

The commenters did not provide firm data or other specific information to indicate what adjustment from the level prescribed by Congress is warranted by a need for access to credit or to protect consumers from abusive lending. The final rule therefore adopts § 1026.32(a)(1)(i)(C) as proposed, for all of the reasons articulated in the section-by-section analysis of § 1026.32(a)(1)(i)(A) above. With respect to the comment suggesting that the Bureau lower the APR percentage point threshold to 5.5 percentage points above the average prime offer rate, the Bureau notes that, even if it possessed data to warrant such a reduction (and it does not), the Bureau does not have authority under TILA section 103(bb)(2)(B)(ii) to reduce the APR percentage-point threshold for subordinate-lien transactions to less than eight percentage points above the average prime offer rate.

### 32(a)(1)(ii)

#### Numerical Coverage Thresholds for Points and Fees

Prior to the Dodd-Frank Act, TILA section 103(aa)(1)(B) provided 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 8 percent of the total loan amount or \$400. Prior to the designated transfer date under the Dodd-Frank Act, the Board adjusted the \$400 figure annually for inflation, in accordance with TILA section 103(aa)(3). For 2013, the Bureau adjusted the figure to \$625

from \$611, where it had been set for 2012.<sup>70</sup>

Section 1431(a) of the Dodd-Frank Act amended HOEPA’s points and fees coverage test to provide in TILA section 103(bb)(1)(A)(ii) that a mortgage is a high-cost mortgage if the total points and fees payable in connection with the transaction exceed either 5 percent or 8 percent of the total transaction amount, depending on the size of the transaction.<sup>71</sup> Specifically, under TILA section 103(bb)(1)(A)(ii)(I), a transaction for \$20,000 or more is a high-cost mortgage if the total points and fees payable in connection with the transaction exceed 5 percent of the total transaction amount. Under TILA section 103(bb)(1)(A)(ii)(II), a transaction for less than \$20,000 is a high-cost mortgage if the total points and fees payable in connection with the transaction exceed the lesser of 8 percent of the total transaction amount or \$1,000, or such other dollar amount as the Bureau shall prescribe by regulation. The Bureau proposed to implement the Dodd-Frank Act’s amendments to TILA’s points and fees coverage test for high-cost mortgages in proposed § 1026.32(a)(1)(ii)(A) and (B).

As in the case of the APR coverage test, consumer group commenters urged the Bureau to apply the same points and fees threshold of 5 percent to all transactions, irrespective of the loan amount. These commenters argued that the higher, 8 percent points and fees threshold for smaller transactions (*i.e.*, loans of less than \$20,000) set forth in the statute disadvantages lower-income and more vulnerable consumers.

The Bureau received a number of comments from industry expressing concern that the points and fees thresholds prescribed by the Dodd-Frank Act, like the amended APR thresholds, would restrict access to credit. Some industry commenters expressed particular concern about smaller transactions, including loans originated by Housing Finance Agencies and under the USDA Rural Housing Program. One such commenter argued that the 5 percent points and fees threshold would be most problematic for loan amounts below approximately \$60,000 and stated that the threshold would drive creditors to impose strict minimum loan amounts on their

mortgage originations. Industry commenters generally acknowledged a good deal of uncertainty in estimating the potential impact of the revised points and fees thresholds given that the Bureau had not yet finalized the Dodd-Frank Act’s amendments to the definition of points and fees. (As discussed in the section-by-section analysis of § 1026.32(b)(1) and (2) below, the Dodd-Frank Act amended the definition of points and fees to remove certain items that previously would have been counted (*e.g.*, certain mortgage insurance premiums and bona fide discount points) and to add other items (*e.g.*, the maximum prepayment penalties that may be charged). Industry commenters nevertheless suggested that the Bureau exercise its authority to leave the points and fees thresholds at their existing (*i.e.*, pre-Dodd-Frank Act) levels.<sup>72</sup>

As in the case of the APR coverage test, manufactured housing industry commenters expressed concern about HOEPA coverage of manufactured home loans under the points and fees coverage test. These commenters estimated that anywhere from 24 to 51 percent of their manufactured home originations during 2010 and 2011 would have been covered under the proposal’s points and fees threshold. (Commenters did not specify what percentage of their loans would have been subject to the 5 percent or 8 percent thresholds.) Commenters explained that manufactured home loans, particularly those secured by personal property, tend to be for smaller amounts than real property-secured loans. However, according to these commenters, the cost of originating and servicing a loan of \$200,000 and a loan of \$20,000 is essentially the same in terms of absolute dollars. They asserted that because the cost of origination as a percentage of loan size thus is significantly higher for smaller loans, transactions with small loan amounts should not be treated the same for purposes of the points and fees test. Commenters suggested that adjusting the points and fees threshold for purchase-money mortgages secured in whole or in part by manufactured housing would ensure consumer protection while maximizing credit availability. For example, one commenter estimated that, if the Bureau applied a points and fees test of the

<sup>70</sup> See 77 FR 69738 (Nov. 6, 2012) (adding comment 32(a)(1)(ii)–2.xviii).

<sup>71</sup> TILA section 103(bb)(1)(A)(ii) also excludes from points and fees bona fide third-party charges not retained by the mortgage originator, the creditor, or an affiliate of either. This exclusion is implemented in § 1026.32(b)(1)(D) (closed-end credit transactions) and (b)(2)(D) (open-end credit plans).

<sup>72</sup> Industry and consumer groups also commented on the Bureau’s proposed implementation of the statutory change from requiring the inclusion in points and fees of items payable by the consumer “at or before closing” to items “payable in connection with the transaction.” The Bureau addresses those comments in the section-by-section analysis of § 1026.32(b)(1) below.

greater of (1) 5 percent of the total loan amount or \$3,000, or (2) 5 percent of the total loan amount or \$5,000, to all purchase-money mortgages secured in whole or in part by manufactured housing, then 41 percent or 22 percent of all manufactured housing loans, respectively, would be covered under the points and fees test.

The Bureau finalizes the adjusted points and fees thresholds in § 1026.32(a)(1)(ii)(A) and (B) as proposed. The Bureau recognizes that points and fees comprise, in part, a means of recovering costs that may constitute a larger percentage of the loan amount for smaller loans. However, as is the case of the APR coverage test, Congress already adjusted the points and fees test to account for this fact by setting the threshold for loans of less than \$20,000 higher than the threshold for all other loans. The Bureau would need to exercise its exception authority under TILA section 105(a) to adjust the thresholds beyond what Congress provided and, in turn, would need data or specific information showing that a departure from the levels set by Congress is warranted. Commenters presented some information indicating that, in a significant percentage of smaller transactions made by some lenders, points and fees currently are charged that exceed the threshold established by Congress. However, neither this information nor any other data available to the Bureau establishes that application of the statutory threshold will cause these lenders to cease making these loans. Moreover, commenters did not provide, and the Bureau is not otherwise aware of data or other information that would support, specific numeric thresholds different than those provided by Congress. The Bureau understands commenters' concerns that, if lenders choose to impose strict lending limits, that could have fair lending implications, because low- to moderate-income families and minorities could be more likely to suffer disproportionately. On the other hand, the Bureau is mindful of concerns raised by consumer groups that these are the very populations that need extra protections that are afforded by laws such as HOEPA. The Bureau believes that the points and fees coverage test is important in ensuring that loans with high upfront costs are subject to such special protections, and in the Bureau's view, the commenters did not present a persuasive case that implementing the statutory thresholds would adversely affect credit availability. In addition, as discussed in the section-by-section analysis of § 1026.32(b)(1) and (2)

below, the Bureau notes that it is adopting several limitations and clarifications to the definition of points and fees in response to industry commenters' concerns (e.g., by specifying that only such fees that are known at or before consummation must be included in the calculation). The Bureau believes that those clarifications and limitations will address some of industry's concerns regarding unwarranted coverage through points and fees.

The Bureau similarly is not persuaded that a different, higher points and fees threshold should apply to manufactured home loans. As noted, manufactured housing industry commenters suggested that the Bureau implement a points and fees threshold for all loans secured in whole or in part by manufactured housing (i.e., for any real- or personal property-secured transaction) of (at least) the greater of 5 percent of the total loan amount or \$3,000. Under this suggested approach, all loans secured by manufactured housing with loan amounts less than \$60,000 could charge points and fees of \$3,000 without triggering HOEPA coverage. The Bureau notes that the \$3,000 amount becomes an increasingly large percent of the loan amount as the loan size decreases. Thus, for the smallest loans (i.e., those that would be expected, for example, to be made to the most vulnerable consumers purchasing used manufactured homes on land that they do not own) the suggested points and fees could reach up to 60 percent of the loan amount.<sup>73</sup> Manufactured housing industry commenters argued, as did other industry commenters, that points and fees naturally comprise a larger percent of the loan amount as loan amounts decrease in size. However, they did not provide specific evidence indicating that smaller manufactured home loans (let alone all manufactured home loans) have characteristics that merit a different points and fees threshold than other, smaller transactions. In short, in light of the fact that Congress articulated a specific points and fees threshold for smaller transactions, and in the absence of specific evidence indicating a more appropriate threshold, the Bureau adopts in the final rule the points and

<sup>73</sup> For example, the Bureau understands that lenders may set minimum loan amounts of \$5,000. Points and fees of \$3,000 on a \$5,000 loan equal 60 percent of the loan amount. One industry commenter, citing the American Housing Survey (AHS) noted that the median purchase price of a manufactured home (including new and existing home sales) is \$27,000. Points and fees of \$3,000 on a \$27,000 loan equal 11 percent of the loan amount.

fees thresholds as set forth in the statute.

#### Determining the \$20,000 Amount; Adjustment for Inflation

As noted, a 5 percent points and fees coverage test applies to transactions of \$20,000 or more, and an 8 percent test applies to transactions of less than \$20,000. The Bureau's 2012 HOEPA Proposal did not propose a specific methodology for determining whether a transaction was above or below the \$20,000 amount. As noted in the section-by-section analysis of § 1026.32(a)(1)(i)(B) above, in the 2013 ATR Final Rule, the Bureau is providing that a creditor must determine which points and fees tier applies to a transaction for purposes of the qualified mortgage points and fees test by using the face amount of the note (i.e., the "loan amount" as defined in § 1026.43(b)(5)). See the section-by-section analysis of § 1026.43(e)(3)(i) in the 2013 ATR Final Rule. For consistency with the approach being adopted in the 2013 ATR Final and to ease compliance, the Bureau is adopting the same approach for determining whether a transaction is above or below the \$20,000 amount for the HOEPA points and fees coverage test. The Bureau adopts this clarification in new comment 32(a)(1)(ii)-3.<sup>74</sup>

The Bureau also clarifies in § 1026.32(a)(1)(ii) and new comment 32(a)(1)(ii)-3 that the \$20,000 amount in § 1026.32(a)(1)(ii)(A) and (B) will be adjusted annually for inflation on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1. To make this adjustment, the Bureau invokes its authority under TILA section 105(a), which grants the Bureau authority to exempt all or any class of transactions where necessary or proper to effectuate the purposes of TILA, to prevent evasion, or to facilitate compliance. The Bureau believes adjusting the \$20,000 amount for inflation is necessary and proper to effectuate the purposes of, and to facilitate compliance with, TILA. The Bureau believes that failing to adjust the \$20,000 amount would hinder access to credit without meaningfully enhancing consumer protection by failing to account for the effects of inflation. As noted above, the Bureau received a

<sup>74</sup> Comment 32(a)(1)(ii)-3 explains that creditors must apply the allowable points and fees percentage to the "total loan amount" as defined in § 1026.32(b)(4), which may be different than the face amount of the note. This approach also is consistent with the approach adopted for the points and fees test for qualified mortgages. See § 1026.43(e)(3)(i) and comment 43(e)(3)(i)-2, as adopted in the 2013 ATR Final Rule.

significant number of comments expressing concern about the points and fees coverage test for smaller transactions. The Bureau believes that adopting this final rule without providing for the \$20,000 to be adjusted for inflation would, over time, discourage some creditors from making smaller loans, to the detriment of consumers, without providing any meaningful corresponding consumer protection benefit. Accordingly, the Bureau believes that providing for the adjustment of the \$20,000 amount will strengthen competition among financial institutions and promote economic stabilization.<sup>75</sup>

#### Total Transaction Amount

TILA section 103(bb)(1)(A)(ii) provides that a mortgage is a high-cost mortgage if its total points and fees exceed (depending on transaction size) either 5 percent or 8 percent of the “total transaction amount,” rather than the “total loan amount.” The Dodd-Frank Act did not define the term “total transaction amount.” However, the Bureau noted in its proposal that it believed the phrase reflected the fact that HOEPA, as amended, applies to both closed- and open-end credit transactions secured by a consumer’s principal dwelling.<sup>76</sup> Notwithstanding the statutory change, for consistency with existing Regulation Z terminology, proposed § 1026.32(a)(1)(ii) would have provided that a high-cost mortgage is one for which the total points and fees exceed a certain percentage of the “total loan amount.” The Bureau received no comments concerning its adoption of the phrase “total loan amount” rather than “total transaction amount,” as set forth in the statute and thus adopts the language as proposed. See the section-by-section analysis of § 1026.32(b)(4) below for a discussion of the definition of “total loan amount.”

#### Annual Adjustment of \$1,000 Amount

As amended by the Dodd-Frank Act, HOEPA’s points and fees coverage test appears in TILA section 103(bb)(1)(A)(ii)(I) and (II). Prior to

being renumbered by Dodd-Frank, this test appeared in TILA section 103(aa)(1)(B)(i) and (ii). The Dodd-Frank Act did not amend TILA section 103(bb)(3), which requires the points and fees dollar figure to be adjusted annually for inflation, to reflect this new numbering. Instead, TILA section 103(bb)(3) continues to cross-reference TILA section 103(bb)(1)(B)(ii), which now sets forth the methodology for determining the APR for HOEPA coverage in transactions with rates that vary according to an index. To give meaning to the statute as amended, the 2012 HOEPA Proposal interpreted the authority provided to it in TILA section 103(bb)(3) as authority to continue to adjust annually for inflation the dollar figure prescribed in TILA section 103(bb)(1)(A)(ii)(II), as has been done prior to the Dodd-Frank Act.

The Bureau proposed to re-number existing comment 32(a)(1)(ii)–2 concerning the annual adjustment of the points and fees dollar figure as 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 would have replaced references to the pre-Dodd-Frank Act statutory figure of \$400 with references to the new statutory figure of \$1,000. 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 would have stated that the Bureau will publish and incorporate into commentary the required annual adjustments to the \$1,000 figure after the June Consumer Price Index figures become available each year.

Finally, the proposal would have retained 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 proposal noted that it would be 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.

The Bureau received no comments on proposed comments 32(a)(1)(ii)–1 and –2. The Bureau adopts the comments as proposed.

#### 32(a)(1)(iii)

Prior to the Dodd-Frank Act, a mortgage was classified as a high cost mortgage if either its APR or its total points and fees exceeded certain statutorily prescribed thresholds. Section 1431(a) of the Dodd-Frank Act

amended TILA to add new section 103(bb)(1)(A)(iii), which provides 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.

Proposed § 1026.32(a)(1)(iii) would have implemented TILA section 103(bb)(1)(A)(iii) with several minor clarifications. First, proposed § 1026.32(a)(1)(iii) would have replaced the statutory reference to prepayment penalties permitted by the “credit transaction documents” with a reference to such penalties permitted by the “terms of the loan contract or open-end credit agreement.” This phrasing was proposed to reflect the application of § 1026.32(a)(1)(iii) to both closed- and open-end transactions, and for consistency with Regulation Z. Proposed § 1026.32(a)(1)(iii) also would have cross-referenced the definition of prepayment penalty in proposed § 1026.32(b)(8).<sup>77</sup> Finally, proposed § 1026.32(a)(1)(iii) would have clarified 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.” The Bureau proposed to use these terms for closed- and open-end transactions, respectively, for consistency with Regulation Z.

Proposed comment 32(a)(1)(iii)–1 would have explained how the coverage tests for high-cost mortgages in § 1026.32(a)(1)(i) through (iii) interact with the ban on prepayment penalties for high-cost mortgages in amended TILA section 129(c), which the HOEPA proposal would have implemented in § 1026.32(d)(6). Specifically, proposed comment 32(a)(1)(iii)–1 would have explained that § 1026.32 implicates prepayment penalties in two main ways. If a transaction is a high-cost mortgage by operation of *any* of the coverage tests in proposed § 1026.32(a)(1) (*i.e.*, the APR, points and fees, or prepayment penalty tests), then the transaction must not include a prepayment penalty. Furthermore, under the prepayment penalty coverage test in § 1026.32(a)(1)(iii), a transaction is a high-cost mortgage if, under the terms of the loan contract or credit agreement, a creditor can charge either (1) a prepayment penalty more than 36 months after consummation or account opening, or (2) total prepayment

<sup>75</sup> The Bureau also notes that adjusting the \$20,000 amount for inflation is consistent with the approach adopted for the points and fees test for qualified mortgages in the Bureau’s 2013 ATR Final Rule. The Bureau believes that adopting a uniform approach in both the high-cost and qualified mortgage contexts will facilitate compliance with TILA. See § 1026.43(e)(3)(i) and (ii), as adopted in the 2013 ATR Final Rule.

<sup>76</sup> In this regard, the Bureau noted that section 1412 of the Dodd-Frank Act retained the phrase “total loan amount” for purposes of determining whether a closed-end credit transaction complied with the points and fees restrictions applicable to qualified mortgages. See TILA section 129C(b)(2)(A)(vii).

<sup>77</sup> The Bureau is finalizing proposed § 1026.32(b)(8) as § 1026.32(b)(6).

penalties that exceed two percent of any amount prepaid. Taken together, § 1026.32(a)(1)(iii) and § 1026.32(d)(6) effectively establish a maximum period during which a prepayment penalty may be imposed, and a maximum prepayment penalty amount that may be imposed, on a transaction secured by a consumer's principal dwelling, other than a mortgage that is exempt from high-cost mortgage coverage under § 1026.32(a)(2).

Proposed comment 32(a)(1)(iii)-1 also cross-referenced proposed § 226.43(g) in the Board's 2011 ATR Proposal. Under that proposal, § 226.43(g) would have implemented new TILA section 129C(c) by (1) prohibiting prepayment penalties altogether for most closed-end credit transactions unless the transaction is a fixed-rate, qualified mortgage with an APR 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.<sup>78</sup>

The Bureau's HOEPA proposal noted that the cumulative effect of the Dodd-Frank Act's amendments to TILA concerning prepayment penalties for closed-end transactions would be to limit the amount of prepayment penalties that may be charged in connection with most such transactions to amounts that would not meet the high-cost mortgage prepayment penalty coverage test. Specifically, the Dodd-Frank Act not only limited the amount of prepayment penalties as just described, but it also provided that prepayment penalties must be included in the points and fees calculations for high-cost mortgages and qualified mortgages. *See* TILA sections 103(bb)(4) and 129C(b)(2)(C).<sup>79</sup>

Proposed comment 32(a)(1)(iii)-2 would have provided guidance concerning the calculation of prepayment penalties for HELOCs for purposes of proposed § 1026.32(b)(1)(iii). Proposed comment 32(a)(1)(iii)-2 provided that, if the terms of a HELOC agreement allow for a prepayment penalty that exceeds two percent of the initial credit limit for the plan, the agreement would 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). Proposed comment 32(a)(1)(iii)-2 provided three examples to illustrate the rule.

The Bureau received comments addressing various aspects of proposed § 1026.32(a)(1)(iii) and comments 32(a)(1)(iii)-1 and -2. A few industry commenters either stated that the 36-month prepayment penalty restriction seemed reasonable or stated that the prepayment penalty test would not have a significant impact. Several other industry commenters, however, either objected entirely to the addition of a prepayment penalty coverage test for high-cost mortgages as unnecessary or stated that the Bureau should narrow the scope of the test. Two industry commenters expressed concern that including waived closing costs as prepayment penalties (*see* the section-by-section analysis of § 1026.32(b)(6) below) would significantly increase the likelihood that many smaller transactions would become high-cost mortgages under the two percent prepayment penalty test. The commenters noted that such loans tend to serve low-income consumers and have costs that are waived at closing on the condition that the consumer does not prepay. The commenters thus suggested that the Bureau establish a different prepayment penalty test for smaller transactions. Finally, one commenter suggested that the Bureau specify that the prepayment penalty coverage test, like the APR and points and fees tests, is based on information known as of consummation or account opening.<sup>80</sup>

The Bureau is adopting § 1026.32(a)(1)(iii) and its commentary substantially as proposed, with minor adjustments to reflect both the high-cost mortgage coverage exemptions in § 1026.32(a)(2) and certain other renumbering in the final rule. Notwithstanding that a small number of commenters expressed general dissatisfaction with the addition of a prepayment penalty coverage test for high-cost mortgages, particularly for smaller-dollar-amount transactions, the Bureau declines to depart from the statutory requirement to add the test. These commenters did not provide data to support the need either for a wholesale departure from the statute or, in the case of smaller loans, to warrant the increased regulatory complexity that would come with adding a separate

prepayment penalty test for such transactions. Furthermore, the Bureau notes that, even if it were to adopt a narrower prepayment penalty test for HOEPA coverage, prepayment penalties still would be restricted by the bans and limitations that the Bureau is adopting for most closed-end transactions in its 2013 ATR Final Rule.

As to the suggestion that the prepayment penalty test be based on information known as of consummation or account opening, the Bureau acknowledges that a creditor may not be able to determine whether a flat-rate prepayment penalty would exceed two percent of an "amount prepaid," when the "amount prepaid" will not be known until the prepayment is made. However, the Bureau notes that, for a transaction with a prepayment penalty, creditors can ensure that they do not exceed the prepayment penalty coverage test by providing that any prepayment penalty (including any flat penalty) will not exceed 2 percent of the prepaid amount.

Although the Bureau adopts the prepayment penalty coverage test in § 1026.32(a)(1)(iii) substantially as proposed, the Bureau adopts in § 1026.32(b)(6) a narrower definition of prepayment penalty. The final definition addresses comments concerning the inclusion of conditionally waived closing costs in prepayment penalties, particularly for smaller loans. The definition provides that certain conditionally-waived, bona fide third-party closing costs are not prepayment penalties. This approach ensures that bona fide third-party charges that would not be counted in points and fees if they were charged to the consumer upfront (*see, e.g.*, the section-by-section analysis of § 1026.32(b)(1)(i)(D)) also will not be counted in points and fees if they are waived on the condition that the consumer does not prepay the loan in full or terminate a HELOC during the first 36 months following consummation or account opening. This approach also should reduce the charges that count toward the high-cost mortgage prepayment penalty coverage test and at least partially address commenters' concerns regarding unwarranted coverage of smaller loans. *See also* the section-by-section analysis of § 1026.32(b)(6) below.

32(a)(2)

#### Exemptions

As noted in the section-by-section analysis of § 1026.32(a)(1) above, the Dodd-Frank Act expanded HOEPA coverage by providing in TILA section

<sup>78</sup> *See* 76 FR 27390, 27472-78 (May 11, 2011). These provisions are being finalized in the Bureau's 2013 ATR Final Rule.

<sup>79</sup> *See* the section-by-section analysis of § 1026.32(b)(1) and (2) below.

<sup>80</sup> In addition to receiving comments concerning the prepayment penalty coverage test, the Bureau received various comments concerning its proposed definition of prepayment penalties for closed- and open-end transactions. Those comments are discussed in the section-by-section analysis of § 1026.32(b)(6)(i) and (ii) below.

103(bb)(1) that the term “high-cost mortgage” means any consumer credit transaction that is secured by the consumer’s principal dwelling, other than a reverse mortgage transaction, if any of the prescribed high-cost mortgage thresholds are met. The proposal would have implemented TILA’s amended definition of “high-cost mortgage” by removing the pre-Dodd-Frank Act statutory exemptions for residential mortgage transactions (*i.e.*, purchase-money mortgage loans) and HELOCs, while retaining the exemption of reverse mortgage transactions.<sup>81</sup>

Consumer advocate commenters generally supported the expansion of HOEPA to cover the new loan types. Industry commenters, on the other hand, expressed concern about the expansion of HOEPA and the resulting decrease in access to credit that they argued would follow.<sup>82</sup> Numerous industry commenters thus requested that the Bureau use its authority under TILA to exempt one or more categories of transactions from high-cost mortgage coverage. These comments are addressed in turn below.

#### General

Several commenters requested an exemption for HELOCs. They argued that exempting HELOCs would not interfere with the purpose of the high-cost mortgage protections and that, particularly in light of current market conditions, the Bureau should use its authority to expand, rather than to constrain, credit availability. The commenters stated that they might stop offering HELOCs if too many are covered by the high-cost mortgage coverage tests. A small number of other industry commenters requested exemptions for purchase-money mortgage loans, loans held in portfolio, and loans originated by smaller lenders or small credit unions.

<sup>81</sup> The HOEPA Proposal proposed to implement the Dodd-Frank Act’s amendments to HOEPA coverage exclusively in § 1026.32(a)(1) and to implement in § 1026.32(a)(2) the Dodd-Frank Act’s amendments to TILA setting forth a new method for calculating APRs for determining HOEPA coverage (TILA section 103(bb)(1)(B)). In the final rule, § 1026.32(a)(2) is used for certain coverage exemptions and § 1026.32(a)(3) is used to implement the APR calculation for HOEPA coverage. Accordingly, the Bureau addresses comments received concerning proposed § 1026.32(a)(2) in the section-by-section analysis of § 1026.32(a)(3) below.

<sup>82</sup> Many commenters expressed similar concerns about a decrease in access to credit that they believe will occur as a result of the potentially expanded scope of HOEPA coverage under the revised high-cost mortgage coverage tests and/or the increased costs of complying with the enhanced prohibitions and protections for high cost mortgages. Those concerns are addressed in the section-by-section analyses of the applicable sections of this final rule.

The Bureau generally declines at this time to depart from Congress’s clear intent to expand HOEPA to apply to most closed- and open-end credit transactions secured by a consumer’s principal dwelling. In most cases, commenters expressed general concerns about the potential impact on access to credit of extending HOEPA to cover purchase-money mortgages and HELOCs. A number of commenters focused particularly on the potential impact on rural or underserved borrowers. However, they did not provide data to support any particular coverage exclusions. The Bureau notes that in order to make adjustments to HOEPA coverage, it must find that an adjustment is necessary and proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. Without firm data or other specific information to support commenters’ claims regarding the effect of HOEPA expansion on access to credit, the Bureau does not believe that departures from TILA’s coverage provisions are warranted. The Bureau recognizes, however, that the expansion of HOEPA to cover purchase-money mortgage loans raises unique concerns for certain categories of transactions (*e.g.*, construction loans) and addresses those unique transactions through the narrower coverage exemptions discussed below. In addition, the Bureau believes that certain, specific concerns regarding expanded high-cost mortgage coverage (*e.g.*, preserving access to balloon payment loans in rural or underserved areas) may be addressed through more targeted measures on a provision-by-provision basis. Those measures are discussed below in the section-by-section analysis of §§ 1026.32 and 1026.34.

#### Manufactured Housing and Personal Property-Secured Transactions

Prior to the Dodd-Frank Act, TILA excluded purchase-money mortgages from HOEPA coverage. The exclusion of purchase-money mortgages meant that specific types of lending were all but excluded from HOEPA coverage as a practical matter, if not by name. For example, refinancings of manufactured home loans and loans secured by other types of personal property (*e.g.*, houseboats or recreational vehicles) historically were subject to HOEPA, but such loans are relatively rare. By amending TILA to remove the exclusion of purchase-money mortgages from HOEPA, the Dodd-Frank Act also removed the effective exclusion of manufactured home and personal property-secured loans from HOEPA. As

discussed in the section-by-section analysis of § 1026.32(a)(1)(i)(A) and (B) above, Congress understood that expanding HOEPA to cover purchase-money transactions implicated such loans, because it created a specific APR coverage threshold for personal property-secured first-liens with a transaction amount of \$50,000 or less.

The HOEPA proposal did not propose specific relief from HOEPA coverage for manufactured home or personal property-secured loans beyond proposing to implement the separate, higher APR threshold set forth in the statute. As already discussed in the section-by-section analysis of § 1026.32(a)(1)(i)(B) and (ii) above, the Bureau received public comments from both industry and consumer groups urging the Bureau to adjust the high-cost mortgage coverage tests as applied to manufactured housing. Numerous participants in the manufactured housing industry also requested that the Bureau exempt manufactured home loans from HOEPA coverage altogether. A few industry commenters similarly recommended that the Bureau exempt loans secured by personal property, such as houseboats and recreational vehicles, from HOEPA coverage.

*Manufactured housing.* Industry commenters expressed serious concerns about the impact that the HOEPA proposal might have on the manufactured housing industry and on lower-income and rural consumers who rely on the manufactured home for affordable housing. Both industry and consumer group commenters noted that manufactured home loans primarily serve low- and moderate-income consumers in rural areas where access to other housing options and credit may be limited. Specifically, the Manufactured Housing Institute (MHI) estimated in its comment letter that there are approximately 9 million American families living in manufactured homes, that the average sales price of a new manufactured home is approximately \$60,600, and that 60 percent of manufactured homes are located in rural areas. Moreover, according to 2011 census data as reported by MHI, in 2011 manufactured homes accounted for 46 percent of all new homes sold under \$150,000, and 72 percent of all new homes sold under \$125,000.

Industry commenters estimated that, taking the HOEPA proposal’s APR and points and fees thresholds together, between 44 and 75 percent of recent manufactured home loan originations would be covered by HOEPA. The commenters stated that they would not originate such loans. Commenters stated

that the cost of originating high cost mortgages (particularly the costs of making additional disclosures and the pre-loan counseling requirement), the ongoing costs of monitoring loans for compliance with HOEPA, and the legal, regulatory, and reputational risks associated with HOEPA would prevent them from originating high cost mortgages. At least one commenter stated that Congress's inclusion of manufactured housing in HOEPA coverage must have been an oversight.

Commenters thus suggested several ways that the Bureau might exempt manufactured housing from HOEPA coverage. Specifically, various commenters suggested exempting (1) All manufactured home loans, (2) purchase-money manufactured home loans, (3) personal property-secured manufactured home loans, or (4) real or personal property-secured manufactured home loans that do not contain terms or practices prohibited by HOEPA (for example, negative amortization or prepayment penalties). Commenters stated that the last exemption would be useful because, as a general matter, manufactured home loans do not contain such loan terms. Thus, consumers taking out manufactured home loans already are adequately protected, and manufactured home creditors would be relieved of the burden of monitoring for high-cost mortgage status and the attendant disclosures and other requirements (*e.g.*, counseling) that come with such status. In the alternative, commenters suggested that the Bureau provide a temporary exemption for manufactured housing until the Bureau obtains and analyzes data concerning the need for a permanent exemption.

The Bureau is finalizing § 1026.32(a) without any categorical exclusions for manufactured housing. Contrary to some industry commenters' suggestions, the plain language of HOEPA demonstrates that Congress specifically contemplated including manufactured home loans within HOEPA. The statutory definition of high-cost mortgage includes all consumer credit transactions secured by the consumer's principal dwelling (other than reverse mortgages); there is no limitation to real estate-secured loans. In fact, Congress specifically included an accommodation for a category of loans that are overwhelmingly comprised by manufactured housing loans by including a special, higher APR threshold for smaller transactions secured by personal property.

The Bureau acknowledges that, as described by industry commenters, manufactured home loans may not

contain certain risky features that HOEPA is designed to combat. However, these or other risky or abusive practices could arise in manufactured home lending (as with most lending) in the future. In addition, the Bureau believes that it would be imprudent to exempt manufactured home loans from HOEPA coverage when HOEPA offers some of the strongest consumer protections for loans secured by a consumer's principal dwelling, when that dwelling is personal property. As discussed in the section-by-section analysis of § 1026.32(a)(1)(i)(A), approximately 77 percent of manufactured homes placed in the U.S. during 2011 were titled as personal property.<sup>83</sup> State and Federal laws generally provide fewer legal protections for personal property-secured loans, including fewer required disclosures to assist consumers in understanding the terms of their credit transactions. For example, as discussed earlier, laws governing foreclosure procedures typically do not apply to loans secured by personal property, and RESPA only partially applies to such loans. The relative lack of protections for manufactured home loans distinguish manufactured housing from the other transaction types that this final rule exempts from HOEPA coverage, as discussed below. Moreover, consumers shopping for a manufactured home may have fewer financing options than those available for site-built dwellings, particularly when the home is titled as personal property. Lower-income consumers with limited financing options may be particularly susceptible to any abusive practices that might arise in the market. Finally, as discussed in the section-by-section analysis of § 1026.32(a)(1)(i) and (ii) above, the Bureau is not persuaded that application of the HOEPA coverage thresholds will adversely affect access to manufactured home loans. The Bureau however, will monitor access to manufactured home credit. The Bureau believes that adjusting the coverage thresholds, if it obtains information indicating that such an adjustment is warranted, is more appropriate than adopting a wholesale exemption.

*Personal property loans.* As noted, a few industry commenters urged the Bureau to exempt loans secured by personal property such as houseboats or recreational vehicles from coverage under the final high-cost mortgage rule, even if such property is the consumer's

principal dwelling. The commenters stated that financing personal property is a separate line of business from mortgage lending, with different risks and pricing, and that vendors that finance such property may not have the capacity to comply with HOEPA. For the reasons just discussed with respect to manufactured housing, the Bureau does not believe that it is appropriate to exempt loans secured by personal property from the high-cost mortgage rules. The Bureau believes that Congress has already balanced the competing considerations regarding coverage of this type of lending, and that this balance is reflected in the special APR threshold for smaller dollar, personal property-secured loans.

#### 32(a)(2)(i)

##### Reverse Mortgages

Prior to the Dodd-Frank Act, TILA section 103(aa)(1) exempted reverse mortgages from coverage under HOEPA. The Dodd-Frank Act retained this exemption in re-designated TILA section 103(bb)(1)(A), and the HOEPA proposal would have implemented it in § 1026.32(a)(1) (*i.e.*, moving it from existing § 1026.32(a)(2)(ii) but making no substantive changes). One consumer group commenter requested that the Bureau revisit the reverse mortgage exemption either in this rulemaking or in the near future, citing particular concerns about increased fees in reverse mortgages. The Bureau declines to depart in this rulemaking from Congress's clear intent to retain the exemption of reverse mortgages from high-cost mortgage coverage. The Bureau notes that reverse mortgages currently are subject to additional disclosure rules under § 1026.33. The Bureau also notes that it anticipates undertaking a rulemaking to address how the Dodd-Frank Act Title XIV requirements apply to reverse mortgages, and any consumer protection issues in the reverse mortgage market may be addressed through such a rulemaking. Accordingly, the final rule adopts the proposed exemption for reverse mortgages as § 1026.32(a)(2)(i).

#### 32(a)(2)(ii)

##### Construction Loans

As previously noted, TILA section 103(bb)(1), as amended by the Dodd-Frank Act, expanded HOEPA coverage to include purchase-money transactions. Proposed § 1026.32(a)(1) therefore would have expanded HOEPA coverage to all purchase-money transactions, including transactions to finance the initial construction of a consumer's principal dwelling. These "construction

<sup>83</sup> See Selected Characteristics of New Manufactured Homes Placed by Region, 2011, at <http://www.census.gov/construction/mhs/pdf/char11.pdf>.

loans” can take different forms. In some cases, creditors may provide “construction-only” loans, where only the construction of the dwelling is financed by the creditor. These loans commonly contain balloon structures and are often refinanced into permanent loans after completion of the construction. In other cases, creditors may provide “construction-to-permanent” loans, where both the construction and the permanent financing are extended by the same creditor. For these loans—which may be disclosed as two separate transactions or as a single transaction at the option of the creditor—the construction financing typically rolls into a permanent financing at the end of the construction phase. The Bureau did not propose different treatment of construction loans in the HOEPA proposal.

The Bureau received numerous comments from industry groups and banks, including a number of community banks, expressing concern that the expansion of HOEPA to include construction loans would unduly restrict access to home construction financing for consumers, with little to no corresponding consumer benefit. These commenters urged the Bureau to create an exemption to § 1026.32 for construction-only loans and the construction phase of construction-to-permanent loans, providing several bases for doing so.

First, industry groups and community banks argued that the short term nature of construction financing as well as typically higher interest and administrative fees associated with construction-only loans or the construction phase of a construction-to-permanent loan would result in large numbers of these loans falling under the new HOEPA APR threshold. These commenters generally asserted that access to credit for these loans would be reduced because most creditors, as a matter of policy, do not make high-cost mortgages. They also noted that an additional barrier exists to making a construction-only loan as a high-cost mortgage, because construction-only loans are typically structured as balloons with terms of 1–2 years, and proposed § 1026.32(d)(1) would have prohibited any such balloon payments on high-cost mortgages. Thus, independent of the various reasons creditors typically refrain from making high-cost mortgages, creditors would be barred from making any such construction-only loan as a high-cost mortgage in its usual form. One large bank indicated that 20 percent of its 2009–2012 construction-only loans would have been classified as high-cost

mortgages under the new HOEPA APR criteria, and that it would not have made those loans had HOEPA applied.

Industry groups and community banks also asserted that construction loans should not be covered by HOEPA, largely because the predatory lending and abusive practices that compelled the passage of HOEPA do not exist for construction loans. Industry groups emphasized that construction loans typically involve more sophisticated consumers than ordinary residential mortgage loans and require more extensive coordination between the creditor, the home builder, and the home buyer, which they believe reduces the risk of abusive credit practices. As support for this position, these commenters noted that construction loans do not have the same history of abusive credit practices as other mortgage loans. In addition, industry groups argued that many of the protections afforded to borrowers under HOEPA—such as restrictions on acceleration, charging of fees for loan modifications or payoff statements, and negative amortization features—are generally inapplicable to construction loans.

The Bureau notes that these comments are consistent with the discussion in the Board’s 2008 HOEPA Final Rule, 73 FR 44522, 44539 (July 30, 2008), which exempted construction loans from the higher-priced mortgage loan rules (*see* § 1026.35(a)(3)) for substantially the same reasons urged by industry. In that rule, the Board determined that construction loans typically have higher points, fees, and interest associated with them than other loan products, as well as shorter terms, which often results in construction loans having substantially higher APRs than other mortgage loan products. Thus, in the Board’s view, applying § 1026.35 to construction loans would have resulted in an excessive number of construction loans being classified as higher-priced mortgage loans, which could discourage some creditors from extending such financing. In addition, the Board also found that construction loans do not present the same risk of abuse as other mortgage loans, and concluded that applying the higher-priced mortgage loan rules to construction loans could hinder some borrowers’ access to construction financing without meaningfully enhancing consumer protection. 73 FR at 44539. Upon careful consideration of the Board’s rulemaking and the public comments received on the Bureau’s 2012 HOEPA Proposal, the Bureau similarly concludes that an exemption

from HOEPA is warranted for construction loans.

The Bureau is adopting § 1026.32(a)(2)(ii) to exempt from HOEPA coverage loans to finance the initial construction of a consumer’s principal residence, which includes both construction-only loans and the construction phase of construction-to-permanent loans. The Bureau is exempting such loans from coverage pursuant to its authority under TILA section 105(a), which grants the Bureau authority to exempt all or any class of transactions where necessary or proper to effectuate the purposes of TILA, to prevent evasion, or to facilitate compliance. The Bureau believes that exempting construction loans from the HOEPA restrictions set forth in §§ 1026.32 and 1026.34 is necessary and proper to effectuate the purposes of, and to facilitate compliance with, TILA, in accordance with TILA section 105(a). The Bureau believes that concerns discussed in the 2008 HOEPA Rule, such as hindering access to credit without meaningfully enhancing consumer protection, are equally applicable to construction financing transactions that otherwise would be high-cost mortgages. The Bureau further believes that adopting this final rule without an exemption for construction loans would discourage some creditors from participation in the construction financing business, thereby reducing competition to the detriment of consumers, without providing any meaningful corresponding consumer protection benefit. Accordingly, the Bureau believes that an exemption for construction loans will strengthen competition among financial institutions and promote economic stabilization.

The Bureau also is adopting comment 32(a)(2)(ii)–1 to provide further guidance on how the exemption applies to construction-to-permanent loans. Comment 32(a)(2)(ii)–1 explains that the § 1026.32(a)(2)(ii) exemption applies to both a construction-only loan and to the construction phase of a construction-to-permanent loan. However, the permanent financing that replaces a construction loan, whether extended by the same or a different creditor, is not exempt from HOEPA coverage. Under § 1026.17(c)(6)(ii), a creditor has the option to treat a construction-to-permanent loan as a single transaction or as multiple transactions for disclosure purposes, even when the same creditor extends both loans and a single closing occurs. Because only the construction phase is exempt from § 1026.32, the Bureau recognizes that the rule could present an incentive to

creditors to shift all or most upfront charges to the construction phase. However, the Bureau remains persuaded that construction loans do not present the same risk of abuse as do other loans. The Bureau also believes that market competition should minimize creditors' ability to engage in such evasion because those creditors should be unable to capture much of the construction market where other creditors offering construction-only financing will tend to have superior pricing. Nevertheless, the Bureau intends to monitor the construction financing market going forward for signs that circumvention may be occurring and, if so, may take future action regarding the exclusion for the construction phase of construction-to-permanent financing.

### 32(a)(2)(iii)

#### Housing Finance Agency Loans

As noted above, Congress amended TILA to expand the types of loans subject to HOEPA coverage and to revise HOEPA's coverage tests. In doing so, Congress did not provide any exemptions from HOEPA coverage for any State or other government agencies, either in TILA section 103(bb) or 129. However, until Congress changed the scope of HOEPA's coverage, few if any of their activities were covered.

Certain commenters, including an association of State housing finance authorities, urged the Bureau to exempt loans financed by Housing Finance Agencies (HFAs). These commenters observed that HFAs operate as public entities in every State and that, as agencies and instrumentalities of government, they have a unique mission to provide safe and affordable financing. In addition, the commenters stated, loans financed by HFAs tend to perform better than other loans. The commenters stated that many loans financed by HFAs would be unlikely to meet any of HOEPA's coverage tests. On the other hand, according to the commenters, many HFAs offer smaller-loan-amount products that, for example, finance the purchase of manufactured homes in rural areas or support critical repairs and renovations. Because the principal amounts of such loans are so low, the commenters expressed concern that even reasonable fees to offset origination and administrative costs might make many of the loans high-cost mortgages, which in turn could prevent the HFAs from originating the loans. In turn, consumers might turn to financing through costlier forms of credit. The commenters stated that the risk of exempting loans originated under such

programs from HOEPA coverage is low because sufficient protections are provided by HFAs' normal lending practices.

The Bureau adopts in the final rule an exemption from HOEPA for transactions that are directly financed by an HFA, as that term is defined in 24 CFR 266.5.<sup>84</sup> The Bureau adopts this exemption pursuant to its authority under TILA section 105(a) to exempt all or any class of transactions where necessary or proper to effectuate the purposes of TILA, to prevent evasion, or to facilitate compliance. The Bureau believes that this exemption is necessary and proper to effectuate the purposes of TILA to avoid the uninformed use of credit by ensuring that borrowers seeking to obtain fair and affordable loans originated and financed directly by HFAs are not driven to other, costlier and riskier forms of credit.

HFAs are quasi-governmental entities, chartered by either a State or a municipality, that engage in diverse housing financing activities for the promotion of affordable housing. Some HFAs are chartered to promote affordable housing goals across an entire State, while others' jurisdiction extends to only particular cities or counties.<sup>85</sup> Among other activities designed to promote affordable homeownership, HFAs provide financial assistance to consumers through first-lien mortgage loans, subordinate-loan financing, and down payment assistance programs (e.g., a loan to the consumer to assist with the consumer's down payment, or to pay for some of the closing costs). The Bureau understands that HFA lending is characterized by low-cost financing, evaluation of a consumer's repayment ability, and homeownership counseling.<sup>86</sup>

The Bureau understands that, in most cases, HFAs partner with creditors, such as local banks, that extend credit pursuant to the HFA program guidelines. HFAs generally do not provide direct financing to consumers. Nonetheless, the Bureau's exemption of HFAs from HOEPA coverage extends only to those transactions where the

<sup>84</sup> Pursuant to 24 CFR 266.5, an HFA is defined as "any public body, agency, or instrumentality created by a specific act of a State legislature or local municipality empowered to finance activities designed to provide housing and related facilities, through land acquisition, construction or rehabilitation."

<sup>85</sup> For example, the Louisiana Housing Corporation administers affordable housing programs across all of Louisiana, while The Finance Authority of New Orleans administers programs only in Orleans Parish. See [www.lhfa.state.la.us](http://www.lhfa.state.la.us) and [www.financeauthority.org](http://www.financeauthority.org).

<sup>86</sup> The vast majority of HFA loans are fixed-rate, fully-amortizing, fully-documented conforming loans.

HFA itself provides direct financing. Transactions made pursuant to a program administered by an HFA but that are financed by private creditors are still subject to HOEPA coverage. Although the details of HFA programs may differ from State to State, the Bureau believes that consumers in loans where a government-chartered agency is the creditor are sufficiently protected from the types of abuse that HOEPA was designed to address. The Bureau acknowledges that loans financed by private entities in partnership with HFAs may also have significant consumer protections, however the Bureau believes that it is important to retain HOEPA protections for such loans because the HFA does not directly control the transaction.

### 32(a)(2)(iv)

#### USDA Rural Loans

As noted in the section-by-section analysis of § 1026.32(a)(2)(iii) above, Congress amended TILA to expand the types of loans subject to high-cost mortgage coverage and to revise the high-cost mortgage coverage tests. In doing so, Congress did not provide any exemptions from HOEPA coverage for loans originated by the Federal government, such as through the USDA Rural Housing Service, either in TILA section 103(bb) or 129. However, until Congress changed the scope of high-cost mortgage coverage, few if any of their activities were covered.

The Bureau received one comment concerning USDA Rural Housing Service loans. Specifically, the industry commenter suggested that the Bureau exempt (or adjust the APR and points and fees thresholds for) loans issued under the USDA Guaranteed Rural Housing Program. This commenter noted that such loans carry enhanced consumer protections, such as maximum interest rates that must track closely to prime, and that they tend to be for small dollar amounts. The commenter expressed concern about the points and fees threshold because loans originated through the USDA Rural Housing Service program tend to be for smaller dollar amounts and thus a relatively higher percentage of their loan amount may be counted toward the points and fees threshold.

The Bureau declines to exempt loans issued under the USDA Guaranteed Rural Housing Program. However, upon further consideration and for reasons similar to those discussed in the section-by-section analysis of § 1026.32(a)(2)(iii) concerning loans originated by HFAs where the HFA is the creditor, the Bureau adopts in



§ 1026.32(a)(2)(iv) in the final rule an exemption for loans originated through the USDA's Rural Housing Service section 502 Direct Loan Program. The Bureau adopts this exemption pursuant to its authority under TILA section 105(a) to exempt all or any class of transactions where necessary or proper to effectuate the purposes of TILA, to prevent evasion, or to facilitate compliance. The Bureau believes that this exemption is necessary and proper to effectuate the purposes of TILA to avoid the uninformed use of credit by ensuring that borrowers seeking to obtain fair and affordable loans through government programs are not driven to other, costlier forms of credit. The Bureau believes that the protections afforded consumers in the section 502 Direct Loan Program, where the Federal government is the creditor, are sufficiently protected from the types of abuse that HOEPA was designed to address. As noted, however, the Bureau does not at this time adopt an exemption in § 1026.32(a)(2)(iv) to loans issued under the USDA Guaranteed Rural Housing Program.

#### 32(a)(3) Determination of Annual Percentage Rate

Prior to the Dodd-Frank Act, TILA did not specify how to calculate the APR for purposes of HOEPA's APR coverage test. The Dodd-Frank Act changed this by adding section 103(bb)(1)(B) to TILA. Section 103(bb)(1)(B) instructs creditors to use one of three methods to determine the interest rate for purposes of calculating the APR for high-cost mortgage coverage. The method that the creditor must use depends on whether the transaction is fixed- or variable-rate and, if the transaction is variable-rate, the manner in which the transaction's rate may vary (*i.e.*, in accordance with an index or otherwise). Under TILA section 103(bb)(1)(B)(i) through (iii), the APR for the high-cost mortgage APR coverage test shall be determined based on the following interest rates, respectively: (1) In the case of a fixed-rate transaction in which the APR will not vary during the term of the loan, the interest rate in effect on the date of consummation of the transaction; (2) in the case of a transaction in which the rate of interest varies solely in accordance with an index, the interest rate determined by adding the index rate in effect on the date of consummation of the transaction to the maximum margin permitted at any time during the loan agreement; and (3) in the case of any other transaction in which the rate may vary at any time during the term of the loan for any reason, the interest charged on the

transaction at the maximum rate that may be charged during the term of the loan.

The Bureau proposed to implement TILA section 103(bb)(1)(B) in § 1026.32(a)(2) and related commentary. Specifically, proposed § 1026.32(a)(2)(i) would have implemented TILA section 103(bb)(1)(B)(i) concerning fixed-rate transactions; proposed § 1026.32(a)(2)(ii) would have implemented TILA section 103(bb)(1)(B)(ii) concerning transactions that vary with an index; and proposed § 1026.32(a)(2)(iii) would have implemented TILA section 103(bb)(1)(B)(i) concerning other transactions with rates that vary. As discussed in the section-by-section analysis of § 1026.32(a)(2) above, the Bureau retains existing § 1026.32(a)(2) in the final rule to provide certain categorical coverage exemptions. Thus, the Bureau adopts proposed § 1026.32(a)(2) and comments 32(a)(2)–1 and –2 as § 1026.32(a)(3) and comments 32(a)(3)–1 and –2 in the final rule, with several revisions as discussed below.

First, as noted above, TILA section 103(bb)(1)(B) describes how to calculate the APR for the high-cost mortgage APR coverage test. Thus, the statute references the “annual percentage rate of interest.” Proposed § 1026.32(a)(2) would have implemented TILA section 103(bb)(1)(B) by referencing both the “annual percentage rate” and the “transaction coverage rate,” as applicable. Proposed § 1026.32(a)(2) referenced both phrases because, as noted in the section-by-section analysis of proposed § 1026.32(a)(1)(i) above, the proposed APR coverage test contained two alternatives that would have required creditors to compare a transaction's APR or transaction coverage rate, respectively, to the average prime offer rate. Because the Bureau is not finalizing the expanded finance charge in connection with its January 2013 rulemakings, the Bureau finalizes § 1026.32(a)(3) with references only to the APR, rather than to both the APR and the transaction coverage rate.

Second, as noted above, TILA section 103(bb)(1)(B) instructs creditors to calculate a transaction's APR based on the interest rate (for a fixed-rate transaction) or index rate (for a transaction that varies with an index) in effect on the date of consummation of the transaction. Proposed § 1026.32(a)(2) would have referred not only to “consummation,” but also to “account opening” to reflect the fact that the requirement also applies to HELOCs. The Bureau received no comments on its inclusion of the phrase “account

opening” and therefore incorporates that phrase into final § 1026.32(a)(3) as proposed.

The Bureau did, however, receive a number of comments stating that the proposal's requirement to use the interest rate or (for variable-rate transactions) the index rate in effect as of consummation or account opening for purposes of calculating the APR for HOEPA coverage would be unworkable as a practical matter. These commenters noted that a creditor may not know until the last minute what index rate to use for purposes of determining HOEPA coverage, and if the index rate changed at the last minute such that the loan became a high-cost mortgage, closing would need to be delayed to comply with the requirement to provide the high-cost mortgage disclosures. The commenters further noted that a different standard—the index rate in effect as of the date the rate for the transaction is set—is used elsewhere in Regulation Z for similar APR determinations, including for determining coverage as a higher-priced mortgage loan under § 1026.35.

Under TILA section 105(a), the Bureau's regulations 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 judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. Pursuant to its authority to make adjustments to facilitate compliance with the TILA, the Bureau adopts in § 1026.32(a)(3)(i) and (ii), respectively, a requirement that creditors use the interest rate or index rate in effect as of the date the interest rate for the transaction is set (*i.e.*, the rate-set date), rather than as of consummation as provided in TILA section 103(bb)(1)(B). The Bureau recognizes that, as commenters pointed out, it likely would not be practicable for creditors to wait until consummation or account opening to determine with certainty the applicable interest or index rate to be used for the high-cost mortgage coverage test. Creditors must be able to determine with certainty prior to this time whether a transaction is a high-cost mortgage. The Bureau further acknowledges that other coverage tests under Regulation Z, such as the test for higher-priced mortgage loans under § 1026.35, require creditors to use the rate-set date and believes that it is useful to harmonize the HOEPA APR coverage test with those rules. Thus, providing that the interest or index rate be the rate in effect on the date that the

rate for the transaction is set will facilitate compliance, consistent with TILA section 105(a).

Proposed comment 32(a)(2)–1 would have made clear that creditors are required to use § 1026.32(a)(2), rather than existing guidance in comment 17(c)(1)–10.i, to calculate the APR for discounted and premium variable-rate loans. Proposed comment 32(a)(2)–2 would have clarified that the APR for a HELOC 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 would have clarified that § 1026.32(a)(2) does not require HELOC creditors to calculate the APR 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 whether the transaction is a high-cost mortgage under the APR coverage test.

Proposed comment 32(a)(2)–4 would have clarified the application of § 1026.32(a)(2) for home-equity plans that offer fixed-rate and -term repayment options. As noted in the proposal, some variable-rate HELOC plans may permit borrowers to repay a portion or all of their outstanding balance at a fixed-rate and over a specified period of time. Proposed comment 32(a)(2)–4 would have clarified that, if a HELOC has only a fixed rate during the draw period, the 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 received no comments on proposed comments 32(a)(2)–1, –2, or –4 and finalizes them as proposed, except that the Bureau renumbers the comments as 32(a)(3)–1, –2, and –5 in the final rule.

#### 32(a)(3)(i)

TILA section 103(bb)(1)(B) requires that, in connection with a fixed-rate transaction in which the APR will not vary during the term of the loan, the APR must be based on the interest rate in effect on the date of consummation. As discussed above, proposed § 1026.32(a)(2)(i) would have required that the calculation of the APR for a fixed-rate transaction be based on the interest rate in effect on the date of consummation or account opening. The

Bureau received no comments specifically addressing proposed § 1026.32(a)(2)(i). The Bureau thus finalizes § 1026.32(a)(3)(i) substantially as proposed, but with the clarification noted in the section-by-section analysis of § 1026.32(a)(3) above (*i.e.*, that the interest rate is measured as of the date the interest rate for the transaction is set).

#### 32(a)(3)(ii)

Proposed § 1026.32(a)(2)(ii) would have implemented TILA section 103(bb)(1)(B)(ii)’s requirements for calculating APRs for transactions in which the interest rate varies solely in accordance with an index. As noted above, pursuant to TILA section 103(bb)(1)(B)(ii), the APR for such transactions must be based on the interest rate that is 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 (*i.e.*, the fully-indexed rate). Proposed § 1026.32(a)(2)(ii) would have implemented this provision with the additional qualification that it applies only in the case of a transaction in which the interest rate can vary during the term of the loan or plan in accordance with an index outside the creditor’s control.

The Bureau believed that the proposed qualification would have helped to differentiate TILA section 103(bb)(1)(B)(ii) concerning rates that vary with an index from TILA section 103(bb)(1)(B)(iii) concerning rates that “may vary at any time during the term of the loan for any reason.” See the section-by-section analysis of § 1026.32(a)(3)(iii) below. Specifically, because interest rates for variable-rate HELOCs are prohibited under TILA section 137(a) (as implemented by § 1026.40(f)) from varying pursuant to an index that is within the creditor’s control, the Bureau believed that adding the language “outside the creditor’s control” to proposed § 1026.32(a)(2)(ii) would have clarified that APRs for variable-rate HELOCs should be determined according to § 1026.32(a)(2)(ii) rather than § 1026(a)(2)(iii).

Additionally, the Bureau proposed to adopt the clarification pursuant to its authority under TILA 105(a) to prevent circumvention of coverage under HOEPA. The Bureau noted that if the index were in the creditor’s control, such as the creditor’s own prime lending rate, a creditor might set a low index rate for purposes of § 1026.32(a)(2)(ii) and thereby avoid classification 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) if it were in effect at consummation. Accordingly, the proposal would have provided that, if the interest rate varies in accordance with an index that is under the creditor’s control, the creditor would determine the APR under § 1026.32(a)(2)(iii), not § 1026.32(a)(2)(ii).

Proposed comment 32(a)(2)–3 would have provided 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 would have provided that proposed § 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 would have clarified that even if the transaction has a fixed, discounted introductory or initial interest rate, proposed § 1026.32(a)(2)(ii) requires adding the contractual maximum margin to the index, without reflecting the introductory rate. Proposed comment 32(a)(2)–3.i also would have provided that the maximum margin means the highest margin that might apply under the terms of the credit transaction. For example, if the terms of the credit transaction provide that a borrower’s margin may increase by 2 percentage points if the borrower’s employment with the creditor ends, then the creditor must add that higher margin to the index to determine HOEPA coverage.

The Bureau received a number of comments on proposed § 1026.32(a)(2)(ii) and (iii). Consumer groups generally advocated that the Bureau depart from the statute by requiring creditors to use the maximum rate permitted under the terms of the mortgage loan or HELOC for all variable-rate transactions. The consumer groups observed that creditors have better information than consumers to predict when interest rates will increase and that, if a consumer could at any time during the term of the loan or credit plan be required to make payments based on an APR within the high-cost mortgage range, the consumer should receive the protections associated with such mortgages.

One industry commenter objected to the requirement to recalculate a distinct variable-rate APR solely for purposes of high-cost mortgage coverage, rather than using the composite rate calculation set forth in existing § 1026.17(c)(1)–10.i. The commenter stated that performing an extra calculation would be extremely

burdensome and would introduce additional opportunities for error into the loan origination process.

Two industry commenters objected to the requirement that the index be “outside the creditor’s control” for purposes of proposed § 1026.32(a)(2)(ii), noting that internal indices are used by certain closed-end creditors to price loans to reflect local economic conditions and by, for example, members of the Farm Credit System.

Several industry commenters requested clarification about whether rate floors or caps would cause the index to vary in a manner within the creditor’s control, such that a creditor originating a loan or credit plan with such features would need to calculate the APR for HOEPA coverage using the maximum rate that could be imposed over the life of the loan under proposed § 1026.32(a)(2)(iii). These commenters expressed particular concern about floor rates in HELOCs, noting that most variable-rate HELOCs provide for such a floor rate, even when the rate otherwise varies solely with an index outside the creditor’s control. Commenters stated that it would be inappropriate to require HELOC creditors to use the maximum rate applicable over the life of the HELOC under proposed § 1026.32(a)(2)(iii) (which often may be the State usury cap) and thereby classify large numbers of HELOCs as high-cost mortgages merely because the credit plan provides for a rate floor.

Other industry commenters requested that the Bureau specify that, if a transaction has an introductory rate that is higher than the fully-indexed rate, creditors must use the introductory rate for the APR calculation. Finally, some industry commenters expressed general concern about undue coverage of loans under HOEPA as a result of the requirement in proposed § 1026.32(a)(2)(iii) to look to the maximum rate for certain variable-rate transactions and general uncertainty about the application of proposed § 1026.32(a)(2) to HELOCs.

The Bureau is renumbering proposed § 1026.32(a)(2)(ii) as § 1026.32(a)(3)(ii), and finalizing follows. First, notwithstanding consumer groups’ comments, the Bureau declines to adopt a final rule that would require creditors generally to use the maximum rate applicable during the life of the loan (*i.e.*, as opposed to the fully-indexed rate) for determining high-cost mortgage coverage. The Bureau understands that creditors originating variable-rate transactions are required to disclose the maximum rate possible during the loan term and that industry practice typically is to disclose the highest rate

permissible under State law. The Bureau does not believe that Congress intended all such variable-rate transactions to be classified as high-cost mortgages and believes that the final rule strikes the appropriate balance between the concerns of industry and those of consumer groups.

Second, notwithstanding industry’s complaints about the burdens of performing an additional calculation, the Bureau implements in the final rule the statutory requirement to calculate APRs for high-cost mortgage coverage pursuant to the requirements set forth in TILA section 103(bb)(1)(B)(ii) and (iii), rather than in accordance with the rules for composite APRs for disclosure purposes under § 1026.17. The Bureau acknowledges that the final rule may require creditors to conduct an additional calculation to determine high-cost mortgage coverage for variable-rate transactions. However, the Bureau believes that Congress made a deliberate decision to depart from the general APR calculation, to ensure that introductory rates not be given undue weight in determining whether a transaction is a high-cost mortgage. Despite the additional burden associated with a different calculation, the Bureau does not believe that avoidance of an additional calculation is a sufficient basis to use its exception authority to depart from the clear intent of the statute.

Third, the Bureau does not adopt in the final rule the proposed requirement that variations in an index must be “outside the creditor’s control” for § 1026.32(a)(3)(ii) to apply. The Bureau is not certain, at present, that the risk of evasion requires adding this limitation. As noted, TILA section 137 and § 1026.40(f) already prohibit variable-rate HELOCs from employing an index that varies outside the creditor’s control. Use of internal indices is also restricted or prohibited for closed-end, variable-rate transactions in many circumstances. Federal regulations significantly restrict the circumstances under which federally-chartered banks and thrifts may use an index within the creditor’s control. For example, Office of the Comptroller of the Currency regulations generally require national banks to use an index for ARMs that is “readily available to, and verifiable by, the borrower and beyond the control of the bank.” 12 CFR 34.22(a). Single-family seller/servicer guides published by the Government Sponsored Enterprises (GSEs) also indicate that ARMs must be tied to publicly-available indices. Finally, the Alternative Mortgage Transactions Parity Act (AMTPA) provides restrictions on the

use of internal indices. AMTPA authorizes state-licensed or -chartered housing creditors to make alternative mortgage transactions such as ARMs in compliance with Federal rather than State law, in order to establish parity and competitive equality between State and Federal lenders. However, AMTPA provides that an ARM cannot benefit from the preemptive effect of Federal law over more restrictive State law unless the transaction uses an index outside the creditor’s control or a formula or schedule identifying the amount by which the rate or finance charge can increase and when a change can occur.<sup>87</sup> Finally, based on the public comments received, there appear to be legitimate, if infrequent, circumstances under which creditors use internally-defined indices. Adopting a requirement in this rule that effectively would require all creditors originating variable-rate transactions to use an index outside the creditor’s control would cause disruption, for example, to Farm Credit System programs. The Bureau notes, however, that it will continue to monitor whether such a restriction would be sensible as a general matter for closed-end transactions and may revisit the issue in future rulemakings.<sup>88</sup>

Comment 32(a)(3)–3 provides guidance concerning the application of § 1026.32(a)(3)(ii). Comment 32(a)(3)–3 clarifies that the interest rate for a transaction varies solely in accordance with an index even if the transaction has an introductory rate that is higher or lower than the fully-indexed rate provided that, following the first rate adjustment, the interest rate for the transaction varies solely in accordance with an index. The comment specifies that, for transactions subject to § 1026.32(a)(3)(ii), the interest rate generally is determined by adding the index rate in effect on the date that the interest rate for the transaction is set to the maximum margin for the transaction, as set forth in the agreement for the loan or plan. However, if a transaction subject to § 1026.32(a)(3)(ii) has an introductory rate that is higher than the index rate plus the maximum margin for the transaction as of the date the interest rate for the transaction is set, then the interest rate for the APR determination is the higher, initial (or “premium”) interest rate.

<sup>87</sup> See 76 FR 44226 (July 22, 2011).

<sup>88</sup> In this regard, the Bureau notes that the Board solicited comment on whether to prohibit the use of an index under a creditor’s control for a closed-end ARM in connection with its 2010 Mortgage Proposal, 75 FR 58539 (Sept. 24, 2010). The Bureau has inherited the Board’s proposal as part of the transfer of authority for TILA under the Dodd-Frank Act.

The Bureau agrees with comments received that use of the introductory rate is the appropriate measure under this circumstance and notes that this approach aligns with the definition of “fully-indexed rate” as adopted in the Bureau’s 2013 ATR Final Rule. Section 1026.43(c)(5) of that rule implements the payment calculation requirements of TILA section 129C(a), which contains the general requirement that a creditor determine a consumer’s ability to repay a mortgage loan. Specifically, § 1026.43(c)(5) and comment 43(c)(5)(i)–2 of the 2013 ATR Final Rule explain that a creditor must determine a consumer’s repayment ability with respect to substantially equal, monthly, fully amortizing payments that are based on the greater of the fully indexed rate or any introductory interest rate.

Comment 32(a)(3)–3.iii provides several examples to illustrate the rule. As described in the examples, creditors should use § 1026.32(a)(3)(ii) notwithstanding the existence of a rate floor or a rate cap on a variable-rate transaction that otherwise varies in accordance with an index. The Bureau believes that the clarification concerning rate floors and rate caps is useful and will promote clarity in applying the rule, notwithstanding the removal of the requirement that the index must be outside the creditor’s control for § 1026.32(a)(3)(ii) to apply. Comment 32(a)(3)–3.iii also notes by way of example that an open-end credit plan may not have a rate that varies other than in accordance with an index, pursuant to existing rules for home-secured open-end credit in § 1026.40(f). 32(a)(3)(iii)

Proposed § 1026.32(a)(2)(iii) would have required that, for a loan in which the interest rate may vary during the term of the loan, other than a loan as described in proposed § 1026.32(a)(2)(ii) (for credit where the rate may vary solely in accordance with an index), the annual percentage rate must be based on the maximum interest rate that may be imposed during the term of the loan. Proposed comment 32(a)(2)–3.ii would have clarified that § 1026.32(a)(2)(iii) applies when the interest rates applicable to a transaction may vary, except as described in proposed § 1026.32(a)(2)(ii). Proposed comment 32(a)(2)–3.ii thus would have specified that proposed § 1026.32(a)(2)(iii) would apply, for example, to a closed-end credit transaction when interest rate changes are at the creditor’s discretion or where multiple fixed rates apply to a transaction, such as a step-rate mortgage, in which specified fixed rates are imposed for specified periods.

The Bureau sought comment on its proposals 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 noted (as discussed above) 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 step-rate plans. The proposal noted that Regulation Z’s HELOC restrictions would effectively limit the application of proposed § 1026.32(a)(2)(iii) primarily to certain types of closed-end credit transactions. The Bureau observed 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 solicited comment on whether there were any circumstances in which the terms of a variable-rate HELOC might warrant application of proposed § 1026.32(a)(2)(iii) and, if so, whether additional clarification would be necessary to avoid unwarranted coverage of HELOCs under HOEPA.

The Bureau received no comments on proposed § 1026.32(a)(2)(iii) apart from those addressed above in connection with § 1026.32(a)(3)(ii) and thus finalizes § 1026.32(a)(3)(iii) as proposed with minor revisions for clarity.

### 32(b) Definitions

#### 32(b)(1) and (2)

#### Points and Fees—General

Section 1431(c)(1) of the Dodd-Frank Act revised and added certain items to the definition of points and fees for purposes of determining whether a transaction exceeds the HOEPA points and fees threshold. *See* TILA section 103(bb)(4).<sup>89</sup> As discussed in detail in

<sup>89</sup> As noted in the preamble to the proposal, 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, TILA section 103(bb)(4) provides that “[f]or purposes of paragraph [103(bb)](1)(B), points and fees shall include . . . \* \* \* TILA section 103(bb)(1)(B), however, concerns the calculation of the APR for HOEPA coverage. To give meaning to the statute as

the Bureau’s 2013 ATR Final Rule, section 1412 of the Dodd-Frank Act also amended TILA to add new provisions that require creditors to consider consumers’ ability to repay and that create a new type of closed-end credit transaction, a “qualified mortgage.” Among other requirements, under new TILA section 129C(b)(2)(A)(vii), to be a qualified mortgage, a transaction must have points and fees payable in connection with the loan that generally do not exceed three percent of the total loan amount. In turn, “points and fees” for purposes of qualified mortgages means “points and fees” as defined by HOEPA.<sup>90</sup>

As noted in the 2012 HOEPA Proposal, the Board proposed to implement the Dodd-Frank Act’s amendments to the definition of points and fees for both qualified mortgages and high-cost mortgages as part of its 2011 ATR Proposal. Thus, for example, the 2011 ATR Proposal would have implemented the Dodd-Frank Act’s exclusion of certain private mortgage insurance (PMI) premiums from points and fees, as well as added loan originator compensation and prepayment penalties to that definition. The Board proposed to implement those changes in § 226.32(b)(1) and (2)<sup>91</sup> and to revise and add corresponding commentary.<sup>92</sup>

amended, the Bureau interprets TILA section 103(bb)(4) as cross-referencing the points and fees coverage test in TILA section 103(bb)(1)(A)(ii), rather than the APR calculation in TILA section 103(bb)(1)(B).

<sup>90</sup> *See* TILA section 129C(b)(2)(A)(vii) and (C)(i) (setting forth points and fees requirements for qualified mortgages). TILA section 129C(b)(2)(C)(i) cross-references the definition of points and fees in TILA section 103(aa)(4), which the Dodd-Frank Act re-designated as TILA section 103(bb)(4).

<sup>91</sup> Whereas the Bureau’s Regulation Z is codified at 12 CFR part 1026, the Board’s Regulation Z was codified at 12 CFR part 226.

<sup>92</sup> *See* 76 FR 27390, 27398–406, 27481–82, 27487–89 (May 11, 2011). In its 2011 ATR Proposal, the Board noted that its proposed amendments to § 226.32(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 of the Dodd-Frank Act defining the points and fees threshold for qualified mortgages. *See id.* at 27398–99.

When the Bureau issued its 2012 HOEPA Proposal, the Bureau was in the process of finalizing the Board's 2011 ATR Proposal, including evaluating comments received concerning the Board's proposed amendments to the definition in Regulation Z of points and fees, § 226.32(b)(1) and (2). The Bureau believed that issuing separate, different proposals to implement the Dodd-Frank Act's amendments to the definition of points and fees, one for high-cost mortgages and one for qualified mortgages, had the potential to cause compliance burden and uncertainty. The Bureau nevertheless needed to address in the 2012 HOEPA Proposal certain aspects of the points and fees definition, most significantly the interaction of points and fees with the Bureau's proposed more inclusive definition of the finance charge, the application of points and fees to HELOCs, and the correction of certain internal cross-references.

To address those issues while also attempting to minimize uncertainty, the Bureau republished in the 2012 HOEPA 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 revisions only to address the issues noted above and to conform terminology to existing Regulation Z provisions. The Bureau noted in its 2012 HOEPA Proposal that it was particularly interested in receiving comments concerning any newly-proposed language and the application of the definitions in proposed § 1026.32(b)(1) and (2) to the high-cost mortgage context.

The Bureau received numerous comments concerning proposed § 1026.32(b)(1) and (2) from both industry and consumer groups, the majority of which did not specifically address newly-proposed language or to the application of the definition to the high-cost mortgage context. The comments largely reiterated comments that the Board and the Bureau had received in response to the 2011 ATR Proposal. For example, commenters generally requested greater clarity with respect to whether certain charges (*e.g.*, charges not known at consummation) must be counted in points and fees. Industry commenters also requested that the Bureau either exclude or limit the amount of certain types of charges that must be included (*e.g.*, affiliate charges and loan originator compensation). The Bureau addresses below the comments received in response to proposed § 1026.32(b)(1) and (2) in the 2012 HOEPA Proposal. Similarly, comments received concerning these same provisions as they relate to the Board's

2011 ATR Proposal are addressed in the Bureau's 2013 ATR Final Rule. The Bureau is coordinating the 2013 HOEPA and 2013 ATR Final Rules to ensure a consistent and cohesive regulatory framework for points and fees. Thus, the 2013 ATR Final Rule is publishing regulation text and commentary concerning the definition of points and fees for closed-end credit transactions, as adopted by that rulemaking in § 1026.32(b)(1). Regulation text and commentary for § 1026.32(b)(1), though discussed in the section-by-section analysis below, is not republished in this **Federal Register** notice but instead is indicated with asterisks.

### 32(b)(1)

#### Closed-End Points and Fees

Existing § 1026.32(b)(1) defines "points and fees" by listing included charges in § 1026.32(b)(1)(i) through (iv).<sup>93</sup> As discussed below, the Board's 2011 ATR Proposal would have revised § 226.32(b)(1)(i) through (iv) to reflect amendments to TILA by the Dodd-Frank Act, and would have added new § 226.32(b)(1)(v) and (vi) concerning the inclusion in points and fees of certain prepayment penalties. The Bureau's 2012 HOEPA Proposal would have amended existing § 1026.32(b)(1), as that provision was proposed in the 2011 ATR Proposal, to clarify that the charges listed in proposed § 1026.32(b)(1) are the charges that must be included in the points and fees calculation for closed-end credit transactions. (The Bureau's 2012 HOEPA Proposal would have set forth a separate definition of points and fees for HELOCs in proposed § 1026.32(b)(3)).<sup>94</sup> As discussed below, the Bureau is adopting proposed § 1026.32(b)(1) in the 2013 ATR Final Rule with certain changes to respond to concerns raised by commenters. Final § 1026.32(b)(1) as adopted in the 2013 ATR Final Rule clarifies, as proposed, that the provision applies to closed-end credit transactions.<sup>95</sup>

*Payable at or before consummation.* Section 1431(a) of the Dodd-Frank Act amended the HOEPA points and fees coverage test in TILA section

103(bb)(1)(A)(ii) by providing for the inclusion in points and fees for high-cost mortgages 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 2012 HOEPA Proposal would have implemented this change in proposed § 1026.32(a)(1)(ii). The Bureau noted in its 2012 HOEPA proposal that the practical result of this change would have been that—unless otherwise specified—any item listed in the points and fees definitions for closed- and open-end credit transactions would have been counted toward the points and fees threshold for high-cost mortgages even if the item were payable after consummation or account opening. The exceptions would have been certain mortgage insurance premiums and charges for credit insurance and debt cancellation and suspension coverage. TILA expressly states that those premiums and charges are included in points and fees only if payable at or before closing. *See* TILA section 103(bb)(1)(C) (mortgage insurance) and TILA section 103(bb)(4)(D) (credit insurance and debt cancellation and suspension coverage).

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" was 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. As discussed in the Bureau's 2013 ATR Final Rule, the Board expressed concern in the 2011 ATR Proposal that some fees that occur after closing, such as fees to modify a loan, might be deemed to be points and fees under the new framework. The Board thus requested comment in the 2011 ATR Proposal on whether other fees (*i.e.*, in addition to certain mortgage insurance premiums and charges for credit insurance and debt cancellation and suspension coverage) should be included in points and fees only if they are "payable at or before closing."

As discussed in greater detail in the Bureau's 2013 ATR Final Rule, both industry and consumer group commenters expressed concern (either in response to the 2011 ATR Proposal, the 2012 HOEPA Proposal, or both) that the general requirement to include in points and fees charges "payable in connection with the transaction" introduced uncertainty into the points and fees calculation by, for example, making it unclear whether certain charges that might not be known (or

<sup>93</sup> In brief, these existing provisions require the inclusion in points and fees for high-cost mortgages of all non-interest items included in the finance charge (§ 1026.32(b)(1)(i)), all compensation paid to mortgage brokers (§ 1026.32(b)(1)(ii)), real estate-related charges paid to an affiliate of the creditor (§ 1026.32(b)(1)(iii)), and certain credit insurance and debt suspension and cancellation premiums (§ 1026.32(b)(1)(iv)).

<sup>94</sup> The Bureau adopts proposed § 1026.32(b)(3) as § 1026.32(b)(2) in this final rule.

<sup>95</sup> Proposed § 1026.32(b)(3) defining points and fees for HELOCs is finalized as § 1026.32(b)(2) in the 2013 HOEPA Final Rule. *See* the section-by-section analysis of § 1026.32(b)(2) below.

knowable) as of consummation would need to be included. One industry commenter thus recommended that the Bureau clarify that items included in the finance charge but paid after consummation are carved out of points and fees. One consumer group commenter suggested that the Bureau replace the “payable in connection with the transaction” phrasing with the general requirement to include in points and fees charges “known at or before” consummation or account opening. The commenter noted that the “known at or before” standard would (1) Clarify that charges financed through the loan amount are included in points and fees, (2) prevent creditors from evading the points and fees test by requiring consumers to pay charges after consummation, and (3) enable creditors to calculate the amount of points and fees with certainty at or before consummation.

As discussed in the 2013 ATR Final Rule, the Dodd-Frank Act provides that for the points and fees tests for both high-cost mortgages and qualified mortgages, the charges “payable in connection with” the transaction are included in points and fees. See TILA sections 103(bb)(1)(A)(ii) (high-cost mortgages) and 129C(b)(2)(A)(vii) (qualified mortgages). The Bureau appreciates, however, that creditors need certainty in calculating points and fees so they can ensure that they are not exceeding the points and fees thresholds for high-cost mortgages (or that they are not exceeding the points and fees cap for qualified mortgages). The Bureau thus interprets the “in connection with” requirement in TILA section 103(bb)(1)(A)(ii) for high-cost mortgages as limiting the universe of charges that need to be included in points and fees.<sup>96</sup> Specifically, to clarify when charges or fees are “in connection with” a transaction, the Bureau is specifying in § 1026.32(b)(1) in the 2013 ATR Final Rule that fees or charges are included in points and fees only if they are “known at or before consummation.”

As discussed in detail in the 2013 ATR Final Rule, the Bureau also is adding new comment 32(b)(1)–1 to explain when fees or charges are known at or before consummation. The comment explains that charges for a subsequent loan modification generally are not included in points and fees because, at consummation, the creditor would not know whether a consumer would seek to modify the loan and

therefore would not know whether charges in connection with a modification would ever be imposed.<sup>97</sup> Comment 32(b)(1)–1 also clarifies that the maximum prepayment penalties that may be charged or collected under the terms of a mortgage loan are known at or before consummation and are included in points and fees under § 1026.32(b)(1)(iv), even though the consumer will pay them, if ever, sometime after consummation.<sup>98</sup> In addition, comment 32(b)(1)–1 notes that, under § 1026.32(b)(1)(i)(C)(1) and (iii), certain premiums or other charges for PMI or credit insurance must be included in points and fees only if they are payable at or before consummation. Thus, even if the amounts of such premiums or other charges are known at or before consummation, they are included in points and fees only if they are payable at or before consummation. 32(b)(1)(i)

Prior to the Dodd-Frank Act, TILA section 103(aa)(4)(A) provided that points and fees includes all items included in the finance charge, except interest or the time-price differential. This provision (the finance charge prong of points and fees) is implemented in existing § 1026.32(b)(1)(i). The Dodd-Frank Act did not specifically amend TILA section 103(aa)(4)(A). Nevertheless, both the Board’s 2011 ATR Proposal and the Bureau’s 2012 HOEPA Proposal proposed several revisions to § 1026.32(b)(1)(i) and comment 32(b)(1)(i)–1.

First, in its 2011 ATR Proposal, the Board proposed to revise existing language in Regulation Z that requires the inclusion in points and fees of “all items required to be disclosed under § 1026.4(a) and 1026.4(b).” 12 CFR 1032(b)(1)(i). Because § 1026.4 does not itself require disclosure of the finance charge, the Board proposed to revise this language to read: “all items considered to be a finance charge under § [1026.4(a)] and [1026.4(b)].” The Board also proposed certain clarifying changes to comment 32(b)(1)(i)–1.

In addition to re-publishing the Board’s proposed change to

§ 1026.32(b)(1)(i), proposed § 1026.32(b)(1)(i) in the Bureau’s 2012 HOEPA Proposal would have amended the finance charge prong of the points and fees definition to ensure that additional charges were not included in points and fees as a result of the more inclusive definition of the finance charge proposed in the Bureau’s 2012 TILA–RESPA Integration Proposal. The Bureau believed that the proposed amendment to § 1026.32(b)(1)(i) was necessary to avoid a potentially unwarranted expansion in HOEPA coverage through an increase in the finance charge.

In response both to the Board’s 2011 ATR Proposal and to Bureau’s 2012 HOEPA Proposal, several industry commenters expressed concern that the proposed definition of points and fees was overbroad because it included all items considered to be a finance charge. The commenters asserted that several items that are included in the finance charge under § 1026.4(b) are vague or inapplicable in the context of mortgage transactions, or that they duplicate items specifically addressed in other provisions of the points and fees test, thus making the points and fees calculation internally inconsistent. Several industry commenters also requested clarification about whether specific fees and charges are included in points and fees. For example, at least two commenters asked that the Bureau clarify whether (and if so, to what extent) interest, real estate agents’ fees, settlement agent costs, hazard insurance premiums, property taxes, § 1026.4(c)(7) charges, appraisal fees, servicing fees, mortgage insurance premiums, discounts for payment other than by credit, and various optional charges, are included in points and fees. The Bureau responds to these comments below, but generally notes that the finance charge as defined in § 1026.4 continues to be the starting point for points and fees. Once a creditor has determined whether a charge would be included in points and fees as a finance charge that is known at or before consummation, then a creditor should apply the more specific points and fees provisions in § 1026.32(b)(1)(i)(A) through (F) to determine whether the charge is excluded. Likewise, even if a creditor has determined that a charge is excluded from points and fees because it is not a finance charge, the creditor must apply the more specific points and fees provisions in § 1026.32(b)(1)(ii) through (vi) to determine whether the charge nonetheless must be included in points and fees.

In response to the 2012 HOEPA Proposal, some industry commenters

<sup>96</sup> The Bureau is adopting the same interpretation for points and fees for qualified mortgages in the 2013 ATR Final Rule. See the section-by-section analysis of § 1026.32(b)(1) therein.

<sup>97</sup> A few industry commenters requested that the Bureau clarify that servicing charges are excluded from points and fees. The Bureau notes that the guidance in comment 32(b)(1)–1 as adopted in the 2013 ATR Final Rule applies equally to these types of charges; thus, they must be included in points and fees only if known at or before consummation.

<sup>98</sup> The Bureau notes that the inclusion of prepayment penalties in points and fees is an exception to the general rule that a creditor must count only those charges that the creditor knows will be imposed. This is a result of the fact that TILA expressly requires the maximum prepayment penalties that may be charged in connection with a transaction to be counted in points and fees.

also generally urged the Bureau to clarify that additional charges would not be brought into points and fees merely by operation of the Bureau's proposed more inclusive definition of the finance charge. Other commenters, particularly consumer groups, expressed dissatisfaction with the Bureau's proposed method for addressing the more inclusive finance charge in § 1026.32(b)(1)(i), generally stating that the Bureau's approach was needlessly complicated and that the Dodd-Frank Act's exclusion of bona fide third-party charges in TILA section 103(bb)(1)(A)(ii) adequately addressed any concerns about unwarranted fees being brought into the points and fees definition through the expanded finance charge.

As discussed in part III above, the Bureau will be determining whether to adopt its proposed more inclusive finance charge definition when it finalizes the 2012 TILA-RESPA Integration Proposal, rather than in January 2013. Accordingly, the Bureau neither addresses comments relating to, nor finalizes in this rulemaking, the 2012 HOEPA Proposal's amendment to the definition of points and fees for closed-end credit transactions to address the more Bureau's proposed more inclusive finance charge.

The Bureau otherwise is adopting proposed § 1026.32(b)(1)(i) in the 2013 ATR Final Rule substantially as proposed in the 2011 ATR Proposal and the 2012 HOEPA Proposal, but with certain additions and clarifications in the commentary to § 1026.32(b)(1)(i) (as well as in other parts of the points and fees calculation) to address commenters' requests for clarification about whether certain fees are included in or excluded from the calculation. These additions and clarifications also are discussed in detail in the section-by-section analysis of § 1026.32(b)(1)(i) in the Bureau's 2013 ATR Final Rule.

With respect to certain of the commenters' specific concerns about whether particular items (*e.g.*, discounts offered to induce payment for a purchase by cash and settlement agent charges), the Bureau notes that creditors should follow § 1026.4 for when such charges must be included in the finance charge. If they are not included in the finance charge, they would not be included in points and fees. Moreover, as discussed below and in new comment 32(b)(1)(i)(D)-1, certain settlement agent charges may also be excluded from points and fees as bona fide third-party charges that are not retained by the creditor, loan originator, or an affiliate of either.

#### 32(b)(1)(i)(A)

TILA section 103(aa)(4)(A) historically has provided that points and fees includes all items included in the finance charge, except interest or the time-price differential. This provision (the finance charge prong of points and fees) is implemented in existing § 1026.32(b)(1)(i). For organizational purposes, the Board in its 2011 ATR Proposal set forth new § 226.32(b)(1)(i)(A) to implement the pre-existing exclusion of interest from points and fees. In its 2012 HOEPA Proposal, the Bureau republished the Board's proposed § 226.32(b)(1)(i)(A) without change as § 1026.32(b)(1)(i)(A). The Bureau adopts proposed § 1026.32(b)(1)(i)(A) in the 2013 ATR Final Rule, as proposed.

#### 32(b)(1)(i)(B)

The Dodd-Frank Act did not amend TILA section 103(aa)(4)(A) concerning the inclusion in points and fees of non-interest items in the finance charge. However, the Dodd-Frank Act added several provisions to TILA that provide for the exclusion from points and fees of certain items that otherwise would be included in points and fees under the finance charge prong. One such item is premiums for government mortgage insurance.<sup>99</sup> Specifically, section 1431 of the Dodd-Frank Act added new TILA section 103(bb)(1)(C), which excludes all government mortgage insurance premiums from the calculation of points and fees. Because such premiums otherwise would be included in points and fees as an item included in the finance charge, the Board in its 2011 ATR Proposal proposed to implement new TILA section 103(bb)(1)(C) in new § 226.32(b)(1)(i)(B), as an exclusion from the finance charge prong of points and fees.<sup>100</sup>

In implementing the government mortgage insurance premium exclusion provided by new TILA section 103(bb)(1)(C), the Board proposed to exclude from points and fees not only mortgage insurance *premiums* under government programs, but also charges for mortgage *guaranties* under government programs.<sup>101</sup> The Board stated that it interpreted the statute to exclude such guaranties, and that its proposal was supported by its authority

<sup>99</sup> These other items are discussed in the section-by-section analysis of § 1026.32(b)(1)(i)(C) through (F) below.

<sup>100</sup> See 76 FR 27390, 27400-02, 27481, 27487-88 (May 11, 2011). The Board's proposed § 226.32(b)(1)(i)(B) also would have excluded certain PMI premiums from points and fees. Those exclusions are addressed in the section-by-section analysis of § 1026.32(b)(1)(i)(C) below.

<sup>101</sup> *Id.* at 27400-01.

under TILA section 105(a) to make adjustments to facilitate compliance with and effectuate the purposes of TILA. Both the U.S. Department of Veterans Affairs (VA) and the USDA expressed concerns to the Board that, if charges for guaranties provided by those agencies and State agencies were included in points and fees, their loans might exceed high-cost mortgage thresholds and the cap for qualified mortgages, thereby disrupting these programs and jeopardizing an important source of credit for many consumers.

The Bureau's 2012 HOEPA Proposal would have implemented the exclusion from points and fees of government mortgage insurance premiums and guaranty fees as proposed by the Board in § 226.32(b)(1)(i)(B) and comment 32(b)(1)(i)-2, with only minor wording changes for consistency with Regulation Z. In excluding guaranty fees, the Bureau, like the Board in its 2011 ATR Proposal, would have exercised its authority under TILA section 105(a) to make adjustments to facilitate compliance with and effectuate the purposes of TILA. For the same reasons stated by the Board in its 2011 ATR Proposal, and as further explained in the Bureau's 2013 ATR Final Rule, the Bureau believes that exercising its authority under TILA section 105(a) to exclude government guaranty fees from points and fees is appropriate to ensure access to credit through Federal and State government programs.

The Bureau did not receive any comments in response to its 2012 HOEPA Proposal objecting to the exclusion from points and fees of government mortgage insurance premiums or guaranty fees.<sup>102</sup> The Bureau is adopting these exclusions in the Bureau's 2013 ATR Final Rule substantially as proposed in the 2011 ATR and 2012 HOEPA Proposals, but with clarifying revisions that are discussed in greater detail in the section-by-section analysis of § 1026.32(b)(1)(i)(B) in the 2013 ATR Final Rule. For instance, the Bureau is adding an example to comment 32(b)(1)(i)(B)-1 to clarify that mortgage guaranty fees under government programs, such as VA and USDA funding fees, are excluded from points and fees.

#### 32(b)(1)(i)(C)

As added by the Dodd-Frank Act, TILA section 103(bb)(1)(C) excludes certain PMI premiums from points and fees for high-cost mortgages and

<sup>102</sup> As discussed in the section-by-section analysis of § 1026.32(b)(1)(i)(C), however, the Bureau received comments concerning the different treatment for points and fees of government and PMI premiums.

qualified mortgages. Specifically, TILA section 103(bb)(1)(C)(ii) provides that points and fees shall exclude any amount of PMI premiums payable at or before consummation that is 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, provided that the premium, charge, or fee is required to be refundable on a pro-rated basis and the refund is automatically issued upon notification of the satisfaction of the underlying mortgage loan. TILA section 103(bb)(1)(C)(iii) provides for the exclusion from points and fees of any mortgage insurance premium paid by the consumer after consummation. As with government mortgage insurance premiums and guarantees, because such PMI premiums otherwise would be included in points and fees as an item included in the finance charge, the Board proposed to implement the new exclusion in § 226.32(b)(1)(i)(B) and comments 32(b)(1)(i)-3 and -4, as an exclusion from the finance charge prong of points and fees.<sup>103</sup>

The 2012 HOEPA Proposal's proposed § 1026.32(b)(1)(i)(B) and comments 32(b)(1)(i)-3 and -4 republished the Board's proposed provisions concerning PMI premiums with only minor changes for consistency with Regulation Z. The Bureau's 2012 HOEPA Proposal thus would have excluded from points and fees, as required by amended TILA section 103(bb)(1)(C): (1) All up-front PMI premiums, but only to the extent that such premiums did not exceed government-sponsored premiums and were refundable to the consumer on a pro rata basis, and (2) all PMI premiums payable after consummation.

Several industry commenters objected to the 2012 HOEPA Proposal's treatment of PMI premiums for closed-end points and fees. Industry commenters generally voiced the same objections to this provision that they voiced in response to the Board's 2011 ATR Proposal. Specifically, some industry commenters criticized what they viewed as different treatment of PMI and government insurance premiums and argued that PMI premiums should be excluded from points and fees altogether, even if the premiums do not satisfy the statutory standard for exclusion. These commenters stated that PMI provides substantial benefits to consumers and noted that the 2012 HOEPA Proposal was likely to incentivize creditors to originate FHA loans rather than loans requiring PMI if FHA premiums are given more favorable treatment in points and fees. One such commenter stated

that driving consumers to FHA loans would be problematic because FHA's insurance book has already grown too large and is at risk of becoming actuarially unsound. Another commenter noted that comparing up-front mortgage insurance premiums for conventional loans to such premiums for FHA loans is problematic for consumers because FHA premiums are structured to have an up-front payment followed by monthly payments, whereas with PMI a consumer can elect to pay a single, up-front premium, to pay on a monthly basis, or to pay through rate. Under the proposal, the commenter argued, consumers would be less likely to be able to choose a single, up-front premium. One commenter argued that tying PMI premiums to up-front government premiums would require conventional lenders to become experts in FHA loans. Some such commenters suggested that all mortgage insurance premiums payable at or before consummation, whether government or private and regardless of amount, should be excluded from points and fees.

Other industry commenters objected to the Bureau's proposed implementation of the statutory distinction that would favor refundable PMI premiums over nonrefundable premiums. These commenters noted that nonrefundable premiums tend to be less expensive for consumers than refundable premiums.

Finally, some commenters expressed uncertainty as to the precise rule for inclusion of PMI premiums payable at or before consummation in points and fees. It was noted that proposed § 1026.32(b)(1)(i)(B)(2), as written, could have been interpreted to require inclusion of the entire PMI premium if it exceeded the FHA insurance premium, rather than merely the inclusion of the portion of the premium in excess of the FHA premium. A few commenters also expressed uncertainty about how to complete the FHA premium comparison when originating conventional loans, particularly loans that would not qualify for FHA insurance (e.g., because their principal balance is too high).

These comments on the Bureau's 2012 HOEPA Proposal generally were consistent with concerns raised in response to the Board's 2011 ATR Proposal. Thus, commenters' concerns primarily are addressed in the section-by-section analysis of § 1026.32(b)(1)(i)(C) in the 2013 ATR Final Rule. As discussed in greater detail therein, the Bureau is finalizing proposed § 1026.32(b)(1)(i)(B) concerning PMI premiums in the 2013

ATR Final Rule substantially as proposed in the 2011 ATR and 2012 HOEPA Proposals. However, the Bureau finalizes the provision in § 1026.32(b)(1)(i)(C) and divides it into two parts. The first part, § 1026.32(b)(1)(i)(C)(1), addresses PMI premiums payable at or before consummation. The second part, § 1026.32(b)(1)(i)(C)(2), addresses PMI premiums payable after consummation.

As noted in the 2013 ATR Final Rule, with respect to the comments requesting that all PMI premiums be excluded from points and fees, the Bureau notes that Congress enacted TILA section 103(bb)(1)(C), which created different treatment of government and PMI premiums and prescribed specific and detailed conditions for excluding PMI premiums (*i.e.*, based on the amount of the premium and whether it is refundable). The Bureau does not believe it would be appropriate to exercise its exception authority to reverse Congress's decision.

The Bureau acknowledges, however, that there is a need for clarification as to what portion of any PMI premium payable at or before consummation must be included in points and fees. Thus, as discussed more fully in the 2013 ATR Final Rule, the Bureau adopts in that rulemaking clarifying changes that, among other things, specify that only the portion of a PMI premium payable at or before consummation that exceeds the government premium is included in points and fees. The Bureau also adopts clarifying changes that specify that creditors originating conventional loans—even such loans that are not eligible to be FHA loans (*i.e.*, because their principal balance is too high)—should look to the permissible up-front premium amount for FHA loans, as implemented by applicable regulations and other written authorities issued by the FHA (such as Mortgagee Letters). For example, pursuant to HUD's Mortgagee Letter 12-4 (published March 6, 2012), the allowable up-front FHA premium for single-family homes is 1.75 percent of the base loan amount.<sup>104</sup> Finally, the Bureau clarifies that only the portion of the single or up-front PMI premium in excess of the allowable FHA premium (*i.e.*, rather than any monthly premium or portion thereof) must be included in points and fees.

32(b)(1)(i)(D)

TILA section 103(bb)(1)(A)(ii) excludes from points and fees for

<sup>104</sup> See Department of Housing and Urban Development, Mortgagee Letter 12-4 (Mar. 6, 2012), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=12-04ml.pdf>.

<sup>103</sup> See 76 FR 27390, 27401-02 (May 11, 2011).



purposes of determining whether a transaction is a high-cost mortgage bona fide third-party charges not retained by the creditor, loan originator, or an affiliate of either. This bona fide third-party charge exclusion from points and fees for high-cost mortgages is identical to the exclusion of such charges from points and fees for qualified mortgages under TILA section 129C(b)(2)(C), which the Board proposed to implement in its 2011 ATR Proposal in § 226.43(e)(3)(ii)(A).<sup>105</sup> Such a bona fide third-party charge would include, for example, a counseling fee paid by the consumer to a HUD-certified homeownership counseling organization to receive the counseling required for high-cost mortgages under § 1026.34(a)(5).<sup>106</sup> For consistency and to ease compliance, the Bureau proposed in its 2012 HOEPA Proposal to implement the bona fide third-party charge exclusion for high-cost mortgages in proposed § 1026.32(b)(5)(i) in a manner that mirrored in all significant respects the Board's proposed § 226.43(e)(3)(ii)(A) concerning such charges.<sup>107</sup>

Specifically, proposed § 1026.32(b)(5)(i) in the 2012 HOEPA Proposal would have excluded from the points and fees calculation for high-cost mortgages any bona fide third-party charge not retained by the creditor, loan originator, or an affiliate of either, unless the charge was a PMI premium that was required to be included in closed-end points and fees under proposed § 1026.32(b)(1)(i)(B). As just discussed in the section-by-section analysis of § 1026.32(b)(1)(i)(C), the Dodd-Frank Act amended TILA to add section 103(bb)(1)(C)(ii), which excludes only certain PMI premiums from the points and fees calculation for high-cost mortgages. Thus, the Bureau would have implemented 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 PMI premiums must be included in points and fees for closed-end credit transactions as set forth in proposed

§ 1026.32(b)(1)(i)(B).<sup>108</sup> In other words, where one portion of the statutory points and fees provision would exclude the charge (the general provision) and another would include it (the specific provision), the Bureau interpreted TILA to require the charge to be included in the calculation.

Proposed comment 32(b)(5)(i)–1 would have clarified 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 would have provided 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)–3 addressing PMI premiums mirrored proposed comment 43(e)(3)(ii)–2 in the Board's 2011 ATR Proposal, except that proposed comment 32(b)(5)(i)–3 would have provided 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 would have specified that the comment applies to closed-end transactions.

The Bureau received two main categories of comments concerning proposed § 1026.32(b)(5)(i). First, several industry commenters stated that Congress intended the “bona fide third-party charge” exclusion to establish a “bona fide” standard, rather than a “reasonable” standard, for the exclusion of all third-party charges from points and fees for high-cost mortgages (and qualified mortgages). These comments are addressed below in the section-by-section analysis of § 1026.32(b)(1)(iii), which deals with the inclusion in points and fees of certain real estate-related charges paid to the creditor or an affiliate of the creditor.<sup>109</sup>

Second, GSE commenters argued, as they did in comments submitted in response to the Board's 2011 ATR Proposal, that loan-level price adjustments (LLPAs) should be excluded from points and fees for high-cost mortgages as bona fide third-party charges. LLPAs are made by Fannie Mae and Freddie Mac when purchasing loans to offset perceived risks, such as a high loan-to-value ratio (LTV) or low credit score, among many other risk factors. The Board's 2011 ATR Proposal solicited comment on whether such charges, including charges in

connection with similar risk-based price adjustments for mortgages held in portfolio, should be excluded from points and fees for qualified mortgages. As discussed in detail in the 2013 ATR Final Rule, creditors may, but are not required to, increase the interest rate charged to the consumer so as to offset the impact of the LLPAs or increase the costs to the consumer in the form of points to offset the lost revenue resulting from the LLPAs. GSE commenters thus argued that these points should not be counted in points and fees for high-cost mortgages (or for qualified mortgages) under the exclusion for “bona fide third party charges not retained by the loan originator, creditor, or an affiliate of either” in TILA section 103(bb)(1)(A)(ii) (or TILA section 129C(b)(2)(C)(i) for qualified mortgages). The GSE commenters noted that LLPAs did not exist when § 1026.32 was originally adopted, so there has been no guidance on whether such charges should be included in, or excluded from, points and fees. The commenters stated that the lack of guidance is now an issue because of the revised points and fees definition and lower threshold for points and fees for high-cost mortgages following the Dodd-Frank Act.

The GSE commenters, as well as certain industry commenters, worried that, without an exclusion for LLPAs, points and fees would quickly be consumed by these fees and loan originator compensation, such that loans could have trouble staying under the general 5 percent high-cost mortgage points and fees threshold. The GSE commenters stated that LLPAs meet the definition of a bona fide third-party charge as that term was proposed in the 2011 ATR and 2012 HOEPA Proposals, because the creditor does not retain the charge. In addition, LLPAs are set fees that are transparent and accessible via the GSEs' Web sites, so there is little risk of abuse. The commenters acknowledged that some creditors charge similar risk-based price adjustments to consumers even when holding loans in portfolio, but they argued that such risk-based price adjustments also could be excluded from points and fees if they were made publicly available, as the GSE's charges are, or disclosed to consumers as a third-party fee on the Bureau's proposed TILA-RESPA integrated disclosure form. Certain industry comments suggested that the Bureau clarify that LLPAs may be excluded from points and fees as bona fide discount points. Consumer groups did not comment on this issue.

<sup>105</sup> See 76 FR 27390, 27465 (May 11, 2011).

<sup>106</sup> This was noted in § 1026.34(a)(5)(v) and comment 34(a)(5)(v)-1 of the 2012 HOEPA Proposal.

<sup>107</sup> Proposed § 1026.32(b)(5)(i) in the 2012 HOEPA Proposal would have differed from the proposed § 226.43(e)(3)(ii)(A) in the Board's 2011 ATR Proposal in one minor respect to address the application of HOEPA and, in turn, the bona fide third-party charge exclusion, to HELOCs. See the section-by-section analysis of § 1026.32(b)(2)(i)(D) below.

<sup>108</sup> See *id.* (proposing the same caveat to the bona fide third-party charge exclusion for qualified mortgages).

<sup>109</sup> This issue is also addressed in the section-by-section analysis of § 1026.32(b)(1)(iii) in the 2013 ATR Final Rule.

To ensure a streamlined definition of points and fees in the high-cost mortgage and qualified mortgage contexts, the Bureau is adopting proposed § 226.43(e)(3)(ii)(A) (from the 2011 ATR Proposal) and proposed § 1026.32(b)(5)(i) as applied to closed-end credit transactions (from the 2012 HOEPA Proposal) in § 1026.32(b)(1)(i)(D) in the 2013 ATR Final Rule.<sup>110</sup> The Bureau believes that this placement is sensible in the context of both rulemakings given that the items excluded through the bona fide third-party charge exclusion would be counted in points and fees, if at all, as a finance charge.

Section 1026.32(b)(1)(i)(D) as adopted in the 2013 ATR Final Rule retains the proposed caveat that the exclusion of bona fide third-party charges from points and fees is subject to the limitation that certain amounts of PMI premiums must sometimes be included in the calculation pursuant to § 1026.32(b)(1)(i)(C). In addition, the 2013 ATR Final Rule adopts § 1026.32(b)(1)(i)(D) with two new comments reflecting that the exclusion for bona fide third-party charges also is subject to the more specific points and fees provisions in § 1026.32(b)(1)(iii) and (iv). As adopted in the 2013 ATR Final Rule, § 1026.32(b)(1)(i)(D) thus provides that a bona fide third-party charge not retained by the creditor, loan originator, or an affiliate of either is excluded from points and fees unless the charge is required to be included under § 1026.32(b)(1)(i)(C) (PMI premiums), (iii) (certain real estate-related fees), or (iv) (credit insurance premiums). The final rule thus adheres to the approach that the specific statutory provisions regarding PMI (TILA section 103(bb)(1)(C)), certain real estate-related fees (TILA section 103(bb)(4)(C)), and credit insurance premiums (TILA section 103(bb)(4)(D)) should govern whether these charges are included in points and fees, rather than the more general provisions regarding the exclusion of bona fide third-party charges in TILA sections 103(bb)(1)(A)(ii) and 129C(b)(2)(C) for high-cost mortgages and qualified mortgages, respectively.

As discussed in detail in the 2013 ATR Final Rule, the Bureau acknowledges that TILA sections 103(bb)(1)(A)(ii) and 129C(b)(2)(C) concerning bona fide third-party charges could be read to provide for a two-step calculation of points and fees. First, the

creditor would calculate points and fees as defined in TILA section 103(bb)(4). Second, the creditor would exclude all bona fide third-party charges not retained by the mortgage originator, creditor, or an affiliate of either, as provided in TILA sections 103(bb)(1)(A)(ii) and 129C(b)(2)(C). Under this reading, certain charges—such as for private mortgage insurance premiums—could initially, in step one, be included in points and fees. In step two, these charges would be excluded if they were bona fide third-party charges.

However, to give meaning to the specific statutory provisions regarding mortgage insurance, real estate related fees, and credit insurance, the Bureau believes that the better reading is that these specific provisions should govern whether such charges are included in points and fees, rather than the general provisions excluding certain bona fide third-party charges. In support of this approach, the Bureau also invokes its authority under TILA section 105(a) to make such adjustments and exceptions as are necessary and proper to effectuate the purposes of TILA. The Bureau believes that Congress included specific provisions regarding these types of fees in part to deter the imposition of excessive fees. Allowing exclusion of these fees and charges if they are “bona fide”—without meeting any of the other conditions specified by Congress—would undermine this purpose. Additionally, it would in effect nullify the specific conditions Congress set forth for exclusion from the points and fees calculation.

As noted above, GSE commenters argued that points charged by creditors to offset LLPAs should be excluded from points and fees as bona fide third-party charges. In setting the purchase price for loans, the GSEs impose LLPAs to offset certain credit risks, and creditors may—but are not required to—recoup the revenue lost as a result of the LLPAs by increasing the costs to consumers in the form of points. As noted in the 2013 ATR Final Rule, the Bureau believes that the manner in which creditors respond to LLPAs is better viewed as a fundamental component of how the pricing of a mortgage loan is determined, rather than as a third-party charge. As the Board noted in its 2011 ATR Proposal, allowing creditors to exclude points charged to offset LLPAs could create market imbalances between loans sold on the secondary market and loans held in portfolio. While such imbalances could be addressed by excluding risk adjustment fees more broadly, including such fees charged by creditors for loans held in portfolio, the Bureau agrees with

the Board that this could create compliance and enforcement difficulties. Thus, the Bureau concludes that, if points are charged to offset LLPAs, those points may not be excluded from points and fees as bona fide third-party charges. However, to the extent that creditors offer consumers the opportunity to pay points to lower the interest rate that the creditor would otherwise charge to recover the lost revenue from the LLPAs, such points may be excluded from points and fees as bona fide discount points if they satisfy the requirements of § 1026.32(b)(1)(i)(E) or (F).

In light of the foregoing considerations, the Bureau is finalizing the exclusion of bona fide third-party charges from closed-end points and fees in § 1026.32(b)(1)(i)(D) in the 2013 ATR Final Rule, with comments 32(b)(1)(i)(D)–1 through –4 providing further guidance concerning the interaction of the bona fide third-party charge exclusion with other points and fees provisions. See comments 32(b)(1)(i)(D)–1 (third-party settlement agent charges), –2 (PMI premiums), –3 (real estate-related charges), and –4 (credit insurance premiums).

#### 32(b)(1)(i)(E)

#### Exclusion of Up to Two Bona Fide Discount Points

Section 1431(d) of the Dodd-Frank Act added new section 103(dd)(1) to TILA, which permits a creditor to exclude from points and fees for high-cost mortgages up to and including two bona fide discount points payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage's interest rate will be discounted does not exceed by more than one percentage point (1) the average prime offer rate or (2) for loans secured by personal property, the average rate on a loan for which insurance is provided under Title I of the National Housing Act.<sup>111</sup> New TILA section 103(dd)(1) for high-cost mortgages is substantially similar to new TILA section 129C(b)(2)(C)(ii)(I). TILA section 129C(b)(2)(C)(ii)(I) provides for the exclusion of up to and including two bona fide discount points from points and fees for qualified mortgages, but only if the interest rate for the transaction before the discount does not exceed by more than one percentage point the average prime offer rate.<sup>112</sup> The only difference between

<sup>110</sup> The exclusion of bona fide third-party charges from points and fees for HELOCs, which also was proposed in § 1026.32(b)(5)(i) in the 2012 HOEPA Proposal, is finalized in § 1026.32(b)(2)(1)(D), as discussed below.

<sup>111</sup> See TILA section 103(dd)(1)(A) (average prime offer rate) and (B) (average rate on loans insured under Title I).

<sup>112</sup> See 76 FR 27390, 27465–67, 27485, 27504 (May 11, 2011).

new TILA section 103(dd)(1) (high-cost mortgages) and new TILA section 129C(b)(2)(C)(ii)(I) (qualified mortgages) is that the high-cost mortgage provision provides for a special calculation to determine whether discount points may be excluded from points and fees for loans secured by personal property.

In the 2012 HOEPA Proposal, the Bureau proposed to implement the exclusion of up to two bona fide discount points from points and fees for high-cost mortgages in proposed § 1026.32(b)(5)(ii)(A)(1) (loans secured by real property) and (2) (loans secured by personal property).<sup>113</sup> The proposed provision generally would have been consistent with proposed § 226.43(e)(3)(ii)(B) in the Board's 2011 ATR Proposal, which would have implemented new TILA section 129C(b)(2)(C)(ii)(I) for qualified mortgages. Specifically, proposed § 1026.32(b)(5)(ii)(A)(1) would have permitted a creditor to exclude from points and fees for high-cost mortgages up to two bona fide discount points payable by the consumer, provided that the interest rate for the closed- or open-end credit transaction without such discount points would not exceed by more than one percentage point the average prime offer rate as defined in § 1026.35(a)(2). Proposed § 1026.32(b)(5)(ii)(A)(2) would have implemented the special calculation for determining whether up to two discount points could be excluded from the high-cost mortgage points and fees calculation for transactions secured by personal property. Thus, under proposed § 1026.32(b)(5)(ii)(A)(2) a creditor extending credit secured by personal property could exclude from points and fees up to two bona fide discount points payable by the consumer, provided that the interest rate for the closed- or open-end credit transaction without such discount points would 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.*).

Proposed comment 32(b)(5)(ii)–1 would have clarified 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 met 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 would have provided 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 would have cross-referenced proposed comments 32(a)(1)(i)–1 and –2 for closed- and open-end credit transactions, respectively, for guidance as to determining the applicable average prime offer rate. Proposed comment 32(b)(5)(ii)–1 also would have cross-referenced proposed comments 43(e)(3)(ii)–3 and –4 for examples of how to calculate bona fide discount points for closed-end credit transactions secured by real property.

The Bureau received several comments concerning the exclusion of discount points from points and fees for high-cost mortgages. The comments, which were from industry, generally requested that the Bureau use its authority to eliminate or loosen the requirement that the interest rate prior to the discount not exceed the average prime offer rate by the statutorily-prescribed amount. The commenters stated that the starting interest rate requirement is too restrictive and will mean that, in many cases, creditors will not be able to deduct any discount points from points and fees. Thus, for example, one commenter suggested that one percentage point be added to the margin above the average prime offer rate for jumbo loans and loans on second homes, which tend to have higher interest rates. A few industry commenters also requested that the Bureau clarify that discount points that meet the criteria are excluded from points and fees regardless of who pays them (*i.e.*, the consumer, the seller, or another person, such as the consumer's employer).<sup>114</sup> The Bureau did not receive any comments specifically on proposed comment 32(b)(5)(ii)–1; however, one industry commenter requested that the Bureau clarify whether the examples in proposed comments 43(e)(3)(ii)–3 and –4 in the 2011 ATR Proposal for performing the discount point calculation apply in the high-cost mortgage context.

As noted in the 2013 ATR Final Rule, which received similar comments concerning the exclusion of bona fide discount points from the points and fees calculation for qualified mortgages, the

starting interest rate limitations are prescribed in the statute. The Bureau recognizes that these limitations may circumscribe the ability of consumers to purchase more discount points to lower their interest rates. Nevertheless, Congress apparently concluded that there was a greater probability of consumer injury when consumers purchased more than two discount points or when consumers use discount points to buy down interest rates that exceed the average prime offer rate by more than two percentage points. In the absence of data or specific information suggesting a contrary conclusion, the Bureau declines to use its authority to adjust the statutory requirement.

As to comments seeking guidance that discount points may be excluded if not directly paid by the consumer, the Bureau notes that creditors should continue to apply the basic rules of Regulation Z concerning whether points are included in the finance charge and, in turn, whether they are included in points and fees. For example, because seller's points are excluded from the finance charge under existing § 1026.4(c)(5), they are not included in points and fees, regardless of whether they meet the bona fide discount point test for exclusion.

In light of the foregoing considerations, the Bureau adopts in the 2013 ATR Final Rule the exclusion from points and fees of up to two bona fide discount points substantially as proposed in the 2011 ATR and 2012 HOEPA Proposals (for qualified mortgages and high-cost mortgages, respectively). However, to ensure a streamlined definition of points and fees in the high-cost mortgage and qualified mortgage contexts, the Bureau is finalizing proposed § 226.43(e)(3)(ii)(B) (from the 2011 ATR Proposal) and proposed § 1026.32(b)(5)(ii)(A)(1) and (2) as applied to closed-end credit transactions (from the 2012 HOEPA Proposal) in § 1026.32(b)(1)(i)(E) in the 2013 ATR Final Rule. Section 1026.32(b)(1)(i)(E)(1) sets forth the general rule, and § 1026.32(b)(1)(i)(E)(2) sets forth the special rule under HOEPA for personal property-secured loans. The Bureau believes that this placement is sensible in the context of both rulemakings given that the points excluded through the bona fide discount point exclusion would be counted in points and fees, if at all, through the finance charge prong.

The 2013 ATR Final Rule finalizes proposed comment 32(b)(5)(ii)–1 from the 2012 HOEPA Proposal as comment 32(b)(1)(i)(E)–2, with certain non-substantive changes. The 2013 ATR Final Rule also adopts as comment

<sup>113</sup>In its 2012 HOEPA Proposal, the Bureau proposed to implement the exclusion of up to one bona fide discount point from the points and fees calculation for high-cost mortgages in § 1026.32(b)(5)(ii)(B)(1) and (2). See the section-by-section analysis of § 1026.32(b)(1)(i)(F) below.

<sup>114</sup>The Bureau also received comment on its proposed definition of the phrase "bona fide." Those comments are addressed in the section-by-section analysis of § 1026.32(b)(3) below.

32(b)(1)(i)(E)–1 a cross-reference to § 1026.32(b)(3) for the definition of “bona fide discount point,” and as comment 32(b)(1)(i)(E)–3 examples of how to calculate the exclusion of up to two bona fide discount points from points and fees. These comments are discussed in further detail in the section-by-section analysis of § 1026.32(b)(1)(i)(E) in the 2013 ATR Final Rule. The Bureau notes that finalizing the bona fide discount point exclusion for both qualified mortgages and high-cost mortgages in § 1026.32(b)(1) should streamline compliance and alleviate any concern that the rules would be applied differently in the high-cost and qualified mortgage contexts.

#### 32(b)(1)(i)(F)

##### Exclusion of Up to One Bona Fide Discount Point

Section 1431(d) of the Dodd-Frank Act added new section 103(dd)(2) to TILA, which permits a creditor to exclude from points and fees for high-cost mortgages up to and including one bona fide discount point payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage’s interest rate will be discounted does not exceed by more than two percentage points (1) the average prime offer rate or (2) for loans secured by personal property, the average rate on a loan for which insurance is provided under Title I of the National Housing Act.<sup>115</sup> New TILA section 103(dd)(2) for high-cost mortgages is substantially similar to new TILA section 129C(b)(2)(C)(ii)(II) for qualified mortgages. TILA section 129C(b)(2)(C)(ii)(II) provides for the exclusion of up to and including one bona fide discount point from points and fees for qualified mortgages, but only if the interest rate for the transaction before the discount does not exceed the average prime offer rate by more than two percentage points.<sup>116</sup> The only difference between new TILA section 103(dd)(2) for high-cost mortgages and new TILA section 129C(b)(2)(C)(ii)(II) for qualified mortgages is that the high-cost mortgage provision provides for a special calculation to determine whether discount points may be excluded from points and fees for loans secured by personal property.

In the 2012 HOEPA Proposal, the Bureau proposed to implement the

<sup>115</sup> See TILA section 103(dd)(2)(A) (average prime offer rate) and (B) (average rate on loans insured under Title I).

<sup>116</sup> See 76 FR 27390, 27465–67, 27485, 27504 (May 11, 2011).

exclusion of up to one bona fide discount point from points and fees for high-cost mortgages in § 1026.32(b)(5)(ii)(B)(1) (loans secured by real property) and (2) (loans secured by personal property). The proposed provision generally would have been consistent with proposed § 226.43(e)(3)(ii)(C) in the Board’s 2011 ATR Proposal, which would have implemented new TILA section 129C(b)(2)(C)(ii)(II) for qualified mortgages.<sup>117</sup> Specifically, proposed § 1026.32(b)(5)(ii)(B)(1) would have permitted a creditor to exclude from points and fees for high-cost mortgages up to one bona fide discount point payable by the consumer, provided that the interest rate for the closed- or open-end credit transaction without such discount point would not exceed by more than two percentage points the average prime offer rate, as defined in § 1026.35(a)(2). Proposed § 1026.32(b)(5)(ii)(B)(2) would have implemented the special calculation for determining whether up to one discount point could be excluded from points and fees for high-cost mortgages for transactions secured by personal property.

The Bureau did not receive any comments on proposed § 1026.32(b)(5)(ii)(B)(1) and (2) other than those addressed in the section-by-section analysis of § 1026.32(b)(1)(i)(E) above, concerning the exclusion of up to two bona fide discount points from points and fees. As with that exclusion, and to ensure a streamlined definition of points and fees in the high-cost mortgage and qualified mortgage contexts, the Bureau is finalizing in the 2013 ATR Final Rule proposed § 226.43(e)(3)(ii)(C) (from the 2011 ATR Proposal) and proposed § 1026.32(b)(5)(ii)(B) as applied to closed-end credit transactions (from the 2012 HOEPA Proposal) in § 1026.32(b)(1)(i)(F). Section 1026.32(b)(1)(i)(F)(1) sets forth the general rule, and § 1026.32(b)(1)(i)(F)(2) sets forth the special rule under HOEPA for personal property-secured loans.

The 2013 ATR Final Rule also adopts in comment 32(b)(1)(i)(F)–1 a cross-reference to comments 32(b)(1)(i)(E)–1 and –2 for the definition of “bona fide discount point” and “average prime offer rate,” respectively, and in comment 32(b)(1)(i)(F)–3 an example of how to calculate the exclusion of up to one bona fide discount point from closed-end points and fees. These comments are discussed in further detail in the section-by-section analysis

<sup>117</sup> See *id.*

of § 1026.32(b)(1)(i)(F) in the 2013 ATR Final Rule.

#### 32(b)(1)(ii)

When HOEPA was enacted in 1994, it required that “all compensation paid to mortgage brokers” be counted toward the threshold for points and fees that triggers special consumer protections under the statute. Specifically, TILA section 103(aa)(4) provided that charges are included in points and fees only if they are payable at or before consummation and did not expressly address whether “backend” payments from creditors to mortgage brokers funded out of the interest rate (commonly referred to as yield spread premiums) are included in points and fees.<sup>118</sup> This requirement is implemented in existing § 1026.32(b)(1)(ii), which requires that all compensation paid by consumers directly to mortgage brokers be included in points and fees, but does not address compensation paid by creditors to mortgage brokers or compensation paid by any company to individual employees (such as loan officers who are employed by a creditor or mortgage broker).

The Dodd-Frank Act substantially expanded the scope of compensation included in points and fees for both the high-cost mortgage threshold in HOEPA and the qualified mortgage points and fees limits. Section 1431 of the Dodd-Frank Act amended TILA to require that “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,” be included in points and fees. TILA section 103(bb)(4)(B) (emphasis added). Under amended TILA section 103(bb)(4)(B), compensation paid to anyone that qualifies as a “mortgage originator” is to be included in points and fees.<sup>119</sup> Thus,

<sup>118</sup> Some commenters use the term “yield spread premium” to refer to any payment from a creditor to a mortgage broker that is funded by increasing the interest rate that would otherwise be charged to the consumer in the absence of that payment. These commenters generally assume that any payment to the brokerage firm by the creditor is funded out of the interest rate, reasoning that had the consumer paid the brokerage firm directly, the creditor would have had lower expenses and would have been able to charge a lower rate. Other commenters use the term “yield spread premium” more narrowly to refer only to a payment from a creditor to a mortgage broker that is based on the interest rate, *i.e.*, the mortgage broker receives a larger payment if the consumer agrees to a higher interest rate. To avoid confusion, the Bureau is limiting its use of the term and is instead more specifically describing the payment at issue.

<sup>119</sup> “Mortgage originator” is generally defined to include “any person who, for direct or indirect compensation or gain, or in the expectation of

in addition to compensation paid to mortgage brokerage firms and individual brokers, points and fees also includes compensation paid to other mortgage originators, including employees of a creditor (i.e., loan officers). In addition, as noted above, the Dodd-Frank Act removed the phrase “payable at or before closing” from the high-cost mortgage points and fees test and did not apply the “payable at or before closing” limitation to the points and fees cap for qualified mortgages. See TILA sections 103(bb)(1)(A)(ii) and 129C(b)(2)(A)(vii), (b)(2)(C). Thus, the statute appears to contemplate that even compensation paid to mortgage brokers and other loan originators after consummation should be counted toward the points and fees thresholds.

This change is one of several provisions in the Dodd-Frank Act that focus on loan originator compensation and regulation, in apparent response to concerns that industry compensation practices contributed to the mortgage market crisis by creating strong incentives for brokers and retail loan officers to steer consumers into higher-priced loans. Specifically, loan originators were often paid a commission by creditors that increased with the interest rate on a transaction. These commissions were funded by creditors through the increased revenue received by the creditor as a result of the higher rate paid by the consumer and were closely tied to the price the creditor expected to receive for the loan on the secondary market as a result of that higher rate.<sup>120</sup> In addition, many mortgage brokers charged consumers up-front fees to cover some of their costs at the same time that they accepted backend payments from creditors out of the rate. This may have contributed to consumer confusion about where the brokers' loyalties lay.

The Dodd-Frank Act took a number of steps to address loan originator compensation issues, including: (1)

direct or indirect compensation or gain—(i) takes a residential mortgage loan application; (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or (iii) offers or negotiates terms of a residential mortgage loan.” TILA section 103(dd)(2). The statute excludes certain persons from the definition, including a person who performs purely administrative or clerical tasks; an employee of a retailer of manufactured homes who does not take a residential mortgage application or offer or negotiate terms of a residential mortgage loan; and, subject to certain conditions, real estate brokers, sellers who finance three or fewer properties in a 12-month period, and servicers. TILA section 103(dd)(2)(C) through (F).

<sup>120</sup> For more detailed discussions, see the Bureau's 2012 Loan Originator Proposal and the final rule issued by the Board in 2010. 77 FR 55272, 55276, 55290 (Sept. 7, 2012); 75 FR 58509, 5815–16, 58519–20 (Sept. 24, 2010) (2010 Loan Originator Final Rule).

Adopting requirements that loan originators be “qualified” as defined by Bureau regulations; (2) generally prohibiting compensation based on rate and other terms (except for loan amount) and prohibiting a loan originator from receiving compensation from both consumers *and* other parties in a single transaction; (3) requiring the promulgation of additional rules to prohibit steering consumers to less advantageous transactions; (4) requiring the disclosure of loan originator compensation; and (5) restricting loan originator compensation under HOEPA and the qualified mortgage provisions by including such compensation within the points and fees calculations. See TILA sections 103(bb)(4)(A)(ii), (B); 128(a)(18); 129B(b), (c); 129C(b)(2)(A)(vii), (C)(i).

The Board's 2011 ATR Proposal proposed revisions to § 226.32(b)(1)(ii) to implement the inclusion of more forms of loan originator compensation into the points and fees thresholds. Those proposed revisions tracked the statutory language, with two exceptions. First, the Board's proposed § 226.32(b)(1)(ii) did not include the phrase “from any source.” The Board noted that the statute covers compensation paid “directly or indirectly” to the loan originator, and concluded that it would be redundant to cover compensation “from any source.” Second, for consistency with Regulation Z, the proposal used the term “loan originator” as defined in § 226.36(a)(1), rather than the term “mortgage originator” that appears in section 1401 of the Dodd-Frank Act. See TILA section 103(cc)(2). The Board explained that it interpreted the definitions of mortgage originator under the statute and loan originator under existing Regulation Z to be generally consistent, with one exception that the Board concluded was not relevant for purposes of the points and fees thresholds. Specifically, the statutory definition refers to “any person who represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items), that such person can or will provide” the services listed in the definition (such as offering or negotiating loan terms), while the existing Regulation Z definition does not include persons solely on this basis. The Board concluded that it was not necessary to add this element of the definition to implement the points and fees calculations anyway, reasoning that the calculation of points and fees is

concerned only with loan originators that receive compensation for performing defined origination functions in connection with a consummated loan. The Board noted that a person who merely represents to the public that such person can offer or negotiate mortgage terms for a consumer has not yet received compensation for that function, so there is no compensation to include in the calculation of points and fees for a particular transaction.

In the proposed commentary, the Board explained what compensation would and would not have been included in points and fees under proposed § 226.32(b)(1)(ii). The Board proposed to revise existing comment 32(b)(1)(ii)–1 to clarify that compensation paid by either a consumer or a creditor to a loan originator, as defined in § 1026.36(a)(1), would be included in points and fees. Proposed comment 32(b)(1)(ii)–1 also stated that loan originator compensation already included in points and fees because it is included in the finance charge under § 226.32(b)(1)(i) would not be counted again under § 226.32(b)(1)(ii).

Proposed comment 32(b)(1)(ii)–2.i stated that, in determining points and fees, loan originator compensation includes the dollar value of compensation paid to a loan originator for a specific transaction, 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. Proposed comment 32(b)(1)(ii)–2.ii clarified that loan originator compensation excludes compensation that cannot be attributed to a transaction at the time of origination, including, for example, the base salary of a loan originator that is also the employee of the creditor, or compensation based on the performance of the loan originator's loans or on the overall quality of a loan originator's loan files. Proposed comment 32(b)(1)(ii)–2.i also explained that compensation paid to a loan originator for a covered transaction must be included in the points and fees calculation for that transaction whenever paid, whether at or before closing or any time after closing, as long as the compensation amount can be determined at the time of closing. In addition, proposed comment 32(b)(1)(ii)–2.i provided three examples of compensation paid to a loan originator that would have been included in the points and fees calculation.

Proposed comment 32(b)(1)(ii)–3 stated that 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. Proposed comment 32(b)(1)(ii)-3 offered an example of a loan originator imposing and retaining a "processing fee" and stated that such a fee is loan originator compensation, regardless of whether the loan originator expends the fee to process the consumer's application or uses it for other expenses, such as overhead.

The Bureau's 2012 HOEPA Proposal largely republished the proposed revisions and additions to proposed § 1026.32(b)(1)(ii) and related commentary contained in the Board's 2011 ATR Proposal, with only non-substantive edits that, for example, clarified that the provisions would have applied to any closed-end credit transactions subject to § 1026.32.

The Bureau received a large number of comments on proposed § 1026.32(b)(1)(ii) and its related commentary in response to the 2012 HOEPA Proposal. Most of the comments came from industry groups or individual institutions. As with other aspects of the definition of points and fees, industry commenters' concerns regarding this provision were similar to those that were raised in response to the Board's 2011 ATR Proposal, which are addressed in detail in the preamble of the Bureau's 2013 ATR Final Rule. Industry commenters objected to the proposed inclusion of loan originator compensation in the points and fees calculation for high-cost mortgages for the following main reasons.

Many industry commenters objected to the general requirement to include loan originator compensation in points and fees. Some of these commenters suggested that the Bureau should use its exception authority to exclude loan originator compensation from the calculation. Several commenters argued that consumers are already protected from harmful compensation practices by other Dodd-Frank Act rules, such as those proposed to be implemented in the Bureau's 2012 Loan Originator Proposal. Some such commenters asserted that the HOEPA proposal, by requiring permissible compensation to be counted toward HOEPA points and fees coverage, would undercut the value derived from the payments deemed proper under the Bureau's other rules. In addition, the commenters argued, including loan originator compensation in points and fees would constrain credit and harm consumers by, for example, increasing the number of loans that might exceed the HOEPA points and fees threshold.

A number of industry commenters asserted, in particular, that loan originator compensation paid to individual employees should not be counted in points and fees. Some commenters stated that the proposed inclusion of loan originator compensation to employees is contrary to the intent of the statute, which the commenters argued was merely intended to cover business entities and not individuals. Other commenters stated, for example, that employee compensation is not a direct cost to the consumer and that it is indistinguishable from aspects of a company's overall cost and expenditure structure, such as expenses for rent, marketing, or office supplies, which are not counted in points and fees.

A number of commenters noted that including compensation to individual loan originators in points and fees would constitute double-counting of costs, because loan originator compensation already is included in the cost of the loan, as an overhead charge. The commenters requested that the Bureau clarify, for example, that compensation paid by a lender to its own loan originator, which is not paid directly by the borrower but rather from the lender's profits or post-closing sale of the loan, should not be counted in points and fees. Similarly, at least one commenter requested that the Bureau clarify that lenders can assume that a fee paid to a broker includes any compensation paid to the broker's employees, and that the lender should have no responsibility to separately account for such payments. One commenter argued that, if compensation to mortgage broker employees is excluded, then compensation to retail loan officer employees should be excluded as well.

Some industry commenters asserted that including loan originator compensation in points and fees is not only unnecessary in light of other Bureau rulemakings, but also that including it would lead to anomalous results, because otherwise identical loans may have different points and fees depending on which loan officer originates a loan (*i.e.*, because better or more experienced loan originators tend to earn more compensation) or on when in the year a loan is originated (*i.e.*, because compensation tends to increase throughout the year as periodic, volume-based bonus thresholds are met). Neither of these factors is indicative of the terms of the loan itself, but consumers' access to credit could depend on such factors, because creditors likely would choose not to originate a loan if its associated loan

originator compensation would cause its points and fees to exceed the HOEPA threshold. Commenters stated that the effects of such anomalous results could be felt within one company (*i.e.*, as between an experienced and a more junior loan officer), or between companies (*i.e.*, with one company that compensates its loan officers more than another company).

Industry commenters also asserted that developing company-wide systems to track employee compensation on a loan-by-loan basis would be highly burdensome, with little consumer benefit. The system changes that would be required would be complex, because there are so many variations in how compensation may be paid. Creditors would continue to face practical challenges even after such systems were established. Many compensation plans pay bonuses at the end of the month, period, or year, so determining compensation to be included at origination would be difficult. One result, commenters asserted, would be that the amount of compensation included in points and fees could be easily second-guessed after the fact, which could be highly problematic (particularly for assignees) considering the risk of liability attendant to originating or purchasing a high-cost mortgage. For example, commenters asserted that such second-guessing could increase the risk that a loan might be determined to be a high-cost mortgage, even if it was not clear to the creditor at origination that it was a high-cost mortgage. Finally, some commenters noted that a rule requiring accurate determination of compensation at origination would require wholesale changes in compensation practices, which is more appropriately addressed in other rulemakings.

Not only would tracking compensation be burdensome, but commenters requested additional guidance concerning when particular types of compensation would be required to be included in the calculation. For example, several commenters stated that compensation often is tied to conditions, such as continued employment, that are not known as of consummation. Other conditions to which compensation might be tied include, for example, the customer service rating of the loan originator, or overall company performance for a particular period of time. Some commenters similarly noted that it was unclear how to count compensation awarded in tiered compensation plans where, for example, the amount of compensation increases as the loan originator's total aggregate

volume increases. In such plans, commenters stated, the compensation tier cannot be determined until month- or quarter-end, and the rule as proposed is not clear about whether such compensation would need to be counted.

Several commenters suggested that, if the Bureau were to adopt a rule including individual loan originator compensation in points and fees, then the Bureau should clearly exclude certain types of compensation, such as salary and hourly wages, from the calculation. The commenters asserted that these types of compensation generally are not tied to any specific loan transaction. The commenters stated that it would be difficult to determine how much of such compensation to count in the points and fees calculation before or at consummation, that establishing systems to make such a determination would be costly, and that including hourly wages would create an incentive for loan originators to spend less time on loans, to the detriment of consumers and in contrast to the overall goal of ensuring, for example, careful loan underwriting.

A number of commenters requested additional guidance concerning the timing of the loan originator compensation calculation. The commenters stated that it would be impracticable to require compensation to be counted as of consummation. In this regard, several commenters asked whether compensation should be determined based on facts known at some earlier time, such as the rate-lock date.

Some commenters also emphasized the importance of having clear guidance concerning the amount of loan originator compensation to be included in points and fees. The commenters stated that ambiguous rules would make it difficult to know how much compensation to count for a particular transaction and, in turn, difficult to discern whether a transaction exceeds the HOEPA points and fees threshold. A few commenters noted that this is of particular concern for entities looking to purchase loans, or for entities conducting due diligence reviews prior to purchase, since it is necessary to determine if points and fees are accurate, to avoid purchasing a high-cost mortgage.

Finally, a number of industry commenters urged the Bureau to provide additional guidance concerning who would be considered a loan originator for purposes of the points and fees test. Several commenters objected to the fact that the Bureau seemingly had not coordinated its proposed

definitions of “loan originator” across its various title XIV rulemakings, or with the definition of that term as set forth in the Secure and Fair Enforcement for Mortgage Licensing Act of 2008. The commenters noted that the Bureau’s 2012 Loan Originator Proposal would have adopted a broad definition of loan originator. According to these commenters, a broad definition will be difficult to apply in the points and fees context, as it will require tracking compensation of anyone who, for compensation, takes an application, arranges, offers, negotiates, or otherwise obtains an extension of consumer credit for another person.

Manufactured housing industry commenters expressed a related concern about the definition of loan originator as applied to employees of manufactured home retailers. Under TILA’s definition of loan originator, an “activities-based” test would apply in determining whether such a person was a loan originator. Thus, creditors would need to track the activities of manufactured home retailer employees to determine whether to count their compensation in points and fees. Commenters asserted that a manufactured home retailer has no way of knowing, or controlling, such activities for a given transaction. At least one commenter argued for a bright-line exclusion from loan originator compensation for any manufactured home retailer or its employees. Other commenters argued for replacing the activities-based exclusion with a bright-line test, such as an exclusion for retailer (or retailer employee) compensation that does not exceed what the retailer or its employee would have received in a comparable cash transaction.

Consumer group commenters strongly supported the inclusion of loan originator compensation in points and fees. The commenters noted that outsized mortgage broker compensation was one of the primary drivers of the passage of HOEPA in the mid-1990’s. The commenters also noted that compensation schemes involving yield spread premiums later became another vehicle through which consumers were assessed costs they were wholly unaware existed, and that the Dodd-Frank Act sought to put such abuses to rest.<sup>121</sup>

Some consumer group commenters strongly opposed the Bureau’s proposal to apply, in the points and fees context, TILA’s activities-based test for

<sup>121</sup> Commenters raised these objections in response to the Bureau’s proposal to exclude loan originator compensation from the definition of points and fees for HELOCs. See the section-by-section analysis of § 1026.32(b)(2)(ii) below.

determining whether an employee of a manufactured home retailer is a loan originator whose compensation must be counted. These commenters asserted that a test that attempts to distinguish between employees who, for example, take an application or advise on loan terms (*i.e.*, loan originators), from employees who merely assist a consumer in obtaining or applying for a loan (*i.e.*, not loan originators) would be unworkable. Commenters either argued that the activities listed in the activities-based test (*i.e.*, taking an application, advising on loan terms, or offering loan terms) should be broadly defined, or that any compensation paid to an employee of a manufactured home retailer to arrange financing should be included.

The Bureau has carefully considered the comments received in response to its 2012 HOEPA Proposal, as well as in response to the Board’s 2011 ATR Proposal, in light of the concerns about various issues with regard to loan originator compensation practices, the general concerns about the impacts of the ability-to-repay/qualified mortgage rule and revised HOEPA thresholds on a market in which access to mortgage credit is already extremely tight, differences between the retail and wholesale origination channels, and practical considerations regarding both the burdens of day-to-day implementation and the opportunities for evasion by parties who wish to engage in rent-seeking. As discussed further below, the Bureau is concerned about implementation burdens and anomalies created by the requirement to include loan originator compensation in points and fees, the impacts that it could have on pricing and access to credit, and the risks that rent-seekers will continue to find ways to evade the statutory scheme. Nevertheless, the Bureau believes that, in light of the historical record and of Congress’s evident concern with loan originator compensation practices, it would not be appropriate to waive the statutory requirement that loan originator compensation be included in points and fees. The Bureau has, however, worked to craft the rule that implements Congress’ judgment in a way that is practicable and that reduces potential negative impacts of the statutory requirement, as discussed below. The Bureau is also seeking comment in the concurrent proposal being published elsewhere in today’s **Federal Register** on whether additional measures would better protect consumers and reduce implementation burdens and unintended consequences.

Accordingly, the 2013 ATR Final Rule in adopting § 1026.32(b)(1)(ii) has generally tracked the statutory language and the Board's proposal in the regulation text, but has expanded the commentary to provide more detailed guidance to clarify what compensation must be included in points and fees. The Dodd-Frank Act requires inclusion in points and fees of "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." See TILA section 103(bb)(4)(B). Consistent with the Board's proposal, revised § 1026.32(b)(ii) as adopted in the 2013 ATR Final Rule does not include the phrase "from any source." The Bureau agrees that the phrase is unnecessary because the provision expressly covers compensation paid "directly or indirectly" to the loan originator. Like the Board's proposal, the final rule also uses the term "loan originator" as defined in § 1026.36(a)(1), not the term "mortgage originator" under section 1401 of the Dodd-Frank Act. See TILA section 103(cc)(2). The Bureau agrees that the definitions are consistent in relevant respects and notes that it is in the process of amending the regulatory definition to harmonize it even more closely with the Dodd-Frank Act definition of "mortgage originator."<sup>122</sup> Accordingly, the Bureau believes use of consistent terminology in Regulation Z will facilitate compliance. Finally, as revised, § 1026.32(b)(1)(ii) also does not include the language in proposed § 226.32(b)(1)(ii) that specified that the provision also applies to a loan originator that is the creditor in a table-funded transaction. The Bureau has concluded that that clarification is unnecessary because a creditor in a table-funded transaction is already included in the definition of loan originator in § 1026.36(a)(1). To clarify what compensation must be included in points and fees, revised § 1026.32(b)(1)(ii) specifies that compensation must be included if it can be attributed to the particular transaction at the time the interest rate is set. These limitations are discussed in more detail below.

In adopting the general rule, the Bureau carefully considered arguments by industry commenters that loan originator compensation should not be included in points and fees because other statutory provisions and rules already regulate loan originator

compensation, because loan originator compensation is already included in the costs of mortgage loans, and because including loan originator compensation in points and fees would push many loans over the 3 percent cap on points and fees for qualified mortgages (or even over the points and fees limits for determining whether a loan is a high-cost mortgage under HOEPA), which would increase costs and impair access to credit.

The Bureau views the fact that other provisions within the Dodd-Frank Act address other aspects of loan originator compensation and activity as evidence of the high priority that Congress placed on regulating such compensation. The other provisions pointed to by the commenters address specific compensation practices that created particularly strong incentives for loan originators to "upcharge" consumers on a loan-by-loan basis and particular confusion about loan originators' loyalties. The Bureau believes that the inclusion of loan originator compensation in points and fees has distinct purposes. In addition to discouraging more generalized rent-seeking and excessive loan originator compensation, the Bureau believes that Congress may have been focused on particular risks to consumers. Thus, with respect to qualified mortgages, including loan originator compensation in points and fees helps to ensure that, in cases in which high up-front compensation might otherwise cause the creditor and/or loan originator to be less concerned about long-term sustainability, the creditor is not able to invoke a presumption of compliance if challenged to demonstrate that it made a reasonable and good faith determination of the consumer's ability to repay the loan. Similarly in HOEPA, the threshold triggers additional consumer protections, such as enhanced disclosures and housing counseling, for the loans with the highest up-front pricing.

The Bureau recognizes that the method that Congress chose to effectuate these goals does not ensure entirely consistent results as to whether a loan is a qualified mortgage or a high-cost transaction. For instance, loans that are identical to consumers in terms of up-front costs and interest rate may nevertheless have different points and fees based on the identity of the loan originator who handled the transaction for the consumer, since different individual loan originators in a retail environment or different brokerage firms in a wholesale environment may earn different commissions from the creditor without that translating in

differences in costs to the consumer. In addition, there are anomalies introduced by the fact that "loan originator" is defined to include mortgage broker firms and individual employees hired by either brokers or creditors, but not creditors themselves. As a result, counting the total compensation paid to a mortgage broker firm will capture both the firm's overhead costs and the compensation that the firm passes on to its individual loan officer. By contrast, in a retail transaction, the creditor would have to include in points and fees the compensation that it paid to its loan officer, but would continue to have the option of recovering its overhead costs through the interest rate, instead of an up-front charge, to avoid counting them toward the points and fees thresholds. Indeed, the Bureau expects that the new requirement may prompt creditors to shift certain other expenses into rate to stay under the thresholds.

Nevertheless, to the extent there are anomalies from including loan originator compensation in points and fees, these anomalies appear to be the result of deliberate policy choices by Congress to expand the historical definition of points and fees to include all methods of loan originator compensation, whether derived from up-front charges or from the rate, without attempting to capture all overhead expenses by creditors or the gain on sale that the creditor can realize upon closing a mortgage. The Bureau agrees that counting loan originator compensation that is structured through rate toward the points and fees thresholds could cause some loans not to be classified as qualified mortgages and to trigger HOEPA protections, compared to existing treatment under HOEPA and its implementing regulation. However, the Bureau views this to be exactly the result that Congress intended.

In light of the express statutory language and Congress's evident concern with increasing consumer protections in connection with high levels of loan originator compensation, the Bureau does not believe that it is appropriate to use its exception or adjustment authority in TILA section 105(a) to exclude loan originator compensation entirely from points and fees for qualified mortgages and HOEPA. As discussed below, however, the Bureau is attempting to implement the points and fees requirements with as much sensitivity as practicable to potential impacts on the pricing of and availability of credit, anomalies and unintended consequences, and compliance burdens.

<sup>122</sup> See 2012 Loan Originator Proposal, 77 FR 55283-88.



The Bureau also carefully considered comments urging it to exclude compensation paid to individual loan originators from points and fees, but ultimately concluded that such a result would be inconsistent with the plain language of the statute and could exacerbate the potential inconsistent effects of the rule on different mortgage origination channels. As noted above, many industry commenters argued that, even if loan originator compensation were not excluded altogether, at least compensation paid to individual loan originators should be excluded from points and fees. Under this approach, only payments to mortgage brokers would be included in points and fees. The commenters contended that it would be difficult to track compensation paid to individual loan originators, particularly when that compensation may be paid after consummation of the loan and that it would create substantial compliance problems. They also argued that including compensation paid to individual loan originators in points and fees would create anomalies, in which identical transactions from the consumer's perspective (*i.e.*, the same interest rate and up-front costs) could nevertheless have different points and fees because of loan originator compensation.

As explained above, the Bureau does not believe it is appropriate to use its exception authority to exclude loan originator compensation from points and fees, and even using that exception authority more narrowly to exclude compensation paid to individual loan originators could undermine Congress's apparent goal of providing stronger consumer protections in cases of high loan originator compensation. Although earlier versions of legislation focused specifically on compensation to "mortgage brokers," which is consistent with existing HOEPA, the Dodd-Frank Act refers to compensation to "mortgage originators," a term that is defined in detail elsewhere in the statute to include individual loan officers employed by both creditors and brokers, in addition to the brokers themselves. To the extent that Congress believed that high levels of loan originator compensation evidenced additional risk to consumers, excluding individual loan originators from consideration appears inconsistent with this policy judgment.

Moreover, the Bureau notes that using exception authority to exclude compensation paid to individual loan originators would exacerbate the differential treatment between the retail and wholesale channels concerning overhead costs. As noted above,

compensation paid by the consumer or creditor to the mortgage broker necessarily will include amounts for both the mortgage broker's overhead and profit and for the compensation the mortgage broker passes on to its loan officer. Excluding individual loan officer compensation on the retail side, however, would effectively exempt creditors from counting any loan originator compensation at all toward points and fees. Thus, for transactions that would be identical from the consumer's perspective in terms of interest rate and up-front costs, the wholesale transaction could have significantly higher points and fees (because the entire payment from the creditor to the mortgage broker would be captured in points and fees), while the retail transaction might include no loan origination compensation at all in points and fees. Such a result would put brokerage firms at a disadvantage in their ability to originate qualified mortgages and put them at significantly greater risk of originating HOEPA loans. This in turn could constrict the supply of loan originators and the origination channels available to consumers to their detriment.

The Bureau recognizes that including compensation paid to individual loan originators, such as loan officers, with respect to individual transactions may impose additional burdens. For example, creditors will have to track employee compensation for purposes of complying with the rule, and the calculation of points and fees will be more complicated. However, the Bureau notes that creditors and brokers already have to monitor compensation more carefully as a result of the 2010 Loan Originator Final Rule and the related Dodd-Frank Act restrictions on compensation based on terms and on dual compensation. The Bureau also believes that these concerns can be reduced by providing clear guidance on issues such as what types of compensation are covered, when compensation is determined, and how to avoid "double-counting" payments that are already included in points and fees calculations. The Bureau has therefore revised the Board's proposed regulation and commentary to provide more detailed guidance, and is seeking comment in the proposal published elsewhere in the **Federal Register** today on additional guidance and potential implementation issues among other matters.

As noted above, the Bureau is revising § 1026.32(b)(1)(ii) to clarify that compensation must be counted toward the points and fees thresholds if it can be attributed to the particular

transaction at the time the interest rate is set. The Bureau is also revising comment 32(b)(1)(ii)-1 to explain in general terms when compensation qualifies as loan originator compensation that must be included in points and fees. In particular, compensation paid by a consumer or creditor to a loan originator is included in the calculation of points and fees, provided that such compensation can be attributed to that particular transaction at the time the interest rate is set. The Bureau also incorporates part of proposed comment 32(b)(1)(ii)-3 into revised comment 32(b)(1)(ii)-1, explaining that 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. However, revised comment 32(b)(1)(ii)-1 does not include the example from proposed comment 32(b)(1)(ii)-3, which stated that, 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. That example may be confusing in this context because a processing fee paid to a loan originator likely would be a finance charge under § 1026.4 and would therefore already be included in points and fees under § 1026.32(b)(1)(i).

Revised comment 32(b)(1)(ii)-2.i explains that compensation, such as a bonus, commission, or an award of merchandise, services, trips or similar prizes, must be included only if it can be attributed to a particular transaction. The requirement that compensation is included in points and fees only if it can be attributed to a particular transaction is consistent with the statutory language. The Dodd-Frank Act provides that, for the points and fees tests for both qualified mortgages and high-cost mortgages, only charges that are "in connection with" the transaction are included in points and fees. See TILA sections 103(bb)(1)(A)(ii) (high-cost mortgages) and 129C(b)(2)(A)(vii) (qualified mortgages). Limiting loan originator compensation to compensation that is attributable to the transaction implements the statutory requirement that points and fees are "in connection" with the transaction. This limitation also makes the rule more workable. Compensation is included in points and fees only if it can be attributed to a specific transaction to facilitate compliance with the rule and avoid over-burdening creditors with

complex calculations to determine, for example, the portion of a loan officer's salary that should be counted in points and fees.<sup>123</sup> For clarity, the Bureau has moved the discussion of the timing of loan originator compensation into new comment 32(b)(1)(ii)-3, and has added additional examples to 32(b)(1)(ii)-4, to illustrate the types and amount of compensation that should be included in points and fees.

Revised comment 32(b)(1)(ii)-2.ii explains that loan originator compensation excludes compensation that cannot be attributed to a particular transaction at the time the interest rate is set, including, for example, compensation based on the long-term performance of the loan originator's loans or on the overall quality of the loan originator's loan files. The base salary of a loan originator is also excluded, although additional compensation that is attributable to a particular transaction must be included in points and fees. The Bureau has decided to seek further comment in the concurrent proposal regarding treatment of hourly wages for the actual number of hours worked on a particular transaction. The Board's proposal would have included hourly pay for the actual number of hours worked on a particular transaction in loan originator compensation for purposes of the points and fees thresholds, and the Bureau agrees that such wages are attributable to the particular transaction. However, the Bureau is unclear as to whether industry actually tracks compensation this way in light of the administrative burdens. Moreover, while the general rule provides for calculation of loan originator compensation at the time the interest rate is set for the reasons discussed above, the actual hours of hours worked on a transaction would not be known at that time. The Bureau is therefore seeking comment on issues relating to hourly wages, including whether to require estimates of the hours to be worked between rate set and consummation.

<sup>123</sup> In contrast, the existing restrictions on particular loan originator compensation structures in § 1026.36 apply to all compensation such as salaries, hourly wages, and contingent bonuses because those restrictions apply only at the time such compensation is paid, and therefore they can be applied with certainty. Moreover, those rules also provide for different treatment of compensation that is not "specific to, and paid solely in connection with, the transaction," where such a distinction is necessary for reasons of practical application of the rule. See comment 36(d)(2)-1 (prohibition of loan originator receiving compensation directly from consumer and also from any other person does not prohibit consumer payments where loan originator also receives salary or hourly wage).

New comment 32(b)(1)(ii)-3 explains that loan originator compensation must be included in the points and fees calculation for a transaction whenever the compensation is paid, whether before, at or after closing, as long as that compensation amount can be attributed to the particular transaction at the time the interest rate is set. Some industry commenters expressed concern that it would be difficult to determine the amount of compensation that would be paid after consummation and that creditors might have to recalculate loan originator compensation (and thus points and fees) after underwriting if, for example, a loan officer became eligible for higher compensation because other transactions had been consummated. The Bureau appreciates that industry participants need certainty at the time of underwriting as to whether transactions will exceed the points and fees limits for qualified mortgages (and for high-cost mortgages). To address this concern, the comment 32(b)(1)(ii)-3 explains that loan originator compensation should be calculated at the time the interest rate is set. The Bureau believes that the date the interest rate is set is an appropriate standard for calculating loan originator compensation. It would allow creditors to be able to calculate points and fees with sufficient certainty so that they know early in the process whether a transaction will be a qualified mortgage or a high-cost mortgage.

As noted above, several industry commenters argued that including loan originator compensation in points and fees would result in double counting. They stated that creditors often will recover loan originator compensation costs through origination charges, and these charges are already included in points and fees under § 1026.32(b)(1)(i). However, the underlying statutory provisions as amended by the Dodd-Frank Act do not express any limitation on its requirement to count loan originator compensation toward the points and fees test. Rather, the literal language of TILA section 103(bb)(4) as amended by the Dodd-Frank Act defines points and fees to include all items included in the finance charge (except interest rate), all compensation paid directly or indirectly by a consumer or creditor to a loan originator, "and" various other enumerated items. The use of "and" and the references to "all" compensation paid "directly or indirectly" and "from any source" suggest that compensation should be counted as it flows downstream from one party to another so that it is counted each time that it reaches a loan

originator, whatever the previous source.

The Bureau believes the statute would be read to require that loan originator compensation be treated as additive to the other elements of points and fees. The Bureau believes that an automatic literal reading of the statute in all cases, however, would not be in the best interest of either consumers or industry. For instance, the Bureau does not believe that it is necessary or appropriate to count the same payment made by a consumer to a mortgage broker firm twice, simply because it is both part of the finance charge and loan originator compensation. Similarly, the Bureau does not believe that, where a payment from either a consumer or a creditor to a mortgage broker is counted toward points and fees, it is necessary or appropriate to count separately funds that the broker then passes on to its individual employees. In each case, any costs and risks to the consumer from high loan originator compensation are adequately captured by counting the funds a single time against the points and fees cap; thus, the Bureau does not believe the purposes of the statute would be served by counting some or all of the funds a second time, and is concerned that doing so could have negative impacts on the price and availability of credit.

Determining the appropriate accounting rule is significantly more complicated, however, in situations in which a consumer pays some up-front charges to the creditor and the creditor pays loan originator compensation to either its own employee or to a mortgage broker firm. Because money is fungible, tracking how a creditor spends money it collects in up-front charges versus amounts collected through the rate to cover both loan originator compensation and its other overhead expenses would be extraordinarily complex and cumbersome. To facilitate compliance, the Bureau believes it is appropriate and necessary to adopt one or more generalized rules regarding the accounting of various payments. However, the Bureau does not believe it yet has sufficient information with which to choose definitively between the additive approach provided for in the statutory language and other potential methods of accounting for payments in light of the multiple practical and complex policy considerations involved.

The potential downstream effects of different accounting methods are significant. Under the additive approach where no offsetting consumer payments against creditor-paid loan originator compensation is allowed, creditors

whose combined loan originator compensation and up-front charges would otherwise exceed the points and fees limits would have strong incentives to cap their up-front charges for other overhead expenses under the threshold and instead recover those expenses by increasing interest rates to generate higher gains on sale. This would adversely affect consumers who prefer a lower interest rate and higher up-front costs and, at the margins, could result in some consumers being unable to qualify for credit. Additionally, to the extent creditors responded to a “no offsetting” rule by increasing interest rates, this could increase the number of qualified mortgages that receive a rebuttable rather than conclusive presumption of compliance.

One alternative would be to allow all consumer payments to offset creditor-paid loan originator compensation. However, a “full offsetting” approach would allow creditors to offset much higher levels of up-front points and fees against expenses paid through rate before the heightened consumer protections required by the Dodd-Frank Act would apply. Particularly under HOEPA, this may raise tensions with Congress’s apparent intent. Other alternatives might use a hybrid approach depending on the type of expense, type of loan, or other factors, but would involve more compliance complexity.

In light of the complex considerations, the Bureau believes it is necessary to seek additional notice and comment. The Bureau therefore is finalizing this rule without qualifying the statutory result and is proposing two alternative comments in the concurrent proposal, one of which would explicitly preclude offsetting, and the other of which would allow full offsetting of any consumer-paid charges against creditor-paid loan originator compensation. The Bureau is also proposing comments to clarify treatment of compensation paid by consumers to mortgage brokers and by mortgage brokers to their individual employees. The Bureau is seeking comment on all aspects of this issue, including the market impacts and whether adjustments to the final rule would be appropriate. In addition, the Bureau is seeking comment on whether it would be helpful to provide for additional adjustment of the rules or additional commentary to clarify any overlaps in definitions between the points and fees provisions in this rulemaking and the 2013 ATR Final Rule and the provisions that the Bureau is separately finalizing in connection with the Bureau’s 2012 Loan Originator Compensation Proposal.

Finally, comment 32(b)(1)(ii)–4 includes revised versions of examples in proposed comment 32(b)(1)(ii)–2, as well as additional examples to provide additional guidance regarding what compensation qualifies as loan originator compensation that must be included in points and fees. These examples illustrate when compensation can be attributed to a particular transaction at the time the interest rate is set. New comment 32(b)(1)(ii)–5 adds an example explaining how salary is treated for purposes of loan originator compensation for calculating points and fees.

#### 32(b)(1)(iii)

##### Real Estate-Related Charges

Since the enactment of HOEPA in 1994, TILA section 103(aa)(4)(C) has provided that points and fees for HOEPA coverage *include* each charge listed in TILA section 106(e) (except escrow for the future payment of taxes), unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is paid to a third party unaffiliated with the creditor.<sup>124</sup> If any of the conditions are not met, then the charge must be included. Thus, such charges—*i.e.*, TILA section 106(a) charges paid to affiliates of the creditor, except such charges that are escrowed for the future payment of taxes—have always been included in the calculation of points and fees for high-cost mortgages, even if they were not included in the finance charge. The long-standing statutory requirement to include such charges in points and fees is implemented in existing § 1026.32(b)(1)(iii).

As noted in the preamble of the Bureau’s 2012 HOEPA Proposal, the Dodd-Frank Act did not amend TILA section 103(aa)(4)(C). However, as also noted in the 2012 HOEPA Proposal, the Board nevertheless proposed certain clarifying revisions to § 226.32(b)(1)(iii) in its 2011 ATR Proposal. In brief, the Board’s proposed revisions would have added the phrase “payable at or before closing of the mortgage” loan. The Board’s proposal would have added this limiting language to clarify that, notwithstanding the Dodd-Frank Act’s amendments to TILA requiring the inclusion in points and fees of all

charges payable “in connection with the transaction” (*see* the section-by-section analysis of § 1026.32(b)(1) above), the charges listed in § 1026.4(c)(7) would only need to be included if they were payable at or before consummation. For consistency with the Dodd-Frank Act, the Board’s proposal also would have enumerated separately as § 1026.32(b)(1)(iii)(A) through (C) the three long-standing pre-conditions for excluding from points and fees the charges referred to in § 226.32(b)(1)(iii).<sup>125</sup>

Proposed § 1026.32(b)(1)(iii) and comment 32(b)(1)(iii)–1 in the Bureau’s 2012 HOEPA Proposal republished the revisions proposed in the 2011 ATR Proposal and only minor, non-substantive changes. Proposed § 1026.32(b)(1)(iii) in the Bureau’s 2012 HOEPA Proposal thus would have provided for the inclusion in points and fees for closed-end credit transactions “all items listed in § 1026.4(c)(7) (other than amounts held for future payment of taxes) payable at or before consummation of the mortgage loan, 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.”

Proposed comment 32(b)(1)(iii)–1 in the Bureau’s 2012 HOEPA Proposal would have republished this comment as set forth in the 2011 ATR Proposal, with one minor change. Specifically, the Bureau’s proposed comment 32(b)(1)(iii)–1 would have provided that a fee paid by the consumer for an appraisal performed by the creditor must be included in points and fees under § 1026.32(b)(1)(iii), but the comment would have removed the phrase “even though the fee may be excludable from the finance charge if it is bona fide and reasonable in amount.” The Bureau would have made this proposed revision to comment 32(b)(1)(iii)–1 for consistency with the Bureau’s proposed more inclusive definition of the finance charge, which would have included such appraisal fees in the finance charge in all cases (*i.e.*, whether or not such fees were bona fide and reasonable in amount).

In sum, neither the Board’s 2011 ATR Proposal, nor the Bureau’s 2012 HOEPA Proposal, would have expanded the scope of items to be included in points and fees under § 1026.32(b)(1)(iii), but only would have made certain clarifying changes. The Bureau nevertheless received a number of comments from industry in response to proposed

<sup>124</sup> *See* TILA section 106(e)(1) (fees or premiums for title examination, title insurance, or similar purposes), (2) (fees for preparation of loan-related documents), (3) (escrows for future payment of taxes and insurance), (4) (fees for notarizing deeds and other documents), (5) (appraisal fees, including fees related to any pest infestation or flood hazard inspection conducted prior to closing), and (6) (credit reports).

<sup>125</sup> *See* 76 FR 27390, 27404, 27481, 27489 (May 11, 2011).

§ 1026.32(b)(1)(iii) as set forth in the 2012 HOEPA Proposal.

*Uncertainty Concerning the Definition of Points and Fees.* First, the Bureau received several comments suggesting that commenters were uncertain as to the interaction of proposed

§ 1026.32(b)(1)(i) (finance charge prong of points and fees) and (iii) (real estate-related charges). Commenters noted that the Bureau's proposed

§ 1026.32(b)(1)(iii) would have required the inclusion in points and fees in certain circumstances of items that the Bureau's proposed § 1026.32(b)(1)(i) otherwise would have excluded from points and fees through that provision's reliance on the finance charge as the starting point for the points and fees calculation. Commenters stated that, for example, proposed § 1026.32(b)(1)(i) would not require the inclusion in points and fees of charges payable in a comparable cash transaction (because such charges are excluded from the definition of the finance charge), but that proposed § 1026.32(b)(1)(iii) nevertheless would require such charges to be included if they were among the items listed in § 1026.4(c)(7) and met any of the other conditions specified in § 1026.32(b)(1)(iii) (e.g., the amount of the charge is unreasonable, the creditor receives direct or indirect compensation in connection with the charge, or the charge is paid to an affiliate of the creditor).<sup>126</sup> Commenters similarly noted that § 1026.32(b)(1)(iii) would include in points and fees charges set forth in § 1026.4(c)(7) unless they are reasonable and paid to a third party, but that § 1026.4(c)(7) itself specifies a list of real estate-related fees that are excluded from the definition of the finance charge (and therefore arguably excluded from points and fees under § 1026.32(b)(1)(i)). These commenters advocated either that the Bureau clarify whether the categories of charges discussed above are included in, or excluded from, points and fees, or that the Bureau clarify the points and fees definition by adopting a "plain English" approach. Finally, one commenter requested that the Bureau clarify whether property taxes are excluded from points and fees in all cases, regardless of whether they are reasonable in amount.

As noted above, neither proposed § 1026.32(b)(1)(i) nor proposed § 1026.32(b)(1)(iii) in the Bureau's 2012 HOEPA Proposal were intended to change the types of charges included in points and fees through these

<sup>126</sup> The commenters suggested that such fees payable in a comparable cash transaction be excluded from points and fees.

provisions, or the way that these provisions work together to define points and fees. The Bureau notes that much of the complexity that exists in the existing points and fees definition and about which industry commenters complained arises from the requirement in TILA to use the finance charge as the starting point for points and fees.

To address any uncertainty, however, the Bureau notes that commentary to § 1026.32(b)(1)(i) as adopted in the 2013 ATR Final Rule provides an example of how § 1026.32(b)(1)(i) and (iii) work together. Specifically, comment 32(b)(1)(i)-1, as adopted in that rulemaking, provides that, if an item meets the conditions for inclusion in points and fees specified in § 1026.32(b)(1)(iii), then it must be included in points and fees irrespective of whether it constitutes a finance charge and, in turn, irrespective of whether it would have been included in points and fees under § 1026.32(b)(1)(i) (i.e., even if payable in a comparable cash transaction). In other words, the finance charge merely constitutes the starting point for points and fees.<sup>127</sup>

*"Reasonable" or "Bona Fide" Charges.* As noted in the section-by-section analysis of § 1026.32(b)(1)(i)(D) above, several industry commenters argued that the Dodd-Frank Act adopted a "bona fide," rather than a "reasonable" standard for the exclusion from points and fees of third-party charges when it amended TILA section 103(bb)(1)(A)(ii) (i.e., HOEPA's points and fees coverage test) to exclude from points and fees bona fide third-party charges not retained by a creditor or its affiliate. These commenters objected to the requirement under proposed § 1026.32(b)(1)(iii) that the third-party charges covered by that provision be "reasonable" (as opposed to "bona fide") to be excluded from points and fees.

The Bureau disagrees that Congress intended that a "bona fide" test apply in determining whether all third-party charges may be excluded from points and fees. As noted in the Bureau's 2013 ATR Final Rule, which interprets similar provisions of TILA for qualified mortgages,<sup>128</sup> at the same time that Congress added the bona fide third-

<sup>127</sup> In response to commenters' questions concerning property taxes, the Bureau notes that escrowed taxes are excluded from the real estate-related charges that must be included in points and fees under certain circumstances.

<sup>128</sup> For qualified mortgages, the statutory counterpart to TILA section 103(bb)(1)(A)(ii) for high-cost mortgages is TILA section 129C(b)(2)(C)(i), which excludes bona fide third-party charges not retained by a creditor or its affiliate from the calculation of points and fees for qualified mortgages.

party charge language to TILA in section 103(bb)(1)(A)(ii), it retained long-standing TILA section 103(aa)(4)(C), requiring that, as a pre-condition for excluding the third-party charges listed in § 1026.4(c)(7) from points and fees, that such charges be "reasonable." The Bureau does not believe that the new "bona fide" third-party charge exclusion renders the pre-existing "reasonable" third-party charge exclusion meaningless and, in the absence of any evidence that the "reasonable" provision has been unworkable, the Bureau declines to alter it. Instead, as discussed in the section-by-section analysis of § 1026.32(b)(1)(i)(D) above, the Bureau concludes, consistent with its determination in the 2013 ATR Final Rule, that § 1026.32(b)(1)(iii), which specifically addresses the exclusion of items listed in § 1026.4(c)(7), takes precedence over the more general exclusion for bona fide third-party charges. In response to commenters' concerns that the "reasonableness" of third-party charges may be second-guessed, the Bureau notes its belief that the fact that a transaction for such services is conducted at arms-length ordinarily should be sufficient to ensure that the charge is reasonable.<sup>129</sup>

*Charges of Affiliated Settlement Service Providers.* Many industry commenters argued that the points and fees definition for high-cost mortgages should not distinguish between fees paid to affiliate and non-affiliate service providers. Commenters thus suggested that the Bureau use its exception authority to level the playing field either by excluding bona fide and reasonable affiliate fees from points and fees, or by requiring that all non-affiliated service provider fees be included. Commenters alternatively suggested that the Bureau require affiliate charges to be included in points and fees only to the extent that such charges are unreasonable or exceed the market price charged by unaffiliated service providers. Commenters advanced a number of arguments in support of these positions.

Commenters argued that there is no basis for a distinction between affiliate and non-affiliate charges, notwithstanding that TILA contemplates just such a distinction for points and fees. These commenters stated that affiliate business arrangements are

<sup>129</sup> The Bureau declines, however, to adopt a rule, as suggested by one industry commenter, that any fee permitted under the customary and reasonable appraisal fee rule in § 1026.42(f), is *per se* reasonable under § 1026.32(b)(1)(iii) and bona fide under § 1026.32(b)(1)(i)(D). Again, in the absence of evidence that the pre-existing reasonableness test in § 1026.32(b)(1)(iii) has been unworkable, the Bureau declines to change it.

expressly permitted and regulated by RESPA, that the Bureau has not articulated any policy purpose or consumer benefit to including affiliate fees in points and fees, and that the Bureau's 2012 HOEPA Proposal would discourage the use of affiliates, which undercuts a goal of the Bureau's 2012 TILA-RESPA Integration Proposal to increase certainty around the cost of affiliate providers by providing for a zero tolerance for settlement charges of affiliated entities. The commenters further stated that affiliate charges, just like charges for services by unaffiliated service providers, are set largely by factors outside the creditor's control, such as market price.

Commenters similarly argued that the HOEPA proposal's inclusion of affiliated third-party charges in points and fees would harm consumers while providing no countervailing benefit. The commenters asserted that roughly 26 percent of the market uses affiliate service providers, and that these providers offer value, convenience, efficiency, and reliability to consumers by providing "one-stop shopping," speeding up loan closings, and allowing creditors to control the quality of ancillary settlement services. Commenters pointed to studies demonstrating that affiliate settlement service providers are competitive in cost with unaffiliated service providers and argued that consumers would be harmed by reduced choice and by having to pay higher prices as a result of reduced competition as lenders avoided using affiliated service providers rather than risk high-cost mortgage coverage through the points and fees threshold.

Certain commenters expressed particular concern about the inclusion in points and fees of affiliated title charges. These commenters stated that there is no rational basis for requiring affiliated title charges to be included in points and fees, because, for example, title insurance fees are regulated at the State level either through statutorily-prescribed rates, or through a requirement that title insurance premiums be publicly filed. Commenters noted that, as a result of State regulation, there is little variation in title insurance charges from provider to provider and such charges are not subject to manipulation. In a variation of the argument that the Bureau generally should exclude affiliate settlement charges from points and fees, some commenters suggested that the Bureau should adopt a specific carve-out for affiliate title fees to the extent such fees are otherwise regulated at the State level, or to the extent that such

charges are reasonable and do not exceed the cost for unaffiliated title insurance.

The Bureau is adopting § 1026.32(b)(1)(iii) and related commentary in the 2013 ATR Final Rule substantially as proposed in the 2011 ATR and 2012 HOEPA Proposals.<sup>130</sup> The rationale set forth in the section-by-section analysis of § 1026.32(b)(1)(iii) in the 2013 ATR Final Rule applies equally to this rulemaking. TILA section 103(bb)(4) specifically mandates that fees paid to and retained by affiliates of the creditor be included in calculating points and fees for high-cost mortgages. To exclude such fees from points and fees for purposes of determining high-cost mortgage coverage, the Bureau would have to use its exception authority under TILA section 105(a). The Bureau is aware of concerns that including fees paid to affiliates in points and fees could make it more difficult for creditors using affiliated service providers to stay under the points and fees threshold for high-cost mortgages. On the other hand, fees paid to an affiliate pose greater risks to the consumer, since affiliates of a creditor may not have to compete in the market with other providers of a service and thus may charge higher prices that get passed on to the consumer. The Bureau believes that Congress weighed these competing considerations and elected not to exclude fees paid to affiliates. Indeed, title XIV repeatedly differentiates between affiliates and independent, third-party service providers. *See, e.g.*, Dodd-Frank Act sections 1403, 1411, 1412, 1414, and 1431. The Bureau is not aware of any empirical evidence suggesting that Congress's election, if implemented, would affect the availability of responsible credit, or otherwise harm consumers, and therefore does not believe that it would be appropriate to use its exception authority in this instance.

#### 32(b)(1)(iv)

As noted in the Bureau's 2013 ATR Final Rule, section 1431(c) of the Dodd-Frank Act amended TILA to add new TILA section 103(bb)(4)(D), which codifies, with a few adjustments, existing § 1026.32(b)(1)(iv). Section 1026.32(b)(1)(iv) requires the inclusion

<sup>130</sup> Comment 32(b)(1)(iii)-1 is adopted in the 2013 ATR Final Rule without the change proposed in the 2012 HOEPA Proposal that would have accounted for the Bureau's proposed more inclusive definition of the finance charge. As discussed, the Bureau plans to determine whether to finalize the more inclusive finance charge proposed in its 2012 TILA-RESPA Integration Proposal at a later time, in conjunction with the finalization of that proposal.

in points and fees for high-cost mortgages of certain credit insurance and debt cancellation premiums.

The Board's 2011 ATR Proposal would have implemented TILA section 103(bb)(4)(D) by amending existing § 226.32(b)(1)(iv) to track the language set forth in the Dodd-Frank Act.<sup>131</sup> Specifically, the 2011 ATR Proposal would have provided that points and fees include premiums payable at or before closing for any credit life, disability, unemployment, or credit property insurance, or any other accident, loss-of-income, life or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract. The 2011 ATR Proposal also would have added new comment 32(b)(1)(iv)-2 to clarify that "credit property insurance" includes insurance against loss or damage to personal property such as a houseboat or manufactured home.

Proposed § 1026.32(b)(1)(iv) in the Bureau's 2012 HOEPA Proposal republished 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 proposed new comment 32(b)(1)(iv)-2, substantially as proposed in the Board's 2011 ATR Proposal.<sup>132</sup> In addition, proposed comment 32(b)(1)(iv)-1 would have clarified 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 stated that the clarifying phrase "if permitted by applicable law" was 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.<sup>133</sup>

<sup>131</sup> See 76 FR 27390, 27404-05, 27481, 27489 (May 11, 2011).

<sup>132</sup> 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." In its 2012 HOEPA Proposal, the Bureau proposed to implement that provision in proposed § 1026.34(a)(10) prohibiting the financing of points and fees for high-cost mortgages. *See* the section-by-section analysis of § 1026.34(a)(10) below.

<sup>133</sup> In general, TILA section 129C(d) provides that no creditor may finance, directly or indirectly, in connection with any residential mortgage loan or with any extension of credit under an open-end consumer credit plan secured by the principal dwelling of the consumer, any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life, or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract. TILA section 129C(d)(1) specifies that insurance premiums or

The Bureau did not receive many comments on proposed § 1026.32(b)(1)(iv) as set forth in the 2012 HOEPA Proposal. A few industry commenters requested that the Bureau clarify whether insurance premiums that are solely for the consumer's benefit, such as homeowner's insurance, must be included in points and fees. One such commenter specifically noted that certain types of voluntary insurance and service contract products for manufactured homes, like homeowner's insurance, protect the consumer as beneficiary and not the creditor. This commenter requested that the Bureau clarify in commentary that such products are clearly excluded from the definition of credit property insurance. At least one industry commenter also stated that the statutory (and thus Regulation Z's) definition of points and fees contradicts itself on whether hazard insurance premiums are included. The commenter stated that hazard insurance premiums are payable in comparable cash transactions, and therefore excluded under § 1026.32(b)(1)(i) (the finance charge prong of points and fees). The commenter argued that the regulation should be clear that hazard insurance premiums are excluded from points and fees in all cases because they are payable in a cash transaction.

The Bureau is adopting § 1026.32(b)(1)(iv) and comments 32(b)(1)(iv)-1 and -2 in the 2013 ATR Final Rule substantially as proposed in the 2011 ATR and 2012 HOEPA Proposals. However, as noted in the 2013 ATR Final Rule, § 1026.32(b)(1)(iii) is adopted in that rulemaking with the clarification in comment 32(b)(1)(iii)-3 that premiums or other charges for "any other life, accident, health, or loss-of-income insurance" need not be included in points and fees if the consumer is the sole beneficiary of the insurance. As with other charges that are specifically required to be included in points and fees, hazard insurance premiums (unless solely for the benefit of the consumer) are included even if they are not payable in a comparable cash transaction and thus not part of the finance charge.

32(b)(1)(v)

As noted in the Bureau's 2013 ATR Final Rule, section 1431(c) of the Dodd-Frank Act amended TILA to add new TILA section 103(bb)(4)(E), which

debt cancellation or suspension fees calculated and paid in full on a monthly basis shall not be considered financed by the creditor, and (d)(2) provides that the prohibition does not apply to reasonable credit unemployment insurance that it not paid to the creditor or an affiliate of the creditor.

requires 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. The Board's 2011 ATR Proposal proposed to implement this statutory change in new § 226.32(b)(1)(v).<sup>134</sup> Proposed § 1026.32(b)(1)(v) in the Bureau's 2012 HOEPA Proposal republished the Board's proposed § 226.32(b)(1)(v), except that it would have replaced 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 credit transactions set forth in the HOEPA Proposal's § 1026.32(b)(8)(i).<sup>135</sup>

The Bureau received few comments on proposed § 1026.32(b)(1)(v). Several commenters observed that proposed § 1026.32(b)(1)(v), when read together with the Bureau's definition of prepayment penalty for closed-end credit transactions in proposed § 1026.32(b)(8)(i), would have required the inclusion in points and fees of bona fide third-party charges waived by the creditor on the condition that the consumer did not prepay the loan, even though the Bureau's proposal would have permitted certain such charges to be excluded from the definition of prepayment penalty (and, in turn, from points and fees) for HELOCs. Those comments are addressed in the section-by-section analysis of § 1026.32(b)(6)(i) below.

Proposed § 1026.32(b)(1)(v) requiring 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 otherwise is being adopted in the 2013 ATR Final Rule substantially as proposed.

32(b)(1)(vi)

Section 1431(c) of the Dodd-Frank Act amended TILA to add new TILA section 103(bb)(4)(F), which requires 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. The Board's 2011 ATR Proposal proposed to implement this statutory change in new § 226.32(b)(1)(vi) by providing for the inclusion in points and fees of the total

prepayment penalty incurred by the consumer if the consumer refinances an 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.<sup>136</sup> Proposed § 1026.32(b)(1)(vi) in the Bureau's 2012 HOEPA Proposal republished the Board's proposed § 226.32(b)(1)(vi), except that it would have replaced 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 credit transactions in proposed § 1026.32(b)(8)(i).<sup>137</sup> The Bureau did not receive any comments specifically in response to proposed § 1026.32(b)(1)(vi).

Proposed § 1026.32(b)(1)(vi) is being adopted, substantially as proposed in the 2011 ATR and 2012 HOEPA Proposals, in § 1026.32(b)(1)(vi) in the 2013 ATR Final Rule, with only minor changes for clarity. As noted in the preamble to the 2013 ATR Final Rule, the Bureau believes that it is appropriate for § 1026.32(b)(1)(vi) to apply to the current holder of the existing mortgage loan, the servicer acting on behalf of the current holder, or an affiliate of either (*i.e.*, and not to the creditor that originally made the loan, if that creditor no longer holds the loan). The entities that are listed in § 1026.32(b)(1)(vi) are the entities that would refinance the transaction and, as a practical matter, gain from the prepayment penalties on the previous transaction. Accordingly, the Bureau is invoking its exception and adjustment authority under TILA section 105(a) with respect to the provision. The Bureau believes that adjusting the statutory language will more precisely target the entities in the current market environment that would benefit from refinancing loans with prepayment penalties, more effectively deter loan flipping to collect prepayment penalties, and help preserve consumers' access to safe, affordable credit. It also will lessen the compliance burden on other entities that lack an incentive for loan flipping, such as a creditor that originated the existing loan but no longer holds the loan. For these reasons, the Bureau believes that use of its exception and adjustment authority is necessary and proper under TILA section 105(a) to effectuate the purposes of and facilitate compliance with TILA.

<sup>134</sup> See 76 FR 27390, 27405, 27481 (May 11, 2011).

<sup>135</sup> The Bureau is finalizing proposed § 1026.32(b)(8)(i) as § 1026.32(b)(6)(i) in the 2013 ATR Final Rule. See the section-by-section analysis of § 1026.32(b)(6)(i) below.

<sup>136</sup> See 76 FR 27390, 27405, 27481 (May 11, 2011).

<sup>137</sup> As already noted, the Bureau is finalizing proposed § 1026.32(b)(8)(i) as § 1026.32(b)(6)(i) in the 2013 ATR Final Rule. See the section-by-section analysis for proposed § 1026.32(b)(6)(i), below.

32(b)(2)

## Proposed Provisions Not Adopted

As noted in the section-by-section analysis of § 1026.32(b)(1)(ii) above, section 1431(c) of the Dodd-Frank Act amended TILA to require the inclusion in points and fees for high-cost mortgages (and qualified mortgages) of all compensation paid directly or indirectly by a consumer or a creditor to a “mortgage originator.” As also noted above, 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.”<sup>138</sup> 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, namely employees of a retailer of manufactured homes under certain circumstances, certain real estate brokers, and servicers.<sup>139</sup> The Bureau’s proposed § 1026.32(b)(2) republished the Board’s proposed § 226.32(b)(2), with certain terminology changes to reflect the scope of transactions covered by § 1026.32, rather than only § 1026.43, as in the Board’s proposal. The Bureau received numerous comments concerning proposed § 1026.32(b)(2). These comments are discussed in the section-by-section analysis of § 1026.32(b)(1)(ii) above. Instead, the Bureau finalizes the definition of points and fees for HELOCs in § 1026.32(b)(2).

## Points and Fees for HELOCs

As discussed in the section-by-section analysis of § 1026.32(a) above, TILA section 103(bb)(1)(A) as amended by the Dodd-Frank Act provides that a “high-cost mortgage” may include an open-end credit plan secured by a consumer’s principal dwelling. 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 HELOCs. Unlike TILA’s pre-existing points and fees definition for closed-end credit transactions, which enumerates six specific categories of items that creditors must include in points and fees, the points and fees provision for HELOCs 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 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 HELOCs.

For clarity and to facilitate compliance, the 2012 HOEPA Proposal would have implemented TILA section 103(bb)(5) in § 1026.32(b)(3) (*i.e.*, separately from closed-end points and fees) and would have defined points and fees for HELOCs to include the following categories of charges: (1) Each item required to be included in points and fees for closed-end credit transactions 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, along with certain modifications adopted in the final rule in response to comments received, is discussed below.

## 32(b)(2)(i)

Proposed § 1026.32(b)(3)(i) would have provided 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 would have mirrored proposed § 1026.32(b)(1)(i) for closed-end credit transactions, with the following differences.

First, proposed § 1026.32(b)(3)(i) would have specified 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 would have clarified that this provision was intended to address the potential uncertainty 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 HELOCs that often may not be known at account opening. Proposed comment 32(b)(3)(i)–1 thus would have explained that charges payable after the opening of a HELOC, 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 HELOCs, 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 HELOCs, except as provided in proposed § 1026.32(b)(3)(vi).

Second, in contrast to proposed § 1026.32(b)(1)(i) for closed-end credit transactions, proposed § 1026.32(b)(3)(i) for HELOCs would not have addressed the more inclusive definition of the finance charge proposed in the Bureau’s 2012 TILA–RESPA Integration Proposal. Such language was unnecessary in the open-end credit context, because the Bureau’s 2012 TILA–RESPA Proposal proposed to adopt the more inclusive finance charge only for closed-end credit transactions.

Third, the Bureau would have omitted from proposed § 1026.32(b)(3)(i) as unnecessary the exclusion from points and fees set forth in amended TILA section 103(bb)(1)(C) for premiums or guaranties for government-provided or certain PMI premiums. The Bureau understands that such insurance products, which are designed to protect creditors originating loans with high loan-to-value ratios, are normally inapplicable in the context of HELOCs.

The Bureau received several comments concerning proposed § 1026.32(b)(3)(i). One industry commenter expressed concern that the different formulation of proposed § 1026.32(b)(1)(i) for closed-end credit transactions and proposed § 1026.32(b)(3)(i) for HELOCs reflected a substantive difference in the approach to points and fees in the closed- and open-end credit contexts. A consumer group commenter urged the Bureau to coordinate the closed- and open-end points and fees definitions to establish a clear and consistent rule in both contexts for when charges must be included in the calculation (*i.e.*, whether points and fees includes any charges in connection with the transaction, charges “payable” at or before consummation or account opening, or charges “known” at or before consummation or account opening). Finally, the Bureau received one comment suggesting that it incorporate TILA section 103(bb)(1)(C) concerning mortgage insurance premiums into the points and fees definition for HELOCs as a prophylactic measure, even though such products typically are not associated with open-end credit plans.

The Bureau finalizes § 1026.32(b)(3)(i) substantially as proposed, in § 1026.32(b)(2)(i). However, the Bureau

<sup>138</sup> See 76 FR 27390, 27402–04, 27481, 27488–89 (May 11, 2011).

<sup>139</sup> See *id.* at 27405–06, 27481.

omits the proposed reference to charges “payable” at or before account opening. As discussed in the section-by-section analysis of § 1026.32(b)(1) above, the final rule instead clarifies that each of the charges in the points and fees calculation for HELOCs must be included (as under final § 1026.32(b)(1) for closed-end credit transactions) only if it is “known” at or before account opening. The result of this change is consistency between the final rules for points and fees in § 1026.32(b)(1) for closed-end credit and § 1026.32(b)(2) for HELOCs. In addition, as suggested by one commenter, the Bureau is incorporating TILA’s provisions concerning mortgage insurance premiums into the definition of points and fees for HELOCs in § 1026.32(b)(2)(i)(B) and (C).

#### 32(b)(2)(i)(B)

The Bureau adopts § 1026.32(b)(2)(i)(B) in the final rule to clarify that government mortgage insurance premiums and guarantees are excluded from points and fees for HELOCs, just as they are from points and fees for closed-end credit transactions. Thus, § 1026.32(b)(2)(i)(B) for HELOCs mirrors § 1026.32(b)(1)(i)(B) as adopted in the 2013 ATR Final Rule for closed-end credit transactions, and comment 32(b)(2)(i)(B) cross-references comment 32(b)(1)(i)(B) for further guidance. The Bureau’s 2012 HOEPA Proposal would not have incorporated this provision of TILA into the definition of points and fees for HELOCs. However, upon further consideration, the Bureau believes that even if such mortgage insurance is not common for HELOCs, it is useful to exclude these types of premiums and guarantees from the points and fees definition to accommodate the possibility of this product developing for HELOCs. Additionally, to ease compliance, the Bureau believes it is desirable for the definition of points and fees for closed-end credit transactions and HELOCs to be parallel to the greatest extent practicable. Accordingly, the Bureau interprets TILA section 103(bb)(5) as containing an exclusion for government premiums and guarantees that is parallel to that for closed-end transactions, and is exercising its authority under TILA section 103(bb)(4)(G) to ensure consistent treatment.

#### 32(b)(2)(i)(C)

The Bureau adopts § 1026.32(b)(2)(i)(C) in the final rule to clarify that PMI premiums are excluded from points and fees for HELOCs to the same extent that they are excluded from

points and fees for closed-end credit transactions. Thus, § 1026.32(b)(2)(i)(C) for HELOCs mirrors § 1026.32(b)(1)(i)(C) as adopted in the 2013 ATR Final Rule for closed-end credit transactions, and comment 32(b)(2)(i)(C) cross-references comments 32(b)(1)(i)(C)–1 and –2 for further guidance. The Bureau’s 2012 HOEPA Proposal would not have incorporated this provision of TILA into the definition of points and fees for HELOCs. However, upon further consideration, the Bureau believes that even if such mortgage insurance is not common for HELOCs, it is useful to include it in the points and fees definition, as noted above. For the same reasons discussed above in connection with government premiums, the Bureau interprets TILA section 103(bb)(5) as containing an exclusion for PMI premiums that is parallel to that for closed-end transactions, and is exercising its authority under TILA section 103(bb)(4)(G) to ensure consistent treatment.

#### 32(b)(2)(i)(D)

As discussed in the section-by-section analysis of § 1026.32(b)(1)(i)(D) above, 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. The proposal would have implemented this provision for both closed- and open-end credit transactions in proposed § 1026.32(b)(5)(i), with a cross-reference to § 1026.36(a)(1) for the definition of loan originator.<sup>140</sup> Proposed § 1026.32(b)(5)(i) would have specified, however, that “loan originator” as used in that provision meant a loan originator as that term is defined in § 1026.36(a)(1), notwithstanding § 1026.36(f). The Bureau believed that such a clarification was necessary for HELOCs because originators of open-end credit plans are not, strictly speaking, “mortgage originators” as that term is defined in amended TILA section 103. TILA section 103(cc)(2)(A) defines a mortgage originator as a person that performs specific activities with respect to a “residential mortgage loan,” and TILA section 103(cc)(5) excludes consumer credit transactions under an open-end credit plan from the definition of residential mortgage loan. Thus, on its face, TILA section 103(bb)(1)(A)(ii) could be read not to exclude from points

and fees bona fide third-party charges not retained by an originator of an HELOC. As stated in the proposal, 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- or open-end credit transaction. Accordingly, proposed § 1026.32(b)(5)(i) stated 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 mortgage credit transaction) notwithstanding § 1026.36(f), which otherwise limits the term “loan originator” to persons originating closed-end credit transactions.

The Bureau did not receive any comments concerning its proposal to treat originators of HELOCs and originators of closed-end credit transactions equally for purposes of the bona fide third-party charge exclusion from points and fees. Thus, the Bureau finalizes the provision substantially as proposed. However, in light of the fact that the Bureau is adopting the bona fide third-party charge exclusion for closed-end credit transactions in § 1026.32(b)(1)(i)(D) in the 2013 ATR Final Rule (*i.e.*, rather than in § 1026.32(b)(5)(i) for both closed- and open-end credit transactions, as proposed), the Bureau adopts a separate exclusion for HELOCs in § 1026.32(b)(2)(i)(D) of the 2013 HOEPA Final Rule, which mirrors the provision for closed-end credit transactions. Thus, the final rule for HELOCs reflects the fact that mortgage insurance premiums, certain real estate-related charges, and certain credit insurance premiums may sometimes be included in points and fees for HELOCs according to the specific requirements in § 1026.32(b)(2)(i)(C), (ii), and (iii), even if those charges might otherwise have been excluded from points and fees as bona fide third-party charges.

#### 32(b)(2)(i)(E) and (F)

As discussed in the section-by-section analysis of § 1026.32(b)(1)(i)(E) and (F) above, section 1431(d) of the Dodd-Frank Act added new section 103(dd) to TILA, which permits a creditor to exclude from the points and fees calculation for high-cost mortgages, if certain conditions are met, either: (1) Up to two bona fide discount points (TILA section 103(dd)(1)), or (2) up to one bona fide discount point (TILA section 103(dd)(2)). The 2012 HOEPA Proposal would have implemented these bona fide discount point provisions for both closed- and open-end credit transactions in § 1026.32(b)(5)(ii)(A) (exclusion of up

<sup>140</sup> Like the Board’s proposed § 226.43(e)(3)(ii), 76 FR 27390, 27465, 27485 (May 11, 2011), the Bureau’s proposed § 1026.32(b)(5)(i) would have used the term “loan originator” rather than “mortgage originator” for consistency within Regulation Z.



to two discount points) and (B) (exclusion of up to one discount point).

Proposed § 1026.32(b)(5)(ii)(A) and (B) are being adopted in the 2013 ATR Final rule as § 1026.32(b)(1)(i)(E) and (F), respectively, as carve-outs in the finance charge prong of closed-end points and fees for closed-end credit transactions. Thus, the Bureau adopts § 1026.32(b)(2)(i)(E) and (F) to provide for the exclusion of up to two bona fide discount points from the points and fees calculation for HELOCs. The Bureau notes that it did not receive any comments specifically concerning the application of the bona fide discount point exclusion to HELOCs. Thus, as adopted, the bona fide discount point exclusions for HELOCs mirror § 1026.32(b)(1)(i)(E) and (F) for closed-end credit transactions, and comments 32(b)(2)(i)(E)–1 and 32(b)(2)(i)(F)–1 cross-reference the commentary to those provisions for additional guidance.

#### 32(b)(2)(ii)

The Bureau's proposal did not include in the calculation of points and fees for HELOCs compensation paid to originators of open-end plans. As discussed above in the section-by-section analysis of § 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 did not specify in amended TILA section 103(bb)(5) concerning HELOCs that compensation paid to originators of open-end credit plans must be included in the calculation of points and fees, the Bureau believed that it was reasonable to conclude that Congress did not intend for such compensation to be included. The Bureau believed that any incentive to evade the closed-end, high-cost mortgage points and fees threshold by structuring a transaction as a HELOC could 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); § 1026.34(b), below.

The Bureau did not propose to include loan originator compensation in points and fees for HELOCs, but the

Bureau noted 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 requested comment on the proposed definition of points and fees for HELOCs, including on whether any additional fees should be included in the definition. In particular, the Bureau requested comment on whether compensation paid to originators should be included in the calculation of points and fees for HELOCs. The Bureau recognized that neither TILA nor Regulation Z currently addresses compensation paid to originators of HELOCs and accordingly requested comment on the operational issues that would be entailed in tracking such compensation for inclusion in the points and fees calculation. The Bureau also requested 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 calculating such compensation for HELOCs, or whether additional or different guidance would be of assistance in the open-end context.

The Bureau received comments from both industry and consumer groups concerning its proposal to omit loan originator compensation from points and fees for HELOCs. Industry commenters supported the exclusion, with some arguing (as discussed in the section-by-section analysis above) that the exclusion should be extended to closed-end credit transactions. Consumer groups strongly objected to the Bureau's proposed exclusion of compensation to originators of HELOCs on the grounds that it would perpetuate an unwarranted distinction between closed- and open-end credit for purposes of HOEPA coverage, when Congress clearly intended that HELOCs be covered by HOEPA and subject to the same protections as closed-end credit transactions, including the provisions that the Dodd-Frank added to address perceived abuses in loan originator compensation. Consumer groups similarly argued that the Bureau's proposal to rely on the anti-structuring provision in § 1026.34(b) was "dangerously naive." No commenters provided information concerning the operational burdens that HELOC creditors might face in tracking loan originator compensation, or on whether closed-end guidance for calculating loan originator compensation would be sufficient to provide guidance to HELOC creditors.

As discussed in the section-by-section analysis of § 1026.32(b)(1)(ii), the Bureau is adopting in the 2013 ATR Final Rule a requirement to include in points and fees compensation paid to loan originators, and is providing guidance for determining what types of compensation, and how much compensation, needs to be included. The Bureau is persuaded that requiring loan originator compensation to be included in points and fees for closed-end credit, while exempting it for open-end credit, could lead to undesirable results, such as creditors steering consumers to open-end credit where a closed-end product would be more appropriate. Accordingly, the Bureau is adopting in the final rule a requirement that creditors include compensation paid to originators of open-end credit plans, to the same extent that such compensation is required to be included for closed-end credit transactions.

To provide the public with an additional opportunity to give feedback concerning what further guidance may be needed to calculate and include loan originator compensation for open-end credit in points and fees, the Bureau is soliciting comment on this issue in the concurrent proposal that is being published today.

#### 32(b)(2)(iii)

Proposed § 1026.32(b)(3)(ii) would have provided for the inclusion in points and fees for HELOCs of the real estate-related charges 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 would have been 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) thus would have mirrored proposed § 1026.32(b)(1)(iii) concerning the inclusion of such charges in points and fees for closed-end credit transactions. Proposed comment 32(b)(3)(ii)–1 would have cross-referenced proposed comment 32(b)(1)(iii)–1 for guidance concerning the inclusion in points and fees of items listed in § 1026.4(c)(7). The Bureau did not receive any comments specifically addressing proposed § 1026.32(b)(3)(ii) or its related commentary. The Bureau thus finalizes these provisions as proposed in § 1026.32(b)(2)(iii).

#### 32(b)(2)(iv)

Proposed § 1026.32(b)(3)(iii) would have provided for the inclusion in points and fees for HELOCs 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) thus would have mirrored proposed § 1026.32(b)(1)(iv) concerning the inclusion of such charges for closed-end credit transactions. Proposed comment 32(b)(3)(iii)-1 would have cross-referenced 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.

The Bureau received few comments specifically addressing proposed § 1026.32(b)(3)(iii) or its related commentary. The comments argued that the Bureau should specify, as for closed-end points and fees, that hazard insurance premiums are excluded in all cases for HELOCs because they are payable in a comparable cash transaction. For the reasons discussed in the section-by-section analysis of closed-end points and fees, the Bureau disagrees and notes that the final rule includes hazard insurance premiums unless they are solely for the benefit of the consumer. The Bureau thus finalizes proposed § 1026.32(b)(3)(iii) and its related commentary generally as proposed, as § 1026.32(b)(2)(iv). The Bureau adds a new cross-reference to comment 32(b)(1)(iv)-3, which is being adopted in the 2013 ATR Final Rule. Comment 32(b)(1)(iv)-3 provides clarification concerning treatment of premiums solely for the benefit of the consumer.

#### 32(b)(2)(v)

Proposed § 1026.32(b)(3)(iv) would have provided for the inclusion in points and fees for HELOCs the maximum prepayment penalty that may be charged or collected under the terms of the plan. This provision would have mirrored proposed § 1026.32(b)(1)(v) concerning the inclusion of maximum prepayment penalties for closed-end credit transactions, except that proposed § 1026.32(b)(3)(iv) would have cross-referenced the definition of prepayment penalty provided for HELOCs in proposed § 1026.32(b)(8)(ii).

The Bureau did not receive any comments specifically addressing proposed § 1026.32(b)(3)(iv). The Bureau thus finalizes this provision generally as proposed, as § 1026.32(b)(2)(v). The Bureau replaces

the proposed cross-reference to § 1026.32(b)(8)(ii) with a cross-reference to § 1026.32(b)(6)(ii), where the definition of prepayment penalty for HELOCs is being finalized.

#### 32(b)(2)(vi)

As discussed in the section-by-section analysis of § 1026.32(b)(1)(vi) above, section 1431(c) of the Dodd-Frank Act amended TILA to add new TILA section 103(bb)(4)(F) to the general definition of points and fees. TILA section 103(bb)(4)(F) requires 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. The HOEPA Proposal would not have included this item in its enumerated list of points and fees for HELOCs. However, proposed comment 32(b)(8)-2 would have aligned the treatment of closed-end and open-end credit transactions by clarifying that for HELOCs, the term “prepayment penalty” includes a charge imposed 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.

Upon further reflection, the Bureau believes that it is preferable to align the list of items in § 1026.32(b)(2) that should be included in points and fees for HELOCs with that for closed-end credit transactions in § 1026.32(b)(1). As a result, the Bureau is including the guidance contained in proposed comment 32(b)(8)-2 in § 1026.32(b)(2)(vi). Section 1026.32(b)(2)(vi) includes a requirement that the creditor include in points and fees for HELOCs the total prepayment penalty, as defined in § 1026.32(b)(6)(ii), incurred by the consumer if the consumer refinances an existing closed-end credit transaction with an open-end credit plan, or terminates an existing open-end credit plan in connection with obtaining a new open-end credit transaction, with the current holder of the existing plan, a servicer acting on behalf of the current holder, or an affiliate of either.

#### 32(b)(2)(vii)

Proposed § 1026.32(b)(3)(v) would have provided for the inclusion in points and fees for HELOCs 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.” In the proposal, the Bureau noted 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 would not otherwise have been included in points and fees for HELOCs under proposed § 1026.32(b)(3)(i). The Bureau believed, however, that such fees should be included in points and fees for HELOCs because creditors extending HELOCs may commonly impose such fees on consumers as a pre-condition to maintaining access to the plans, and because the Bureau believed that creditors generally could calculate at account opening the amount of participation charges that the consumer would be required to pay to maintain access for the life of the plan.

Proposed comment 32(b)(3)(v)-1 thus would have clarified that § 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, as described in § 1026.4(c)(4). The comment would have clarified 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 would be required to include \$500 in participation fees in its calculation of points and fees.

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

The Bureau received several comments from industry concerning the proposed inclusion of participation fees in points and fees for HELOCs. Several commenters expressed concern that the definition would disproportionately impact HELOCs with lower commitment amounts and therefore adversely affect the availability of such products. Commenters also stated that TILA’s statutory language did not support the inclusion of participation fees in points and fees if the creditor waives the fees dependent on the consumer’s use of the credit plan, such as if the consumer carries an outstanding balance or if the line has been used during the year. Commenters observed that these conditions cannot be known at account opening, thus the amount of participation charge to be included in points and fees over the term of the HELOC cannot be known at account opening. Commenters suggested

various alternatives for including participation fees in points and fees for HELOCs, such as requiring the fees to be included only if they are payable at or before account opening, or requiring them to be included only for the first three years of the account (after which the consumer could close the account without facing a prepayment penalty if the consumer objected to paying the fee). No commenters provided any suggestions for calculating the amount of participation fees to be included in points and fees for a HELOC without a specified account termination date.

The Bureau adopts this provision as § 1026.32(b)(2)(vii) with the limitation that creditors must include only those participation charges that are payable before or at account opening. The Bureau expects that this approach will provide a workable rule for creditors opening HELOCs with participation charges that may be waived depending on a consumer's use of the account, as well as for HELOCs without a specified account termination date.

#### 32(b)(2)(viii)

As noted above, new TILA section 103(bb)(5) specifies, in part, that the calculation of points and fees for HELOCs 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 proposed to implement this requirement in § 1026.32(b)(3)(vi). Specifically, proposed § 1026.32(b)(3)(vi) would have provided for inclusion in the calculation of points and fees for HELOCs any transaction fee, including any minimum fee or per-transaction fee, that would be charged for a draw on the credit line. Proposed § 1026.32(b)(3)(vi) would have clarified 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. In the proposal, the Bureau noted its belief 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 would have clarified this requirement with an example. Proposed comment 32(b)(3)(vi)-2 would have clarified that, if the terms of the HELOC permit a consumer to draw on the credit line using either a variable- or 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.

The Bureau solicited comment on the requirement to include in points and fees for HELOCs the charge assessed for one draw of the total credit line, and on whether additional guidance was needed for HELOCs with a maximum amount per draw. The Bureau did not receive any comments specifically addressing proposed § 1026.32(b)(3)(vi) or its related commentary. The Bureau thus finalizes these provisions as proposed, but rennumbers them in the final rule as § 1026.32(b)(2)(viii) and comments 32(b)(2)(viii)-1 and -2.

#### 32(b)(3)

##### Definition of Bona Fide Discount Point

As discussed in the section-by-section analysis of § 1026.32(b)(2) above, the Bureau proposed to implement the calculation of points and fees for HELOCs in § 1026.32(b)(3). The Bureau is finalizing the calculation of points and fees for HELOCs in § 1026.32(b)(2). Thus, the Bureau is adopting in § 1026.32(b)(3) the definition of bona fide discount point. The Bureau proposed to implement this definition in § 1026.32(b)(5)(ii) in the 2012 HOEPA Proposal.

The Dodd-Frank Act added TILA sections 103(dd)(3) and (4) and 129C(b)(2)(C)(iii) and (iv) to provide the same methodology for high-cost mortgages and qualified mortgages, respectively, for determining whether a discount point is "bona fide" and thus excludable from points and fees. Specifically, these sections provide that a discount point is "bona fide" if (1) the consumer knowingly pays it for the purpose of reducing, and the point in fact results in a bona fide reduction of, the interest rate or time-price differential applicable to the mortgage, and (2) the amount of the interest rate reduction purchased is reasonably consistent with established industry norms and practices for secondary mortgage market transactions.

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 would have been "bona fide" if it both (1) reduced the interest rate or time-price differential applicable to transaction based on a calculation that was 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) accounted for the amount of compensation that the creditor could reasonably expect to receive from secondary market investors in return for the transaction. Specifically, proposed § 1026.32(b)(5)(ii)(C) in the 2012 HOEPA Proposal simply would have cross-referenced proposed § 226.43(e)(3)(iv) as set forth in the Board's 2011 ATR Proposal for purposes of determining whether a discount point was "bona fide" and excludable from the high-cost mortgage points and fees calculation.<sup>141</sup> The Bureau noted in the 2012 HOEPA Proposal that it expected to provide further clarification concerning the exclusion of bona fide discount points from points and fees for qualified mortgages when it finalized the Board's 2011 ATR Proposal. In the 2012 HOEPA Proposal, the Bureau thus stated that it would coordinate any such clarification across the ATR and HOEPA Final Rules.

The Bureau received several comments concerning its proposed definition of "bona fide discount point," all from industry commenters. The comments generally repeated what commenters had stated in response to the Board's 2011 ATR Proposal. Specifically, commenters stated that the proposed definition was both vague and overly restrictive, and that the secondary market does not create a meaningful benchmark for whether the amount of a given interest rate reduction is "bona fide." Some commenters objected that they were not aware of "established industry practices" related to loan pricing and that pricing strategies vary significantly from creditor to creditor. For example, one creditor's "par rate" may be higher or lower than another's based on whether the creditor absorbs secondary market costs such as LLPAs and processing fees or passes them on to the consumer. Such factors could impact the creditor's discount point pricing. Certain other commenters requested guidance for how creditors making portfolio loans with discount points could establish that the discount point is "bona fide," given that

<sup>141</sup> See 76 FR 27390, 27485 (May 11, 2011).

the proposed test would have been tied to the secondary market.

As discussed at length in the Bureau's 2013 ATR Final Rule, the Bureau is adopting in that rulemaking a definition of "bona fide discount point" with certain modifications from what was proposed in the 2011 ATR and 2012 HOEPA Final Rules. In brief, the Bureau is removing the proposed requirement that interest rate reductions take into account secondary market considerations. Instead, as revised, § 1026.32(b)(3) requires only that the calculation of the interest rate reduction be 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. As noted in the 2013 ATR Final Rule, the Bureau finds that removing the secondary market component of the "bona fide" discount point definition is necessary and proper under TILA section 105(a) to effectuate the purposes of and facilitate compliance with TILA. In particular, the exception is necessary and proper to permit creditors sufficient flexibility to demonstrate that they are in compliance with the requirement that discount points are bona fide. These same considerations regarding facilitating compliance apply equally in the high-cost mortgage context.

To further assist creditors in the bona fide discount point calculation for high-cost mortgages and qualified mortgages, the Bureau is adopting in the 2013 ATR Final Rule new comment 32(b)(3)-1, which provides examples of methods that a creditor can use to determine whether a discount point is "bona fide." The examples are discussed in further detail in the section-by-section analysis of § 1026.32(b)(4) in the ATR Final Rule.

32(b)(4)

#### Proposed Provision Not Adopted

Proposed § 1026.32(b)(4) in the 2012 HOEPA Proposal would have excluded from points and fees for HELOCs any charge the creditor waived at or before account opening, unless the creditor could assess the charge after account opening. Proposed comment 32(b)(4)-1 would have provided an example to illustrate the rule. The Bureau received several comments relating to whether and when conditionally-waived closing costs should be required to be included in points and fees through the prepayment penalty prong of the calculation. The Bureau is addressing issues concerning the treatment of conditionally-waived, third-party charges in the definition of prepayment

penalty, and therefore is not finalizing proposed § 1026.32(b)(4). Public comments regarding these charges are addressed in the section-by-section analysis of § 1026.32(b)(6) below.

#### Total Loan Amount for Points and Fees

As noted in the section-by-section analysis of § 1026.32(a)(1)(ii) above, the Bureau's 2012 HOEPA Proposal proposed for organizational purposes to move (1) the existing definition of "total loan amount" for closed-end credit transactions from comment 32(a)(1)(ii)-1 to proposed § 1026.32(b)(6)(i), and (2) the examples showing how to calculate the total loan amount for closed-end credit transactions from existing comment 32(a)(1)(ii)-1 to proposed comment 32(b)(6)(i)-1. The Bureau also proposed certain changes to the total loan amount definition and commentary for closed-end credit transactions, as discussed below. Finally, the Bureau proposed to define "total loan amount" for HELOCs in proposed § 1026.32(b)(6)(ii). The definition of "total loan amount" is being finalized in the 2013 ATR Final Rule. As adopted in that rulemaking, the definitions and accompanying guidance will appear in § 1026.32(b)(4) and comment 32(b)(4)(i)-1. Changes from what the Bureau proposed in its 2012 HOEPA Proposal are discussed below.

#### 32(b)(4)(i)

As noted, the Bureau proposed to move existing comment 32(a)(1)(ii)-1 concerning calculation of the "total loan amount" for points and fees to proposed § 1026.32(b)(6)(i) and comment 32(b)(6)(i)-1 and to specify that the calculation applies to closed-end credit transactions. The Bureau also proposed to amend the definition of "total loan amount" so that the "amount financed," as calculated pursuant to § 1026.18(b), would no longer be the starting point for the total loan amount calculation. The Bureau proposed this amendment both because the Bureau believed that it would streamline the total loan amount calculation and because the Bureau believed the revisions were sensible in light of the more inclusive definition of the finance charge proposed in the Bureau's 2012 TILA-RESPA Proposal. In the preamble of the HOEPA proposal, the Bureau noted that one effect of the proposed more inclusive finance charge generally could have been to reduce the "amount financed" for many transactions. The Bureau thus proposed not to rely on the "amount financed" calculation as the starting point for the "total loan amount" in HOEPA. The Bureau instead proposed 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 would have provided an example of the Bureau's proposed "total loan amount" calculation for closed-end credit transactions.

The Bureau requested comment on the appropriateness of its revised definition of "total loan amount," and particularly on whether additional guidance was needed in light of the prohibition against financing of points and fees for high-cost mortgages. Specifically, the Bureau noted that, under the 2012 HOEPA 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 a closed-end credit transaction is covered by HOEPA under the points and fees threshold. Second, if a transaction 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 of § 1026.34(a)(10) below.

The 2012 HOEPA Proposal noted that, notwithstanding HOEPA's ban on the financing of points and fees for high-cost mortgages, 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.<sup>142</sup> In this way, the percentage limit on points and fees for determining HOEPA coverage would 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 preamble to the 2012 HOEPA Proposal provided an example to illustrate how the provisions concerning financed points and fees in proposed §§ 1026.32(b)(6)(i) and 1026.34(a)(10) would have worked together.

The Bureau received numerous comments concerning its proposed amendment to the total loan amount calculation for closed-end credit transactions. The comments, from both industry and consumer groups,

<sup>142</sup> 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.

generally requested that the calculation be clarified prior to its finalization. The Bureau received no comments seeking further guidance or clarification concerning the interaction of the total loan amount calculation and the prohibition against financing of points and fees for high-cost mortgages.

After further consideration, the Bureau has determined not to adopt at this time the proposed revisions to the total loan amount calculation for closed-end credit transactions. The Bureau notes that it likely will revisit this subject when it issues a final rule concerning the proposed more inclusive finance charge. Thus, the Bureau adopts the total loan amount definition for closed-end credit transactions as separately finalized in connection with the 2013 ATR Final Rule. As finalized therein, the total loan amount for a closed-end credit transaction is calculated consistently with existing comment 32(a)(1)(ii)–1, except that the Bureau is adopting certain clarifications to reflect the operation of other, new provisions under TILA. For example, the total loan amount calculation examples, which discuss whether and when to subtract financed points and fees from the amount financed, are revised so that they no longer refer to the financing of credit life insurance, because the financing of most such insurance is prohibited under TILA section 129C(d).

#### 32(b)(4)(ii)

Proposed § 1026.32(b)(6)(ii) in the 2012 HOEPA Proposal would have provided that the “total loan amount” for a HELOC is the credit limit for the plan when the account is opened. The Bureau requested comment as to whether additional guidance was needed concerning the “total loan amount” for HELOCs. The Bureau received no comments concerning proposed § 1026.32(b)(6)(ii) and finalizes it in this rulemaking, as § 1026.32(b)(4)(ii).

#### 32(b)(5)

The 2012 HOEPA Proposal would have re-numbered existing § 1026.32(b)(2) defining the term “affiliate” as § 1026.32(b)(7) for organizational purposes. The Bureau received no comments on this provision. The Bureau finalizes this organizational change in the 2013 ATR Final Rule, by re-numbering existing § 1026.32(b)(2) as § 1026.32(b)(5).

#### 32(b)(6)

##### HOEPA’s Current Approach to Prepayment Penalties

Existing § 1026.32 addresses prepayment penalties in § 1026.32(d)(6) and (7). Existing § 1026.32(d)(6) has implemented 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. Existing § 1026.32(d)(7) has implemented TILA section 129(c)(2) by specifying when a creditor historically has been permitted to 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 in TILA, other than certain disclosure requirements set forth in TILA section 128(a)(11) and (12).<sup>143</sup>

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

As discussed in the 2012 HOEPA Proposal, sections 1431 and 1432 of the Dodd-Frank Act (high-cost mortgages) and section 1414 of the Dodd-Frank Act (qualified mortgages) amended TILA to further restrict (and often prohibit) prepayment penalties in dwelling-secured credit transactions. The Dodd-Frank Act restricted prepayment penalties in three main ways.

*Qualified Mortgages.* First, as discussed in the 2013 ATR Final Rule, the Dodd-Frank Act added to TILA new section 129C(c)(1) relating to qualified mortgages, which generally provides that a residential mortgage loan (*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 Bureau is defining that term in § 1026.43(e)(2), (e)(4), and (f)), (2) has an APR that cannot increase after consummation, and (3) is not a higher-priced mortgage

loan as defined in § 1026.35(a).<sup>144</sup> Under amended TILA section 129C(c)(3), moreover, even loans that meet the statutorily-prescribed criteria just described (*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).<sup>145</sup>

*High-Cost Mortgages.* Second, as discussed above in the section-by-section analysis of § 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 2 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 credit transactions and HELOCs 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 both qualified mortgages and high-cost mortgages. *See* the section-by-section analysis of § 1026.32(b)(1)(v)–(vi) and (b)(2)(v)–(vi) above. *See also* the section-by-section analysis of §§ 1026.32(b)(1)(v)–(vi) and .43(e)(3) in the Bureau’s 2013 ATR Final Rule (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

<sup>143</sup> Existing § 1026.35(b)(2) restricts prepayment penalties for higher-priced mortgage loans in much the same way that existing § 1026.32(d)(6) and (7) restricts such penalties for high-cost mortgages, but § 1026.35(b)(2) was adopted before the specific prohibitions contained in the Dodd-Frank Act were enacted. The Bureau’s Escrows Final Rule is removing the restriction in § 1026.35(b)(2), in any event, in light of the broader prepayment penalty regulations being adopted both in this rulemaking and the 2013 ATR Final Rule.

<sup>144</sup> The Bureau’s 2013 ATR Final Rule is finalizing the Board’s proposed implementation of TILA section 129C(c)(1) in new § 1026.43(g)(1).

<sup>145</sup> The Bureau’s 2013 ATR Final Rule is finalizing the Board’s proposed implementation of TILA section 129C(c)(3) in new § 1026.43(g)(2), which provides that a prepayment penalty must not apply after the three-year period following consummation, and must not exceed 2 percent of the outstanding loan balance prepaid (during the first two years following consummation) or 1 percent of the outstanding loan balance prepaid (during the third year following consummation).

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;<sup>146</sup> 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 threshold for high-cost mortgages. In addition, in the open-end credit context, no HELOC 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 and the Bureau'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 credit 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.<sup>147</sup>

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).<sup>148</sup> 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,<sup>149</sup> 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.

The Bureau's 2012 TILA-RESPA Proposal drew from the Board's pre-existing proposals concerning the definition of prepayment penalty for closed-end credit transactions, and reconciled their definitions in proposing a definition for closed-end credit disclosures.

#### The Bureau's 2012 HOEPA Proposal

To provide guidance as to the meaning of “prepayment penalty” for closed-end credit transactions subject to § 1026.32 that was consistent with the definition proposed in the Bureau's 2012 TILA-RESPA Proposal, as well as to provide guidance concerning prepayment penalties in the context of HELOCs, the Bureau's 2012 HOEPA Proposal would have established a new § 1026.32(b)(8) to define the term “prepayment penalty” for purposes of closed- and open-end credit transactions subject to § 1026.32. Proposed § 1026.32(b)(8)(i) defining “prepayment penalty” for closed-end credit transactions is finalized as § 1026.32(b)(6)(i) in the 2013 ATR Final Rule, and proposed § 1026.32(b)(8)(ii) defining the term for HELOCs is finalized as § 1026.32(b)(6)(ii) in this final rule, with certain adjustments from the proposal discussed below.

#### 32(b)(6)(i)

#### Prepayment Penalty; Closed-End Credit Transactions

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) would have provided that, for a closed-end credit transaction, 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 would have given examples of prepayment penalties for closed-end credit transactions, including (among others) (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; and (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. Proposed comment

<sup>146</sup> New TILA section 129(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 credit transactions with prepayment penalties that exceed two percent of the amount prepaid. To comply with both the high-cost mortgage provisions and the qualified mortgage provisions, creditors originating most closed-end transactions 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.

<sup>147</sup> See 75 FR 58539, 58756, 58781 (Sept. 24, 2010). The preamble to the Board's 2010 Mortgage Proposal explained that the proposed revisions to current Regulation Z commentary and proposed comment 38(a)(5)–2 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).

<sup>148</sup> See 76 FR 27390, 27481–82 (May 11, 2011).

<sup>149</sup> 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).

32(b)(8)–1.i would have provided additional clarification concerning the treatment as prepayment penalties of charges imposed as a result of the interest accrual amortization method used in the transaction.

Proposed comment 32(b)(8)–3.i through –3.ii would have applied to both closed- and open-end credit transactions and would have clarified that a prepayment penalty does not include: (1) Fees imposed for preparing and providing documents when a loan is paid in full, or when a HELOC 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 Bureau noted that its proposed definition of prepayment penalty in § 1026.32(b)(8)(i) and comments 32(b)(8)–1 and 32(b)(8)–3.i and .ii would have substantially incorporated 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, reconciled their differences. For example, the definitions would have incorporated the language from the Board's 2009 Closed-End Proposal and 2010 Mortgage Proposal (but that was 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's HOEPA proposal sought 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's HOEPA proposal noted that it expected 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 believed that adopting a consistent definition of "prepayment penalty" across its various pending

rulemakings affecting closed-end credit would facilitate compliance.

The Bureau received several comments concerning its proposed definition for prepayment penalties in closed-end credit transactions. The comments related to two main aspects of the proposal: (1) The treatment as a prepayment penalty of the assessment of interest for periods after the borrower has paid in full; and (2) the inclusion of all conditionally-waived closing costs in the definition of prepayment penalty for closed-end credit transactions. The Bureau is adopting proposed § 1026.32(b)(8)(i) as § 1026.32(b)(6)(i) in the 2013 ATR Final Rule, with certain changes from the 2012 HOEPA Proposal to address comments received, as discussed below. As adopted in the 2013 ATR Final Rule and as discussed further therein, comments 32(b)(6)–1 and –2 provide examples of payments that are (and are not) prepayment penalties in the case of closed-end credit transactions.

*Post-payoff interest charges.* Several commenters expressed serious concern about the Bureau's proposal to include in the definition of prepayment penalty for closed-end credit transactions the assessment of interest for periods after the borrower pays in full. Commenters voiced concern about the potential impact of this provision on FHA lending. FHA loans, based on a monthly interest accrual amortization method, are subject to a policy under which interest may accrue and be charged to the consumer for a partial month after a full payoff. Given that FHA loans can be paid off well beyond 36 months (the maximum time period during which a prepayment penalty may be imposed without triggering HOEPA), defining prepayment penalty to include such interest would effectively cause FHA loans to trigger HOEPA unless the FHA changes its policy going forward.<sup>150</sup> Commenters stated that the Bureau should either define prepayment penalties to exclude interest payments that are imposed for the balance of a month in which a consumer repays a mortgage loan in full, or the Bureau should work with FHA prior to the change taking effect to avoid disruption to industry and, in turn, to borrowers.

As discussed in the 2013 ATR Final Rule, the Bureau is not removing or substantively amending comment

<sup>150</sup> As noted in the Bureau's 2013 ATR Final Rule, it would similarly mean that no future FHA loan could be a qualified mortgage absent a change in the accrual method, due to prepayment penalty limitations on qualified mortgages. In addition, the accrual method would be prohibited for non-qualified mortgages, which are not permitted to have any prepayment penalties.

32(b)(6)–1.i, which specifies that the practice of charging a consumer interest after the consumer prepays the loan in full is a prepayment penalty. As noted in that rulemaking, the Bureau includes the interest calculation as an example of a prepayment penalty in comment 32(b)(6)–1.i chiefly because such methodology penalizes the consumer by requiring the consumer to pay interest for a period after the loan has been paid in full. The inclusion of this example is also consistent with long-standing Regulation Z commentary accompanying § 1026.18 that requires such charges to be disclosed as prepayment penalties, as well as with Board Regulation Z proposals from 2009 and 2010.<sup>151</sup>

However, with respect to FHA practices relating to monthly interest accrual amortization, the Bureau has consulted extensively with HUD in issuing this final rule as well as the 2013 ATR Final Rule. Based on these consultations, the Bureau understands that HUD must engage in rulemaking to end its practice of imposing interest charges on consumers for the balance of the month in which consumers prepay in full. The Bureau further understands that HUD requires approximately 24 months to complete its rulemaking process. Accordingly, in recognition of the important role that FHA-insured credit plays in the current mortgage market and to facilitate FHA creditors' ability to comply with this aspect of the 2013 HOEPA and ATR Final Rules, the Bureau is using its authority under TILA section 105(a) to provide for optional compliance until January 21, 2015 with § 1026.32(b)(6)(i) and the official interpretation of that provision in comment 32(b)(6)–1.i regarding monthly interest accrual amortization.

Specifically, § 1026.32(b)(6)(i) provides that interest charged consistent with the monthly interest accrual amortization method is not a prepayment penalty for FHA loans consummated before January 21, 2015. FHA loans consummated on or after January 21, 2015 must comply with all aspects of the final rule. The Bureau is making this adjustment pursuant to its authority under TILA section 105(a), which provides that the Bureau's regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions as in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, prevent

<sup>151</sup> 74 FR 43232, 43257, 43295, 43390, 43413 (Aug. 26, 2009); 75 FR 58539, 58586 (Sept. 24, 2010).

circumvention or evasion thereof, or facilitate compliance therewith. 15 U.S.C. 1604(a). The Bureau believes it is necessary and proper to make this adjustment to facilitate compliance with TILA and its purposes while mitigating the risk of disruption to the market. For purposes of this rulemaking, the Bureau specifically notes that the inclusion of interest charged consistent with the monthly interest accrual amortization method in the definition of prepayment penalty for purposes of determining whether a transaction has exceeded the high-cost mortgage prepayment penalty or points and fees coverage tests (and, in turn, whether the transaction has violated the prohibition against prepayment penalties for high-cost mortgages) applies only to transactions consummated on or after January 10, 2014; for FHA loans, compliance with this aspect of the definition or prepayment penalties is optional for transactions consummated prior to January 21, 2015.

*Conditionally-waived closing costs.* Several commenters expressed dissatisfaction with the proposed inclusion of conditionally-waived closing costs as prepayment penalties for closed-end credit transactions. The commenters noted that the 2012 HOEPA Proposal would have excluded such waived closing costs from the definition of prepayment penalty for HELOCs, provided that the costs represented bona fide third-party charges and were recouped only in the case of prepayments occurring within the first 36 months after account opening. As with other aspects of the Proposal that applied different treatment to open-versus closed-end credit, consumer groups argued that waived closing costs should be considered prepayment penalties in all cases. Some industry commenters, on the other hand, argued that all waived closing charges (*i.e.*, not only bona fide third-party charges, and not only such charges that the creditor might recoup during the first three years) should be excluded from the definition of prepayment penalty for both closed- and open-end credit. Other industry commenters requested that the exemption from prepayment penalties for waived third-party charges proposed for HELOCs apply equally to closed-end subordinate-lien loans, because creditors commonly waive third-party fees on those loans as they do for HELOCs. One commenter suggested that the rule be clarified so that a charge, such as taxes, which would not be included in points and fees if the consumer paid it at closing would not be included in points and fees through

the prepayment penalty prong if the creditor waived that charge but required it to be repaid if the consumer prepaid the loan or terminated the plan early. Another commenter noted that there is a practice of waiving closing costs on smaller transactions on the condition that the consumer does not prepay within three years of consummation or account opening. This commenter expressed concern that treatment of those costs as prepayment penalties would exceed the two percent HOEPA prepayment penalty trigger, thus unfairly burdening small-dollar-value lending.

The Bureau is also adopting language and adding an example in the 2013 ATR Final Rule to comment 32(b)(6)–1.ii to clarify that, for closed-end credit transactions (as for HELOCs), the term “prepayment penalty” does not include conditionally-waived, bona fide third-party closing charges that the creditor may impose on the consumer if the consumer prepaies the loan in full within 36 months of consummation.

The Bureau believes that excluding such charges from the definition of prepayment penalty for both closed- and open-end credit is the only practicable way to make the various provisions of HOEPA relating to prepayment penalties and points and fees work sensibly together. In this regard, the Bureau notes that bona fide third-party charges that the consumer pays upfront and that are not paid to or retained by the creditor or its affiliate are excluded from the definition of points and fees for closed-end credit transactions under § 1026.32(b)(1)(i)(D). By contrast, if the same bona fide third-party charges, waived on the condition that the consumer does not prepay the loan in full, are defined as prepayment penalties, then such charges would be required to be included in points and fees (through the prepayment penalty prong) even though the consumer may never actually pay those fees. The Bureau believes that treating a conditionally-waived charge that would not otherwise be included in points and fee as a prepayment penalty would penalize the creditor for the conditional waiver and deter creditors from making these offers to the detriment of consumers. As noted in the 2013 ATR Final Rule, the Bureau recognizes that the creditor receives no profit from imposing or collecting such bona fide third-party charges, and the Bureau believes that treating such charges as a prepayment penalty might very well have the effect of reducing consumer choice without providing any commensurate consumer benefit. In an effort to provide a sensible way to

permit a creditor to protect itself from losing money paid at closing to third parties on the consumer’s behalf, prior to such time as the creditor can otherwise recoup such costs through the interest rate on the mortgage loan, while balancing consumer protection interests, the Bureau has concluded that such fees should be permissible for a limited time after consummation for closed-end credit transactions.

#### 32(b)(6)(ii)

##### Prepayment Penalties; HELOCs

Proposed § 1026.32(b)(8)(ii) would have defined the term “prepayment penalty” for HELOCs. Specifically, proposed § 1026.32(b)(8)(ii) would have provided 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 would have clarified 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 would have further clarified 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 provided 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.<sup>152</sup>

Proposed comment 32(b)(8)–3.iii would have specified that, in the case of

<sup>152</sup> The proposal noted that exclusion of certain conditionally-waived closing costs from the definition of prepayment penalty for HELOCs would have been different from the proposal’s definition of prepayment penalty for closed-end credit transactions. As discussed in the section-by-section analysis of § 1026.32(b)(6)(i), the Bureau adopts a consistent treatment of conditionally-waived closing costs for closed-end credit transactions.



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.<sup>153</sup>

The Bureau received several comments from consumer groups concerning its proposed definition of prepayment penalties for HELOCs. These comments generally urged the Bureau to eliminate distinctions between the treatment of prepayment penalties in the closed- and open-end credit contexts because consumers do not distinguish between closed- and open-end products and thus they should not be treated differently.

The Bureau finalizes § 1026.32(b)(8)(ii) as § 1026.32(b)(6)(ii). For the reasons discussed in the section-by-section analysis of § 1026.32(b)(6)(i) above, the Bureau has determined to exclude conditionally-waived, bona fide third-party closing costs from the definition of prepayment penalty for closed-end credit transactions where the terms of the transaction provide that the creditor may recoup those costs from the consumer if the consumer prepays the transaction in full sooner than 36 months after consummation. With this change, the Bureau believes there is parity between closed- and open-end credit transactions for prepayment penalties.

### 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 proposed 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 proposed 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 would have clarified that creditors must comply with § 1026.6(a)(1), which sets forth the general requirements for determination and disclosure of finance charges associated with open-end credit plans. In addition, the proposed comment would have stated 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 proposed rule would have made clarifications to § 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) would have incorporated the requirement in current § 1026.32(c)(3) for closed-end credit transactions and clarified 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. To facilitate compliance and to provide consumers with meaningful disclosures, the Bureau proposed § 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) would have provided 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, the proposal would have required this example to be based on the following assumptions: (1) The consumer borrows the full credit line, as disclosed pursuant to § 1026.32(c)(5)(ii) 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 would have required 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 proposed § 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) would have required 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) would have required 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) would have required 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.

The Bureau solicited comment on these proposed statements and whether other language would be appropriate and beneficial to consumer. The Bureau did not receive any comments addressing these issues. Accordingly, the Bureau is adopting § 1026.32(c)(3) as proposed.

The Bureau also proposed 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 proposed to renumber current comment 32(c)(3)–1 as proposed comment 32(c)(3)(i)–1 for organizational purposes. The Bureau did not receive any comments addressing revised comment 32(c)(3)–1, and accordingly is adopting comment 32(c)(3)(i)–1 as proposed, with a minor revision for consistency with Regulation Z terminology.

In order to provide additional guidance on the application of § 1026.32(c)(4) to open-end credit plans, the Bureau proposed to revise comment 32(c)(4)–1. For an open-end credit plan, comment 32(c)(4)–1 would have provided that the disclosure of the maximum monthly payment, as required under § 1026.32(c)(4), must be

<sup>153</sup> The proposal noted that the exclusion from prepayment penalties of fees that a creditor may charge in a HELOC may impose in lieu of terminating and accelerating a plan is consistent with 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).

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 received no comments on this aspect of the proposal, and accordingly is adopting comment 32(c)(4)–1 as proposed.

The Bureau proposed to amend § 1026.32(c)(5) to clarify the disclosure requirements for open-end credit plans. In the proposal, the Bureau noted that the amount borrowed can be ascertained in a closed-end credit transaction but typically is not known at account opening for an open-end credit plan. Specifically, proposed § 1026.32(c)(5)(ii) would have provided 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 proposed technical revisions to the existing requirements for closed-end credit transactions under § 1026.32(c)(5) and to the guidance under comment 32(c)(5)–1. Upon further consideration of these provisions, the Bureau recognizes that the prohibition of financing points and fees in final § 1026.34(a)(10) will prohibit the financing of any points and fees, as defined in § 1026.32(b)(1) and (2) for all high-cost mortgages. This prohibition thus includes the financing of optional credit insurance or debt cancellation coverage described in existing § 1026.32(c)(5), as well as “premiums or other charges for any credit life, credit disability, credit unemployment, or credit property insurance, or any other life, accident, health, or loss-of-income insurance for which the creditor is the beneficiary, as well as any payments directly or indirectly for any debt cancellation or suspension agreement or contract” as described in existing comment 32(c)(5)–1. Accordingly, the disclosure for high-

cost mortgages required by § 1026.32(c)(5) should not include premiums or other charges for debt cancellation coverage or other charges that are included in the calculation of points and fees, and thereby prohibited from being financed under § 1026.34(a)(10). Section 34(a)(10) does not prohibit, however, the financing of certain bona fide third-party charges that are not considered “points and fees,” such as fees charged by a third-party counselor in connection with the consumer’s receipt of pre-loan counseling under § 1025.34(a)(5). Accordingly, the Bureau is adopting § 1026.32(c)(5) with revisions for clarification and consistency with final §§ 1026.32(b)(2) and 1026.34(a)(10), and eliminating 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.

#### Definition of Balloon Payment

The Bureau proposed two alternatives in proposed § 1026.32(d)(1)(i) to define balloon payments for purposes of implementing HOEPA’s new restrictions on these payments. Under Alternative 1, proposed § 1026.32(d)(1)(i) would have incorporated the statutory language and defined “balloon payment” as a scheduled payment that is more than twice as large as the average of regular periodic payments. Under Alternative 2, the rule would have mirrored Regulation Z’s existing definition of “balloon payment” in § 1026.18(s)(5)(i). Accordingly, proposed § 1026.32(d)(1)(i) would have provided that a balloon payment is “a payment schedule with a payment 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.

The Bureau noted in the proposal that, in its view, Alternative 2 would better protect consumers and their interests, but solicited comment on both alternatives. As stated in the proposal, 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 noted 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. Under either alternative, a high-cost mortgage generally must provide for fully amortizing payments.

The Bureau solicited 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. The Bureau did not receive any comments that persuasively suggested Alternative 1 was preferable to Alternative 2.

The Bureau is adopting Alternative 2 as proposed, pursuant to its authority under TILA section 129(p)(1). TILA section 129(p)(1) allows the Bureau to 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 homeownership 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 being adopted in the 2013 ATR Final Rule and was proposed in the 2012 TILA–RESPA Proposal.

The Bureau also adopts proposed comment 32(d)(1)(i)–1, which provides

further guidance on the application of § 1026.32(d)(1)(i) under Alternative 2. Specifically, the comment clarifies that for purposes of open-end transactions, the term “regular periodic payment” or “periodic payment” means the required minimum periodic payment.

In addition, the Bureau is finalizing proposed § 1026.32(d)(1)(iii) with some changes for clarification purposes. Proposed § 1026.32(d)(1)(i) would have been applicable to open-end credit plans. However, for an open-end credit plan that has both a draw period and a repayment period during which no further draws may be taken—a structure the Bureau believes is common for open-end plans—proposed § 1026.32(d)(1)(iii) would have made the limitations of § 1026.32(d)(1)(i) applicable only to the repayment period. Given that § 1026.32(d)(1)(i) defines a balloon payment as any payment that is more than twice the regular periodic payment, any open-end credit plan that converts from smaller interest-only payments to larger fully amortizing payments could be considered a balloon payment if the post-conversion payment is more than twice the interest-only payment during the draw period. As stated in the 2012 HOEPA Proposal, the purpose of the proposed exclusion of the draw period from the balloon limitation for this type of open-end plan was to provide creditors with flexibility to offer products with beneficial payment features.

The Bureau is adopting proposed § 1026.32(d)(1)(iii) with revisions to clarify that the exception to § 1026.32(d)(1)(i) applies to any adjustment in the regular periodic payment that results solely from the credit plan’s transition from the draw period to the repayment period. The Bureau believes this revision alleviates any concern that proposed § 1026.32(d)(1)(iii) would have allowed balloon payments during the draw period in other situations. The Bureau is also adding new comment 32(d)(1)–2 to provide further guidance on how the balloon payment restriction applies to open-end credit plans with both a draw and repayment period, including a clarification that the limitation in § 1026.32(d)(1)(i) does not apply to any increases in regular periodic payments that result from the initial draw or additional draws on the credit line during the draw period. Finally, the Bureau is renumbering proposed comment 32(d)(1)–2 to comment 32(d)(1)–3.

#### “Bridge” Loans

As previously noted, the Bureau proposed to revise § 1026.32(d)(1)(ii) consistent with amended TILA section 129(e). Accordingly, proposed § 1026.32(d)(1)(ii) would have provided an exemption to the balloon payment restrictions under § 1026.32(d)(1)(i) only if the payment schedule is adjusted to the seasonal or irregular income of the consumer. The proposal would have removed an exemption from current § 1026.32(d)(1)(ii) to the restrictions on balloon payments for loans with maturity 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.

The Bureau received several comments from industry groups and banks that supported retaining the exemption for bridge loans in the final rule, and no comments that voiced opposition. Industry groups and some community banks pointed out that bridge loans are currently covered by HOEPA, and an exemption to the pre-Dodd Frank Act restrictions on balloon payments was in place to prevent unnecessarily restricting access to short-term bridge loans for consumers. In particular, commenters stated that, because all short-term bridge loans are structured with balloon payments, the effect of this removal would be to prohibit any bridge loan that is classified as a high-cost mortgage. Some commenters suggested that the Bureau retain the existing exemption for temporary or bridge loans of less than 12 months as exists in current § 1026.32(d)(1)(ii), while one commenter suggested that the Bureau provide an exemption for temporary bridge loans of 12 months or less.

The Bureau agrees with these commenters that the proposed rule would have unnecessarily banned any short term bridge loans covered by HOEPA. Accordingly, final § 1026.32(d)(1)(ii) retains an exemption to the restriction on balloon payments for short-term bridge loans made in connection with the acquisition of a new dwelling. In addition, because it is the Bureau’s understanding that temporary or short-term “bridge” loans are commonly structured as 12-month balloons, the Bureau is adopting the commenter’s suggestion of bridge loans of terms of 12 months or less.

The Bureau is retaining this exemption as modified pursuant to its authority under TILA section 129(p), which grants the Bureau authority to exempt specific mortgage products or

categories from any or all of the prohibitions specified in TILA section 129(c) through (i) 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 homeownership and equity protections. The Bureau believes this approach is in the interest of the borrowing public and will strengthen homeownership and equity protection, because it is consistent with the historical and current treatment of bridge loans under HOEPA and will not unduly restrict access to temporary bridge financing for consumers. The Bureau further believes that improving access to short-term bridge financing will strengthen homeownership and equity protection by better allowing homeowners who need to sell a current residence in order to purchase a new one access to short-term financing to do so. Finally, the Bureau believes that adopting an exemption for short-term bridge loans of 12 months or less, as opposed to the current exemption for short-term bridge loans of less than 12 months, is also in the interest of the borrowing public because it will remove an unnecessary barrier to short-term financing in its usual 12-month form, at negligible if any cost to consumer protection. The Bureau does not believe that permitting a term of 12 months or less, as opposed to 11 months and 30 days or less, presents an increased risk of abuse to consumers. In addition, permitting balloons for bridge loans with a term of 12 months or less is consistent with the 2013 ATR Final Rule and 2013 Escrows Final Rule.

#### Balloon Payment Restrictions for Creditors in Rural or Underserved Areas

As previously noted, proposed § 1026.32(d)(1)(ii) would have provided an exemption to the balloon payment restrictions under § 1026.32(d)(1)(i) only if the payment schedule is adjusted to the seasonal or irregular income of the consumer. The Bureau did not propose different treatment for loans made by creditors in rural or underserved areas.

A significant number of industry commenters, especially community banks, objected generally to the balloon payment restriction. These commenters expressed concerns that the 2012 HOEPA Proposal would have prohibited them from making balloon loans that fall within the new HOEPA thresholds, which may have a significant adverse effect on their businesses given that the thresholds for high-cost mortgages are being expanded by the statute. These commenters argued that balloon loans are important to serve the needs of their customers, especially in rural areas, and

banks in these areas use balloon loans to manage their risks and safety and soundness concerns. Commenters asked for various types of relief, including that the prohibition be lifted entirely; that community banks be exempt from the prohibition if the balloon loan is held in portfolio; or that balloon payments be permitted so long as they are only for a final payment.

The Bureau notes that it is including an exemption to the balloon payment restrictions on qualified mortgages for certain loans made by creditors in "rural" or "underserved" areas in the 2013 ATR Final Rule. As more fully explained in that rule, the Bureau is allowing for certain qualified mortgages to contain balloon payments provided that (1) The loan meets all of the criteria for a qualified mortgage, with certain exceptions; (2) the creditor makes a determination that the consumer is able to make all scheduled payments, except the balloon payment, out of income or assets other than the collateral; (3) the loan is underwritten based on a payment schedule that fully amortizes the loan over a period of not more than 30 years and takes into account all applicable mortgage-related obligations; (4) the loan is not originated in conjunction with a forward commitment and is held in portfolio for at least three years; and (5) the creditor meets prescribed qualifications. See §§ 1026.43(f)(1)(i)–(vi) and 1026.43(f)(2). Those qualifications are that the creditor: (1) Operates predominantly in rural or underserved areas; (2) together with all affiliates, has total annual residential mortgage loan originations that do not exceed 500 first-lien covered transactions per year; (3) retains the balloon payment loans in portfolio; and (4) has less than \$2 billion in assets. See §§ 1026.43(f)(1)(vi) and 1026.35(b)(2)(iii)(A), (B), (C).<sup>154</sup>

The Bureau agrees with commenters that allowing creditors in certain rural or underserved areas to extend high-cost mortgages with balloon payments could benefit consumers by expanding access to credit in these areas, and also would facilitate compliance for creditors who make these loans. The Bureau thus believes that balloon payments should not be prohibited for high-cost mortgages in rural or underserved areas, provided the creditor meets certain criteria that balance the need for access to credit with appropriate consumer protections. In the Bureau's view, the 2013 ATR Final Rule provides an appropriate framework for determining

when a high-cost mortgage may be permitted to contain a balloon payment. Further, allowing creditors who make high-cost mortgages in rural or underserved areas to originate loans with balloon payments if they satisfy the same criteria promotes consistency between the 2013 HOEPA Final Rule and the 2013 ATR Final Rule, and thereby facilitates compliance for creditors who operate in these areas. Thus, as adopted, § 1026.32(d)(1) grants a limited exemption from the balloon payment prohibition for creditors that make high-cost mortgages with balloon payments, but that also meet the conditions set forth in §§ 1026.43(f)(1)(i) through (vi) and 1026.43(f)(2), as adopted by the 2013 ATR Final Rule.

The Bureau is providing this exemption pursuant to its authority under TILA section 129(p)(1), which grants it authority to exempt specific mortgage products or categories from any or all of the prohibitions specified in TILA section 129(c) through (i) 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 homeownership and equity protections. The Bureau believes the balloon payment exemption for high-cost mortgages is in the interest of the borrowing public and will strengthen homeownership and equity protection. Allowing greater access to credit in rural or underserved areas will help those consumers who may be able to obtain credit only from a limited number of creditors obtain mortgages. Further, it will do so in a manner that balances consumer protections with access to credit. In the Bureau's view, concerns about potentially abusive practices that may accompany balloon payments will be curtailed by the additional requirements set forth in §§ 1026.43(f)(1)(i) through (vi). Creditors who make these high-cost mortgages will be required to verify that the loans also satisfy a number of additional criteria, including some specific criteria required for qualified mortgages. Further, as fully discussed in the 2013 ATR Final Rule, creditors that make balloon high-cost mortgages under this exception will be required to hold the high-cost mortgages in portfolio for a specified time, which the Bureau believes also decreases the risk of abusive lending practices. Accordingly, for these reasons and for the purpose of consistency between the two rulemakings, the Bureau is amending the final rule to include an exemption to the § 1026.32(d)(1) balloon restriction for high-cost mortgages where the

creditor satisfies the conditions set forth in §§ 1026.43(f)(1)(i) through (vi) and 1026.43(f)(2).

#### 32(d)(6) and (7) Prepayment Penalties

As discussed in the section-by-section analysis of § 1026.32(b)(6) above, prior to the Dodd-Frank Act, TILA permitted prepayment penalties for high-cost mortgages in certain circumstances. In particular, under TILA section 129(c)(2), which historically has been implemented in § 1026.32(d)(7), prior to the Dodd-Frank Act a high-cost mortgage could provide for a prepayment penalty so long as the penalty was otherwise permitted by law and, under the terms of the loan, the penalty would not apply: (1) To a prepayment made more than 24 months after consummation, (2) if the source of the prepayment was a refinancing of the current mortgage by the creditor or an affiliate of the creditor, (3) if the consumer's debt-to-income ratio exceeded fifty percent, or (4) if the amount of the periodic payment of principal or interest (or both) could 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 would have implemented this change consistent with the statute by removing and reserving existing § 1026.32(d)(7) and comments 32(d)(7)(iii)–1 through –3 and 32(d)(7)(iv)–1 and –2. The proposal also would have amended existing § 1026.32(d)(6) to clarify that prepayment penalties are a prohibited term for high-cost mortgages. As discussed in the section-by-section analysis of § 1026.32(b)(6)(i) above, the proposal would have retained 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.

The Bureau received few comments concerning its proposal to implement the Dodd-Frank Act provisions banning prepayment penalties for high-cost mortgages. One commenter objected as a general matter to the Dodd-Frank Act's treatment of prepayment penalties for purposes of both qualified mortgages and high-cost mortgages. The Bureau does not find these comments persuasive, for the reasons discussed above in connection with § 1026.32(a)(1)(iii), and the Bureau finalizes § 1026.32(d)(6) and (7) as proposed.

<sup>154</sup> The 2013 Escrows Final Rule defines the terms "rural" and "underserved" for purposes of § 1026.32(d)(1). See § 1026.35(b)(iv).

## 32(d)(8) Acceleration of Debt

The Bureau proposed 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) would have replaced current § 1026.32(d)(8), which similarly prohibits due-on-demand clauses for high-cost mortgage except (1) In cases of fraud or material misrepresentation in connection with the loan; (2) a consumer's failure to meet the repayment terms of the loan agreement for any outstanding balance; or (3) 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) would have prohibited 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. The Bureau also proposed comments to provide additional clarification and examples of when acceleration under proposed § 1026.32(d)(8) would be permitted. The Bureau sought comment from the public on these aspects of the proposal, and in particular sought possible additional examples where a consumer's material violation of the loan or open-end credit agreement may or may not warrant acceleration of the debt.

The Bureau received two public comments from industry in response to this request, which generally requested additional guidance on the term "material violation of the loan agreement," and questioned whether the proposed rule would permit acceleration in circumstances other than failure to pay property taxes that may materially impair the creditor's security interest, such as the examples that exist in the commentary to current § 1026.32(d)(8). These commenters also suggested some additional examples of actions undertaken by the consumer that they believe could result in prior lien to a first mortgage being filed against the property in "material

violation" of a loan term. These examples included failure to pay property taxes; failure to pay condominium fees, homeowner association dues or assessments, or utilities; and default on another lien on the subject property. The commenters also objected to the proposal's removal of several of the existing comments to current § 1026.32(d)(8)(iii), on the ground that acceleration is justified in those situations, and is currently permitted. Specifically, the commenters objected to the removal of language in comment 32(d)(8)(iii)-2.i.E providing that a creditor may terminate and accelerate a high-cost mortgage in some instances if the consumer obligated on the credit dies. The commenters also objected to the proposal's removal of an example in comment 32(d)(8)(iii)-2.i.F providing that a creditor may terminate and accelerate a high-cost mortgage if the property is taken by eminent domain.

In the Bureau's view, section 129(l) essentially codified the substance of current § 1026.32(d)(8). The changes the Bureau proposed to § 1026.32(d)(8) and its commentary were primarily for clarity and organizational purposes. Upon further consideration and in light of the comments regarding the potential impact of removing certain examples, the Bureau has decided to implement a final rule and commentary that closely follow the current § 1026.32(d)(8) and commentary. The Bureau agrees that acceleration should not be deemed impermissible under Regulation Z in situations where it is currently permitted, and is including the examples set forth in current comments 32(d)(8)(iii)-2.i.E and F the commentary to the final rule. The Bureau believes these revisions adequately and appropriately address industry's comments by clarifying that acceleration may be permitted in certain circumstances where the creditor's security interest is materially and adversely affected, such as when an action or inaction by the consumer results in a prior lien being filed against the property, or the property is taken by eminent domain.

The Bureau declines to include the various other examples provided by industry commenters in the commentary. The Bureau notes that the examples set forth in comment 32(d)(8)(iii)-2.i.A through G serve only as illustrations of instances where acceleration may be deemed permissible when the action or inaction by the consumer impairs the creditor's security interest. These circumstances may, but do not always, adversely affect the creditor's security interest, and the list

of examples is not all-inclusive. While the Bureau agrees with industry commenters that other actions or inactions that may result in a prior lien being filed against the property could materially impair the creditor's security interest, the Bureau does not believe the examples provided, such as failure to pay homeowner association dues or utilities, are likely to result in such an impairment in most circumstances. The Bureau thus declines to include these specific examples in the commentary to § 1026.32(d)(8).

In addition, the Bureau is adding comment 32(d)(8)(i)-1 to provide further guidance regarding acceleration of a loan for fraud or material misrepresentation, consistent with comment 40(f)(2)(i)-1 (concerning requirements for home equity plans). The Bureau believes that this guidance will be equally helpful to creditors seeking to accelerate a high-cost mortgage. Finally, the Bureau has made minor changes for clarification and in light of the expansion of the coverage of HOEPA to include open-end credit.

#### 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 is finalizing proposed § 1026.34(a)(1) through (3) and comment 34(a)(3)-2 with revisions for consistency and clarity. Proposed section 1026.34(a)(1) and comment 34(a)(3)-2 are revised to replace the terms "loan subject to section 226.32" with "high-cost mortgage." Sections 1026.34(a)(2) and (3) are revised to remove capitalization from "assignee" and "within one year period," for consistency purposes.

#### 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). In 2008, the Board by regulation eliminated the "pattern or practice" requirement under the HOEPA ability-to-repay provision and also applied the repayment ability requirement to higher-priced mortgage loans. The 2008 HOEPA Rule set forth the specific requirements for verification of repayment ability in § 1026.34(a)(4)(ii). In addition,

§ 1026.34(a)(4)(iii) provides for a presumption of compliance with the ability-to-repay requirements if the creditor follows certain procedures. See § 1026.34(a)(4)(iii)–(iv) and comment 34(a)(4)(iii)–1. However, the 2008 HOEPA Final Rule makes clear that the presumption of compliance is rebuttable. See comment 34(a)(4)(iii)–1. The consumer can still rebut or overcome that presumption by showing that, despite following the procedures specified in § 1026.34(a)(4)(iii), the creditor nonetheless disregarded the consumer's ability to repay the loan. For example, the consumer could present evidence that although the creditor assessed the consumer's debt-to-income ratio or residual income, the debt-to-income ratio was very high or the residual income was very low. This evidence may be sufficient to overcome the presumption of compliance and demonstrate that the creditor extended credit without regard to the consumer's ability to repay the loan.

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 all residential mortgage loans under new TILA section 129C. Specifically, the Bureau's 2013 ATR Final Rule (which implements TILA section 129C) extends these new ability-to-repay requirements to any consumer credit transaction secured by a dwelling, except an open-end credit plan, a transaction secured by a consumer's interest in a timeshare plan, a reverse mortgage, or temporary loans such as construction loans and bridge loans with terms of 12 months or less. Closed-end credit transactions 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 implementing regulations at § 1026.43. Open-end credit plans secured by the consumer's principal dwelling that are high-cost mortgages will not be subject to the ability-to-pay requirements of Bureau's 2013 ATR Final Rule, but will instead be subject to the existing ability-to-repay requirements of TILA section 129(h) and the Bureau's implementing regulations at § 1026.34(a)(4). As discussed below, the Bureau is revising § 1026.34(a)(4) to account for these significant changes to the regulatory landscape with respect to repayment ability for closed-end credit transactions, and amending the existing repayment ability requirements in current § 1026.34(a)(4) to apply specifically to high-cost open-end credit plans.

#### Closed-End High-Cost Mortgages

For consistency with TILA section 129C, proposed § 1026.34(a)(4) would have provided that, in connection with a closed-end high-cost mortgage, a creditor must comply with the repayment ability requirements in § 1026.43 (to be established separately under the Bureau's 2013 ATR Final Rule). Therefore, the existing requirements and the presumption of compliance under § 1026.34(a)(4)(i)–(iv) would no longer have applied to closed-end credit transactions. Rather, as set forth in the Bureau's 2013 ATR Final Rule, a creditor would have been required to consider specific criteria and records set forth in § 1026.43(c)(2) and (3) and, based on that criteria, make a "reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability to repay" the high-cost mortgage. See § 1026.43(c)(1) and comments 43(c)(1)–1 and 43(c)(2)–1.

Thus, as set forth more fully in the 2013 ATR Final Rule, for any closed-end high-cost mortgage that does not meet the qualified mortgage criteria set forth in § 1026.43(e), there would have been no presumption of compliance available to creditors for the ability to repay requirement. The 2012 HOEPA Proposal stated that only open-end credit transactions are subject to the § 1026.34(a)(4) ability-to-repay requirements, and thus would have removed the presumption of compliance currently available for any such high-cost mortgage under § 1026.34(a)(4)(iii). See proposed comment 34(a)(4)–1.<sup>155</sup> However, as also set forth in the 2013 ATR Final Rule, the § 1026.43(e) rebuttable presumption of compliance with the ability-to-repay requirement would have been available for certain high-cost mortgages that meet the specific qualified mortgage criteria set forth in § 1026.43(e).<sup>156</sup>

<sup>155</sup> In the final rule, the Bureau is adding additional clarifying language to make clear that the § 1026.34(a)(4)(iii) presumption only applies to open-end credit plans.

<sup>156</sup> The safe harbor available for certain qualified mortgage transactions under § 1026.43(e)(1) will not be available for HOEPA transactions that otherwise meet the qualified mortgage criteria. As set forth in the 2013 ATR Final Rule, the safe harbor is only available for loans that are not higher-priced covered transactions, as defined in § 1026.43(b)(4). This will preclude any high-cost mortgage covered by HOEPA's APR threshold from being eligible for a safe harbor. Similarly, any loan that triggers the HOEPA thresholds for limitations on points and fees and prepayment penalties will fail to satisfy the criteria for qualified mortgages, and thus will be ineligible for either the safe harbor or the rebuttable presumption of compliance available to qualified mortgages. See § 1026.43(e)(3) and (g).

The Bureau solicited comment on this aspect of the proposal, and received a few public comments from consumer groups that generally supported it. In particular, consumer groups agreed that requiring creditors to comply with the ability-to-repay requirements set forth in § 1026.43 for all closed-end credit transactions, including high-cost mortgages, should benefit consumers by simplifying compliance and enforcement of the rules, provided that the final rule does not reduce the remedies available for high-cost mortgages. No commenters raised objections to this aspect of the proposal. However, as more fully discussed in the 2013 ATR Final Rule, several consumer groups submitted comments in connection with the Board's 2011 ATR Proposal requesting that high-cost mortgages be prohibited from receiving qualified mortgage status through the 2013 ATR Final Rule. Those commenters noted that high-cost mortgages have been singled out by Congress as deserving of special regulatory treatment because of their potential to be abusive to consumers, and argued that it would seem incongruous for any high-cost mortgage to be given a presumption of compliance with the ability-to-repay rule.

The Bureau is adopting this aspect of § 1026.34(a)(4) as proposed, which is consistent with the statutory language of TILA section 129C. The Bureau notes that the 2013 ATR Final Rule does not prohibit a high-cost mortgage from being a qualified mortgage, but is mindful that allowing a high-cost mortgage to meet the qualified mortgage criteria set forth in § 1026.43 potentially raises concerns for consumer groups regarding HOEPA protections and remedies. However, the Bureau disagrees with consumer groups that suggest allowing certain high-cost mortgages to be "qualified mortgages"—and thereby permitting a rebuttable presumption of compliance with the § 1026.43(a) repayment ability requirements for these transactions—is incongruous with the underlying consumer protection purpose of HOEPA. Rather, the Bureau believes that the net effect of requiring creditors to comply with § 1026.43 for all closed-end transactions, including those rules that pertain to the presumption of compliance available for qualified mortgages, should be enhanced consumer protection and facilitation of compliance.

There are several considerations informing the Bureau's treatment of repayment ability requirements. First, as discussed above, the Dodd-Frank Act does not prohibit high-cost mortgages

from receiving qualified mortgage status. While the statute imposes a points and fees limit on qualified mortgages (3 percent, generally) that effectively prohibits loans that trigger the high-cost mortgage points and fee threshold from receiving qualified mortgage status, it does not impose an APR limit on qualified mortgages. Therefore, nothing in the statute prohibits a creditor from making a loan with an APR that triggers HOEPA coverage, while still meeting the criteria for a qualified mortgage.

Second, although they are similar, the Bureau generally considers the ability-to-repay requirements set forth in § 1026.43 to be more protective of consumers than the current ability-to-repay criteria for high-cost mortgages set forth in current § 1026.34(a)(4)(i)–(iv). For example, § 1026.43 would require creditors to consider additional factors not currently included in § 1026.34(a)(4), such as a consumer's monthly debt-to-income ratio or residual income. The Bureau generally believes these criteria to be more rigorous than the current ability-to-repay provisions.

Third, the Bureau believes that, for high-cost mortgages that meet the qualified mortgage definition, there is reason to provide a presumption, subject to rebuttal, that the creditor had a reasonable and good faith belief in the consumer's ability to repay notwithstanding the high interest rate. High-cost mortgages will be less likely to meet qualified mortgage criteria because the higher interest rate will generate higher monthly payments and thus require higher income to satisfy the debt-to-income test for a qualified mortgage. Where that test is satisfied—that is, where the consumer has an acceptable debt-to-income ratio calculated in accordance with qualified mortgage underwriting rules—there is no logical reason to exclude the loan from the definition of a qualified mortgage.

The Bureau also disagrees with the concerns raised by consumer groups that allowing a rebuttable presumption of compliance for these high-cost mortgages will undermine consumer protection. Rather, the Bureau believes the final rule will provide greater consumer protection than the current ability-to-repay rules, which allow for a presumption of compliance for any high-cost mortgages. See current § 1026.34(a)(4)(iii). As more fully set forth in the Bureau's 2013 ATR Final Rule, for any high-cost mortgages that do not meet the qualified mortgage criteria set forth in § 1026.43(e), there will be no presumption of compliance

available to creditors for the § 1026.34(a)(4) ability-to-repay requirement. The Bureau believes this will provide greater consumer protection and facilitate, rather than hinder, challenges to creditors' repayment ability determinations for these transactions.

The Bureau also believes that allowing high-cost mortgages to be qualified mortgages could provide an incentive to creditors that make high-cost mortgages to satisfy the qualified mortgage requirements, which would provide additional consumer protections. For example, creditors who make high-cost mortgages as qualified mortgages will need to have verified the consumer's assets, liabilities, income and other criteria, and determined that the consumer's debt-to-income ratio meets certain specified criteria. See § 1026.43(e). Further protections and restrictions, such as restricting interest-only payments and limiting loan terms to 30 years, are not requirements under HOEPA, but are required to achieve qualified mortgage status.

The Bureau believes that allowing high-cost, qualified mortgages may be particularly beneficial to consumers in certain small loan markets, where some creditors may need to exceed high-cost mortgage thresholds due to the unique structure of their business. The Bureau believes that these creditors are likely to make high-cost mortgages regardless of the various disincentives to high-cost lending, and allowing for a presumption of compliance for these high-cost mortgages could provide an incentive to these creditors to make these mortgages as qualified mortgages. As discussed above, the Bureau believes this would be in the interest of consumers by providing additional consumer protections.

The Bureau also does not believe that allowing high-cost mortgages to be "qualified mortgages" will deprive consumers of the substantive protections or remedies afforded by HOEPA or encourage creditors to engage in high-cost lending. Other than allowing for a presumption of compliance with the § 1026.43 repayment ability requirements for those transactions that meet the criteria for qualified mortgages, the enhanced disclosure and counseling requirements, and the enhanced liability for HOEPA violations, are unaffected by the final rule.

Finally, in addition to the various benefits to consumers described above, the Bureau believes that requiring the same standards for determining repayment ability and obtaining a rebuttable presumption of compliance

for other closed-end credit transactions not covered by HOEPA and high-cost mortgages that are subject to the repayment ability requirements of § 1026.43 will facilitate compliance by providing clarity and consistency between the 2013 ATR Final Rule and the 2013 HOEPA Final Rule.

#### "Bridge" Loans

Because temporary or "bridge" loans, such as loans with maturity of 12 months or less made in connection with the acquisition or construction of a dwelling intended to become the consumer's principal dwelling are closed-end credit transactions, any such loan that is a high-cost mortgage will be subject to the ability-to-repay requirements pursuant to TILA section 129C and the Bureau's implementing regulations at § 1026.43. As discussed in the Bureau's 2013 ATR Final Rule, temporary loans such as bridge loans with terms of 12 months or less (including high-cost mortgages) are exempt from the § 1026.43 ability-to-repay requirements. The proposal nonetheless would have retained an exemption from the § 1026.34(a)(4) HOEPA ability-to-repay requirement that exists in current § 1026.34(a)(4)(v).

The Bureau received no comments on this aspect of the proposal, and is retaining the exemption from the § 1026.34(a)(4) ability-to-repay requirements for "bridge" loans as proposed. For clarity and organizational purposes, however, the Bureau is moving the exemption from proposed § 1026.34(a)(4)(v) to § 1026.34(a)(4), which discusses ability-to-repay for closed-end credit transactions.

The Bureau is retaining this exemption as consistent with TILA section 129C(a)(8), and pursuant to its authority under TILA section 129(p), which grants the Bureau authority to exempt specific mortgage products or categories from any or all of the prohibitions specified in TILA section 129(c) through (i) 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 protections. Retaining this exemption is consistent with the historical and current treatment of bridge loans under HOEPA's ability-to-repay standards, and also is consistent with the TILA section 129C(a)(8) exemption for bridge loans that apply to the general ability-to-repay requirements set forth in the 2013 ATR Final Rule. The Bureau believes this approach is in the interest of the borrowing public and will strengthen home ownership and equity protection because it will not unduly restrict

access to temporary bridge financing for consumers.

#### Open-End High-Cost Mortgages

As previously noted, the existing ability-to-repay requirements of TILA section 129(h) will now apply to open-end credit plans that are high-cost mortgages. To facilitate compliance, the Bureau proposed 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 solicited public comment on this issue, but did not receive any comments that addressed it.

The Bureau is revising § 1026.34(a)(4) to provide, as proposed, 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 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, and current obligations, including any mortgage-related obligations. As discussed above, the Bureau notes that in the 2008 HOEPA Final Rule, the Board adopted a rule prohibiting individual high-cost mortgages or higher-priced mortgage loans from being extended based on the collateral without regard to repayment ability, in place of a prior rule prohibiting a pattern or practice of making extensions based on the collateral without regard to consumers' ability to repay. The existing requirements further create a presumption of compliance under certain conditions to provide creditors with more certainty 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 the liability standard for high-cost mortgages based on a conclusion that the revisions were necessary to prevent unfair or deceptive acts or practices in connection with mortgage loans. *See* 73 FR 44545, at 44539 (July 30, 2008). In particular, the Board concluded that 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.

The Board determined that imposing the burden to prove "pattern or practice" on an individual consumer 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. While the Board's rule removed the "pattern or practice" language from its rule, it provided certainty to creditors by including specific procedures for establishing a rebuttable presumption of compliance.

For substantially the same reasons detailed by the Board in the 2008 HOEPA Final Rule, the Bureau believes that it is necessary and proper to use its authority under TILA section 129(p)(2) 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 HOEPA Final 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, also for these same reasons, the Bureau believes it would not be in creditors' and borrowers' interest to reinsert the "pattern or practice" language and remove 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).

The Bureau is also revising several aspects of § 1026.34(a)(4) for consistency with the 2013 ATR Final Rule and for clarification purposes. The Bureau is removing § 1026.34(a)(4)(ii)(B) and accompanying comments 34(a)(4)(ii)(B)-1 and -2, which the Bureau proposed to retain. This provision would have provided an affirmative defense for a creditor that

can show that the amounts of the consumer's income or assets that the creditor relied upon in determining the consumer's repayment ability were not materially greater than the amounts the creditor could have verified using third-party records at or before consummation. The Bureau notes that the Board's 2011 ATR Proposal solicited comment on whether it should have provided this provision in the § 1026.43 repayment ability requirements which, while not specified under TILA, would have been consistent with the Board's 2008 HOEPA Final Rule. *See* 2011 ATR Proposal, 76 FR 27390, 27426 (May 11, 2011); *see also* § 1026.34(a)(4)(ii)(B).

As more fully discussed in the 2013 ATR Final Rule, the Bureau received several responses from consumer groups in response to the Board's 2011 ATR Proposal that generally opposed the affirmative defense. These commenters argued that the provision would undermine the income and asset verification requirement provided in proposed § 1026.43(c)(4). Other commenters noted that providing an affirmative defense might result in confusion, and possible litigation, over what the term "material" may mean, and that a rule permitting an affirmative defense would need to define materiality specifically, including from whose perspective materiality should be measured (*i.e.*, the creditor's or the consumer's).

As discussed in the 2013 ATR Final Rule, the Bureau is not adopting an affirmative defense as part of final § 1026.43 because, in the Bureau's view, such a defense could result in circumvention of the § 1026.43(c)(4) verification requirement.

Upon further consideration of proposed § 1026.34(a)(4)(ii)(B), and in light of the 2013 ATR Final Rule, the Bureau believes that the same reasoning applies to the repayment ability requirements for open-end credit transactions. In the Bureau's view, adopting the affirmative defense set forth in proposed § 1026.34(a)(4)(ii)(B) would create an unnecessary inconsistency between the repayment ability criteria in § 1026.43(c) and § 1026.34(a)(4). Further, the Bureau believes the title XIV amendments to TILA provide a strong indication that creditors should be required to verify income, assets, and other relevant information as part of the repayment ability determination. This principle is reflected in the Bureau's decision not to adopt this affirmative defense for the repayment ability requirements set forth in the 2013 ATR Final Rule. The Bureau believes that proposed § 1026.34(a)(4)(ii)(B) could have



encouraged some creditors to determine repayment ability for open-end credit plans without verifying a consumer's income, assets, and other relevant information. Removing proposed § 1026.34(a)(4)(ii)(B), on the other hand, will better protect consumers, facilitate compliance, and better harmonize the 2013 HOEPA and ATR Final Rules. Accordingly, the Bureau is removing proposed § 1026.34(a)(4)(ii)(B) and renumbering the remainder of § 1026.34(a)(4)(ii).

The Bureau is also revising the definition of "mortgage-related obligations" to reflect the definition set forth in the 2013 ATR Final Rule, and clarifying that, with respect to open-end credit plans, "mortgage-related obligations" are obligations that are required by another credit obligation undertaken prior to or at account opening, and are secured by the same dwelling. See § 1026.43(b)(8). For clarity and consistency with this revised definition, the Bureau is also removing existing comment 34(a)(4)(i)-1, which had further defined the term using the previous definition.

In addition, the Bureau is adopting clarifying revisions as proposed in § 1026.32(a)(4) and its associated commentary, with several additional minor edits for consistency, clarity, or organizational purposes. The Bureau is removing proposed § 1026.34(a)(4)(iv)(A), which would have excluded negatively amortizing transactions from the § 1026.34(a)(4) presumption of compliance. Given that negative amortization features are prohibited altogether for high-cost mortgages, and § 1026.34(a)(4)(iv) only applies only to open-end, high-cost mortgages, it is unnecessary to exclude such transactions from the § 1026.34(a)(4)(iii) presumption of compliance. The Bureau is also revising comment 34(a)(4)-4 to reflect this change.

The proposal generally incorporated guidance in current comments 34(a)(4)-1 through -5, with revisions for clarity and consistency. Proposed comment 34(a)(4)-1 would have clarified 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 also would have clarified the current commentary to conform with proposed revisions and removed the current example. Finally, proposed comment 34(a)(4)(iii)(B)-1 would have removed the examples in current comment 34(a)(4)(iii)(B) as unnecessary or

inapplicable. The Bureau did not receive any comments addressing these aspects of the proposal.

The Bureau is adopting these comments as proposed, with several changes for clarity and consistency. Comment 34(a)(4)-3 is amended to clarify that "other dwelling-secured obligations" includes any mortgage-related obligations that are required by another credit obligation undertaken prior to or at account opening, and are secured by the same dwelling that secures the high-cost mortgage transaction.

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

As noted above, because open-end credit plans are excluded from coverage of TILA section 129C, the existing ability-to-repay requirements of TILA section 129(h) and the Bureau's implementing regulations at § 1026.34(a)(4) would still apply to open-end credit plans that are high-cost mortgages. Moreover, because the presumption of compliance set forth in § 1026.43(e) may only apply to qualified mortgages (which cannot include open-end credit plans), the presumption of compliance set forth in § 1026.34(a)(4)(iii) will still apply to open-end credit plans that are high-cost mortgages.

The Bureau proposed to revise current § 1026.34(a)(4)(iii) to clarify the criteria that a creditor must satisfy 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 proposed 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) would have required 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 APR that may apply under the payment plan (as required to be included in the consumer credit contract under § 1026.30) applies to the plan at account opening and will apply during the draw period and any repayment period. The Bureau received no comments on these aspects of the proposal, and accordingly is adopting them as proposed.

#### 34(a)(5) Pre-Loan Counseling

##### Summary of Dodd-Frank Act Amendments

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)(1) also prohibits such a counselor from being employed by or affiliated with the creditor. 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.<sup>157</sup> The Bureau is exercising

<sup>157</sup> 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 § 1026.36(k) below.

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 Concerning HUD's Housing Counseling Program

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), which is implemented in 24 CFR part 214. As described in the preamble of the proposal, 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 issuing approvals of nonprofit agencies that meet its requirements for participation, monitoring these agencies, and awarding competitive grants to these agencies. HUD also provides counseling funds through State housing finance authorities and national and regional intermediaries, which provide oversight, support, and funding for affiliated local counseling agencies. 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.<sup>158</sup> While HUD's regulations establish training and experience requirements for the individual counselors employed by the counseling agencies, to date, HUD generally 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 going forward. Section 106(e) of the Housing and Urban Development Act (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 counseling be provided prior to origination of certain types of loans. For example, as previously discussed in connection with the Bureau's amendment to Regulation X, Federal law requires homeowners to receive counseling before obtaining a reverse mortgage insured by the FHA (*i.e.*, a HECM).<sup>159</sup> HUD imposes various requirements related to HECM counseling, including, for example: Requiring FHA-approved HECM lenders to provide applicants with contact information for HUD-approved counseling agencies; delineating particular topics that need to be addressed through HECM counseling; and prohibiting HECM lenders from steering a prospective borrower to a particular counseling agency.<sup>160</sup> As discussed and implemented in this final rule, the Dodd-Frank Act added counseling requirements for high-cost mortgages and certain loans involving negative amortization.

#### Proposal

The proposal would have implemented the Dodd-Frank Act's requirement that a creditor receive written certification that a consumer has obtained counseling on the advisability of the mortgage prior to extending a high-cost mortgage to a consumer in proposed § 1026.34(a)(5) and accompanying commentary. As discussed in further detail below, the Bureau is adopting the pre-loan counseling requirement for high-cost mortgages in § 1026.34(a)(5), with several revisions.

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

Consistent with the statute, proposed § 1026.34(a)(5)(i) would have prohibited a creditor from extending 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.

While a significant number of both consumer group and industry commenters expressed support for the counseling requirement for high-cost mortgages, a few commenters objected to the counseling requirement generally. Some industry commenters were concerned that consumers would view counseling as an unnecessary burden due to its cost and inconvenience, or that the requirement for counseling could cause closings to be delayed. In addition, a nonprofit network that provides training to housing counselors objected to the counseling requirement out of concern that because counseling is only being required for consumers seeking the riskiest loans, counselors will be unable to influence the performance of the loans, which could cause others to question the value of counseling unfairly. This commenter instead recommended that counseling be required for all first-time borrowers seeking anything other than a 30 year, fixed-rate mortgage with fixed payments. One commenter urged that high-cost mortgages that finance manufactured housing be exempt from the counseling requirement, because the counseling fee would constitute a disproportionately large cost for these relatively small mortgages.

The Bureau does not believe any of these concerns warrant departing from the statutory requirement for high-cost mortgage counseling. The Bureau does not agree with commenters that the counseling for high-cost mortgages is an unnecessary burden. Congress made the determination that mandatory counseling would be beneficial to consumers prior to obtaining certain types of riskier loans, and the Bureau is not persuaded that it should use its authority to depart from that determination. Although the Bureau understands concerns that counseling could be valuable for some first-time borrowers of loans other than those that are fixed-rate and with fixed payments, the Bureau proposed to require and solicited comment on counseling consistent with the statute, and does not believe that it has a basis to determine whether the benefits of mandatory counseling outweigh the costs for a broader group of consumers. With respect to concerns about the perceived efficacy of counseling due to the limited nature of the counseling requirements, the Bureau does not agree that a counselor will be unable to influence the outcome of the mortgage. The Bureau believes that a consumer may decide not to move forward with a high-cost mortgage even after application, or

<sup>159</sup> 12 U.S.C. 1715z-20(d)(2)(B).

<sup>160</sup> See HUD Housing Counseling Handbook 7610.1 (05/2010), Chapter 4, available at <http://www.hud.gov/offices/adm/hudclips/handbooks/hshg/7610.1/76101HSGH.pdf> (visited June 16, 20012) (HUD Handbook).

<sup>158</sup> 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 Mortgage letters.

may be able to shop or negotiate for different mortgage terms, based on counseling received on the advisability of the mortgage. Moreover, the Bureau believes that the requirement to provide a list of housing counselors under RESPA, discussed above, will encourage applicants for other types of mortgages to obtain homeownership counseling even if they are not required to do so. As to the requested exclusion from counseling for high-cost mortgages that finance manufactured housing, the Bureau believes that counseling would be equally beneficial to a consumer financing a manufactured home through a high-cost mortgage as it would be for a consumer financing another type of dwelling. Finally, the Bureau notes that the counseling provisions would permit the cost of counseling to be financed or to be paid by the creditor, provided that the creditor does not condition payment on the closing of the loan. For all of these reasons, the Bureau is finalizing the requirement for certification of counseling in § 1026.34(a)(5)(i) as proposed.

The Bureau also proposed commentary addressing a number of issues related to proposed § 1026.34(a)(5)(i), to provide creditors additional compliance guidance. As discussed in detail below, the Bureau is also adopting this guidance as proposed, with certain revisions.

TILA section 129(u) does not define the term "State housing finance authority." Proposed comment 34(a)(5)–1 would have clarified that for the purposes of § 1026.34(a)(5), 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 proposed 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. The Bureau did not receive any comment regarding this definition and is finalizing it as proposed, except that the Bureau is renumbering it as 34(a)(5)(i)–2 for organizational purposes.

The Bureau proposed comment 34(a)(5)(i)–1 to clarify 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. The Bureau proposed this clarification because of its understanding that other than for its HECM counseling program, HUD

currently approves housing counseling agencies and not individual counselors, but will be certifying housing counselors in the future to implement section 1445 of the Dodd-Frank Act. The proposed comment was 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.<sup>161</sup> The Bureau did not receive any comments objecting to this guidance, and is adopting it as proposed.

Proposed comment 34(a)(5)(i)–2 would have provided 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). As the Bureau discussed in the preamble of the proposal, 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, and permitting the processing of the application is consistent with the high-cost mortgage counseling requirements as a whole.<sup>162</sup> Moreover, 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. As discussed in the preamble of the proposal, 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

<sup>161</sup> 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.

<sup>162</sup> 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 Mortgage 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.

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 settlement statement. Currently, the HUD–1 may be provided by the creditor at settlement.<sup>163</sup> Commenters generally did not raise any objections to comment 34(a)(5)(i)–2, and the Bureau is finalizing it as proposed, except that it is renumbering it as 34(a)(5)(i)–3 for organizational purposes.

Proposed comment 34(a)(5)(i)–3 would have set 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. The Bureau did not receive any comments on this guidance, and except for renumbering it as 34(a)(5)(i)–4, is finalizing it as proposed.

One counseling association requested clarification that the required certification of counseling is not an indication that a counselor has made a judgment about the appropriateness of a high-cost mortgage for a consumer. This commenter expressed its support for proposed comment 34(a)(5)(iv)–1, which similarly would have provided that a statement that a consumer has received counseling on the advisability of a high-cost mortgage does not require the counselor to have made a judgment as to the appropriateness of the high-cost mortgage, as discussed below. The Bureau agrees that it would be useful to clarify that certification of counseling is not evidence of a counselor's opinion of the loan for the consumer, but only that the consumer has received counseling. Accordingly, the Bureau has added new comment 34(a)(5)(i)–5 to address the purpose of certification in the final rule.

A few commenters raised operational issues related to the certification process, including generally asking for more guidance and asking the Bureau to allow creditors to move forward with the consummation of a high-cost mortgage without a certification form if the counselor does not provide the form

<sup>163</sup> The Bureau notes that as part of its 2012 TILA–RESPA Proposal, the Bureau proposed requiring that a closing disclosure combining the RESPA settlement statement and the final TILA disclosure be provided to a consumer prior to settlement. However, the Bureau does not anticipate that any such requirement will take effect until after the effective date for the requirements for high-cost mortgages.

to the creditor within a certain time period. The Bureau has not proposed additional guidance related to the certification process, in part because the Bureau believes that it is important to allow flexibility so that counselors and creditors can develop processes that work best. The Bureau also declines to permit a creditor to consummate a high-cost mortgage without receiving certification of counseling, which is required by the statute. Such a result would be inconsistent with the basic statutory scheme, since absent certification, a creditor could not be certain that counseling occurred, that the counseling addressed the required elements, or that the counselor was able to verify receipt of the required disclosures.

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

As noted above, TILA section 129(u)(1) requires that a creditor receive certification of counseling prior to extending a high-cost mortgage to a consumer, but otherwise does not address when counseling should occur. Proposed § 1026.34(a)(5)(ii) would have required counseling to 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 noted in the preamble to the proposal 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 or negotiate 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. The Bureau therefore concluded that 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 would 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.<sup>164</sup>

<sup>164</sup> The Bureau notes that as part of its 2012 TILA-RESPA Proposal, the Bureau proposed that the good faith estimate required by RESPA be

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) would require a counselor to wait for the receipt of either the § 1026.32(c) disclosure or the full set of 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 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 disclosures 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 concluded that the best approach would be 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 disclosures. The Bureau noted its belief 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.

Proposed comment 34(a)(5)(ii)-1 clarified 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

combined with the early TILA disclosure. Proposed § 1026.34(a)(5)(ii) was intended to permit both the current good faith estimate or a future combined disclosure to satisfy the requirement in order to trigger counseling.

§ 1026.40 to be provided in lieu of a good faith estimate, in the case of an open-end credit plan.

Proposed comment 34(a)(5)(ii)-2 clarified 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.

The Bureau solicited comment on the proposed timing requirements for counseling, including whether a second contact would help facilitate compliance with the requirement for certification of counseling. Most commenters were generally supportive of the timing proposed by the Bureau, and the accompanying guidance. Commenters noted that the Bureau's proposal would allow counseling to occur early in the process, but also provide counselors with the ability to view specific disclosures. A few commenters, however, expressed a view that the counseling should occur earlier in the process, *e.g.*, before a consumer shops for a property or a loan.

The Bureau agrees that counseling earlier in the process may be beneficial to some consumers. However, the Bureau believes that for high-cost mortgage borrowers, it is also important that the consumer receive counseling on the terms of the mortgage the consumer is offered. The ability to view the mortgage specific disclosures will allow counselors to provide counseling that addresses the affordability of the specific loan the consumer is considering. Moreover, the Bureau notes that practically speaking, a creditor is not likely to know whether or not the consumer will be offered a high-cost mortgage prior to receiving the consumer's application. For these reasons, the Bureau is finalizing § 1026.34(a)(5)(ii) as proposed, with minor edits for clarity and consistency.

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

Proposed § 1026.34(a)(5)(iii)(A) would have implemented the general prohibition in new TILA section 129(u)(1) that the counseling required for a high-cost mortgage shall not be provided by a counselor who is employed by or affiliated<sup>165</sup> 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) also would have created an exemption from this general prohibition for a State

<sup>165</sup> "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.*)"

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 requested comment on the proposed general affiliation prohibition, the exemption provided for State housing finance authorities, and whether the Bureau should consider excepting any other entities from the general affiliation prohibition, including nonprofit counseling agencies. A number of commenters supported the general affiliation prohibition, and several commenters also supported the exemption to the affiliation prohibition for State housing finance authorities. A few commenters, including a consumer group and an association for nonprofit counseling organizations, urged the Bureau to also exempt nonprofit organizations with 501(c)(3) status from the affiliation prohibition because such entities also provide small loans for purposes such as emergency repair or foreclosure rescue that may be classified as high-cost. These commenters noted that organizations with 501(c)(3) status have a higher level of accountability than other entities.

The Bureau is adopting § 1026.34(a)(5)(iii)(A) substantially as proposed. However, because a transaction made by a Housing Finance Agency acting as the creditor is now exempt from HOEPA coverage, as discussed in the section-by-section analysis to § 1026.32(a)(1), the Bureau is not finalizing § 1026.34(a)(5)(iii)(B). The Bureau does not believe that an exemption from the affiliation prohibition is necessary for State housing finance authorities, given the general exemption from HOEPA for the transactions they make. With respect to the request for an exemption for loans originated by organizations with 501(c)(3) status, the Bureau agrees that as with loans made by State housing finance authorities, such loans may be beneficial to consumers. However, the Bureau is concerned that an entity's 501(c)(3) status may not be sufficient to prevent potential abuses and that an entity could be motivated to obtain nonprofit status in order to avoid the affiliation prohibition, if it were to exempt such entities. The Bureau is aware, for example, of concerns that credit counseling organizations engaging in questionable activities have sought nonprofit status to circumvent consumer protection laws.<sup>166</sup> Accordingly, the Bureau declines to

create an exception to the affiliation prohibition for nonprofit organizations.

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

As described above, TILA section 129(u)(1) requires a creditor to receive certification that the consumer has received counseling on the advisability of the mortgage prior to extending the high-cost mortgage, and TILA section 129(u)(2) requires a counselor to verify a consumer's receipt of each statement required by TILA section 129 or RESPA in connection with the transaction prior to certifying the consumer has received counseling. Proposed § 1026.34(a)(5)(iv) would have set forth requirements for the certification form that is provided to the creditor. Specifically, proposed § 1026.34(a)(5)(iv) would have provided 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.

TILA section 129(u) did not define the term "advisability." The Bureau proposed guidance in comment 34(a)(5)(iv)-1 that would have addressed the meaning of the statement that a consumer has received counseling on the advisability of the high-cost mortgage. Specifically, the Bureau proposed 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 Bureau further provided 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 that are provided to the consumer. The Bureau noted in the preamble of the proposal 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, and 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. HUD already requires counselors to analyze the financial situation of their clients and establish a household budget for their clients when providing housing counseling.<sup>167</sup>

Proposed comment 34(a)(5)(iv)-1 would have further explained, however, that 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 loan for the consumer. The proposal would have provided 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.<sup>168</sup>

Proposed comment 34(a)(5)(iv)-2 would have clarified 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 noted 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.

Commenters raised two main points concerning proposed § 1026.34(a)(5)(iv). First, a significant number of commenters raised concerns about the form of counseling and requested that the Bureau permit counseling to occur through means other than in person, such as by telephone, group classes, or self-study, particularly in rural areas where counseling resources may be more limited. A few commenters also raised concerns about proposed comment 34(a)(5)(iv)-1 and the guidance that a statement that a consumer has received counseling on the advisability of the high-cost mortgage does not require the counselor

<sup>167</sup> HUD Handbook at 3-5.

<sup>168</sup> 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).

<sup>166</sup> See <http://www.irs.gov/uac/IRS-FTC-and-State-Regulators-Urge-Care-When-Seeking-Help-from-Credit-Counseling-Organizations>.

to have determined whether a loan is appropriate for the consumer. These commenters believe that counselors should advise consumers on whether or not they should accept the high-cost mortgage and that advising consumers in this manner would be beneficial.

The Bureau is finalizing proposed § 1026.34(a)(5)(iv) and its associated commentary as proposed, with minor edits for clarity and consistency. The Bureau agrees that counseling for a high-cost mortgage should not be required to be received in person, and the Bureau notes that nothing in the proposed or final regulation or commentary would prohibit or prescribe any particular format for the required counseling. The Bureau also notes, however, that the requirement for a certification form completed by a counselor will necessitate that the counseling be provided by a counselor. As such, certain forms of counseling, such as self-study, cannot be used to satisfy the counseling requirement.

The Bureau also agrees with commenters that consumers may benefit from a counselor's judgment about whether a mortgage is appropriate for the consumer. However, the Bureau notes that nothing in the regulation or commentary would prohibit or restrict a counselor from advising a consumer whether or not to enter into the high-cost mortgage. Under the proposal, a counselor would be permitted to advise the consumer in the manner the counselor deemed most helpful, in accordance with the requirements set forth by HUD, but a counselor would not be *required* to make a determination as to the appropriateness of the mortgage.

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

TILA section 129(u) does not address the payment of fees for high-cost mortgage counseling. As the Bureau discussed in the preamble of the proposal, 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.<sup>169</sup> 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.<sup>170</sup> 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.

As noted in the preamble, 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.<sup>171</sup> 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) would have addressed 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 also proposed that a creditor may not condition the payment of these fees on the consummation of the high-cost mortgage. Moreover, the Bureau proposed 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

<sup>170</sup> 24 CFR 214.313(e); 214.303.

<sup>171</sup> See U.S. Department of Housing and Urban Development Office of Policy Development & Research, *The State of the Housing Counseling Industry* (Sept. 2008), at 22, 59, 156–57.

recognized, 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 would have provided that a creditor may otherwise confirm that a counselor has provided counseling to a consumer prior to paying counseling fees. The Bureau believed proposed § 1026.34(a)(5)(v) would 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.

The Bureau also proposed comment 34(a)(5)(v)–1 to address the financing of counseling fees to likewise preserve the availability of counseling for high-cost mortgages. The proposed comment would have clarified 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 proposal was intended to 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.

Several commenters were supportive of the proposal to allow lender funding of counseling with the restriction that the funding cannot be contingent upon consummation of the high-cost mortgage. Other commenters raised general concerns about the lack of funding for counseling and the lack of counseling resources, particularly in rural areas. One commenter suggested that the Bureau address the lack of funding by amending the HUD–1 settlement form to provide a line item for “counseling/education” fees, to legitimize the payment of counseling fees from closing costs. As noted in the preamble of the proposal, the Bureau is aware of concerns about the adequacy of funding for counseling. The Bureau is not persuaded, however, that it should take additional measures to address this concern beyond its proposal to ensure that several options are available for the payment of counseling fees in the context of this rulemaking. The Bureau is therefore adopting § 1026.34(a)(5)(v) and its associated commentary as proposed.

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

TILA section 129(u) does not address potential steering of consumers by

<sup>169</sup> 24 CFR 214.313(a), (b).

creditors to particular counselors. Pursuant to its authority under TILA section 129(u)(3), proposed § 1026.34(a)(5)(vi) would have provided 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 Bureau proposed this restriction to help preserve counselor independence and prevent conflicts of interest that may arise when creditors refer consumers to particular counselors or counseling organizations. Under the HECM program, lenders providing HECMs are prohibited from steering consumers to any particular counselor or counseling agency.<sup>172</sup> As the Bureau noted in the preamble to the proposal, 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.

The Bureau also proposed comments 34(a)(5)(vi)-1 and 2, to provide an example of an action that constitutes steering and an example of an action that does not constitute steering.

The Bureau solicited comment on its proposed approach to prevent steering of consumers to particular counselors or counseling organizations and the examples proposed in comments 34(a)(5)(vi)-1 and 2. The Bureau did not receive any comments addressing the steering prohibition or examples, and adopts them as proposed.

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

##### Proposed Provisions Not Adopted

Proposed § 1026.34(a)(5)(vii) would have added a requirement that a creditor provide to a consumer for whom counseling is required a notice containing a list of five counselors or counseling organizations approved by HUD to provide high-cost mortgage counseling. Proposed § 1026.34(a)(5)(vii) would have further stated that a creditor will be deemed to have complied with the obligation to provide a counselor list if the creditor complied with the broader obligation proposed under Regulation X, § 1024.20, discussed above, to provide a counselor list to any applicant for a federally related mortgage loan.

The Bureau sought comment on the content and form of the required counselor list. Comments addressing these aspects of the list are addressed above, in the discussion of § 1024.20.

The Bureau also sought comment on whether some creditors would likely comply with the counselor list requirement in § 1026.34(a)(5)(vii) independent of their obligations under RESPA. The Bureau did not receive any comments indicating that creditors would likely comply with the high-cost mortgage counseling list requirement other than through the general obligation to provide a counseling list in § 1024.20.

As noted above, the Bureau is finalizing the counseling list requirement under § 1024.20 to apply broadly to all federally related mortgage loans, including open-end credit plans. Given the scope of this requirement, a creditor extending a high-cost mortgage to a consumer will always be obliged to provide a consumer with a notice about counseling resources under § 1024.20. As a result, because it would duplicate the requirement in § 1024.20, the Bureau is not adopting proposed § 1026.34(a)(5)(vii) in the final rule.

#### 34(a)(6) Recommended Default

Proposed § 1026.34(a)(6) would have implemented the prohibition on a creditor recommending that a consumer default on an existing obligation 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 proposed 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 \* \* \* 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 proposal noted that 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 knowing that if the consumer takes that advice, the consumer will default on the existing 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, to refinance and eliminate the default on the existing loan. As noted in the preamble of the proposed rule, 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 2008 HOEPA Final Rule, 73 FR 44522, 44529 (July 30, 2008), the exception authority under TILA section 129(p)(2) is broad, and is not limited to practices of creditors. Proposed § 1026.34(a)(6) therefore prohibits this practice for both creditors and mortgage brokers.<sup>173</sup> The Bureau received comments from a few consumer groups that supported this extension and no comments that opposed it. Therefore, the Bureau is adopting § 1026.34(a)(6) as proposed.

In addition, the Bureau proposed comments to § 1026.34(a)(6), which would have clarified 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 provided examples. Specifically, the Bureau proposed comment 34(a)(6)-2, which explained that 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

<sup>173</sup> 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 mortgage 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 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.

<sup>172</sup> HUD Handbook at 4–11.

payments will cause the consumer to default on the existing loan.” Proposed comment 34(a)(6)–2 also explained that a creditor or mortgage broker does not recommend or encourage default by “advis[ing] 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.”

The Bureau solicited 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. The Bureau received a few public comments addressing proposed comment 34(a)(6)–2. For example, one consumer group suggested that the proposed discussions of “knowledge” and “good faith” were vague and could undermine what it believed Congress intended to be a “bright line” prohibition on any communication that may be viewed as a recommended default. Commenters did not suggest alternative language for the Bureau to use in place of this comment, but instead urged the Bureau to strike proposed comment 34(a)(6)–2 altogether, or replace it with a general statement that any recommendation or encouragement of nonpayment violates the ban.

The Bureau agrees with these commenters that the discussion of “knowledge” and “good faith” in proposed comment 34(a)(6)–2 could be confusing to creditors or to consumers. However, the Bureau believes that a flat prohibition of communication between a creditor or broker and a consumer concerning the relationship between timing of the next payment due on the existing loan and the anticipated date of consummation of the new high-cost mortgage would be unnecessary and contrary to the interests of consumers. In particular, the Bureau believes that such a prohibition could result in consumers unnecessarily making payments on loans that will be paid off prior to the due date, and then needing to seek refunds after payoff. Such a result would be inefficient and contrary to the interests of consumers—particularly those with limited financial resources. On the other hand, the Bureau believes permitting limited communication from the creditor or broker to inform the borrower that the anticipated consummation date of the new high-cost mortgage will occur prior to the next payment due date on an existing loan to be refinanced by the

high-cost mortgage will help prevent this inefficiency and benefit consumers.

For these reasons, the Bureau believes that operational guidance would be helpful regarding certain situations where a consumer is scheduled to refinance an existing loan through a new high-cost mortgage, and that loan is scheduled to be consummated prior to the due date for the next payment due on the consumer’s existing loan. The Bureau is adopting a revised comment 34(a)(6)–2, which addresses these concerns. Revised comment 34(a)(6)–2 removes the references to “knowledge” and “good faith” and instead provides that 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 in a manner that is likely to cause the consumer to default on the existing loan. The Bureau believes that this language will alleviate the consumer protection concerns raised by commenters without unnecessarily restricting communication between a borrower and a creditor or broker.

Revised comment 34(a)(6)–2 further provides operational guidance on certain instances where delay of consummation of a high-cost mortgage occurs for reasons outside the control of a creditor or mortgage broker. In those circumstances, revised comment 34(a)(6)–2 provides that a creditor or mortgage broker does not “recommend or encourage” default because the creditor or mortgage broker informs a consumer that the new high-cost mortgage is scheduled to be consummated prior to the due date for the next payment due on the consumer’s existing loan (which is intended to be paid by the proceeds of the new high-cost mortgage) so long as the creditor or broker also informs the consumer that any delay of consummation of the new high-cost mortgage beyond the payment due date of the existing loan will not relieve the consumer of the obligation to make timely payment on that loan. For the reasons set forth above, the Bureau believes these revisions also address the consumer protection concerns raised by commenters without unnecessarily restricting communication between a borrower and a creditor or broker.

#### 34(a)(7) Modification and Deferral Fees

The Bureau proposed 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) would have closely followed the statutory language in its implementation of section 129(s).

The Bureau sought 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. The Bureau also sought comment on the specific circumstances, including examples, under which the prohibition on modification and deferral fees is particularly needed to protect consumers. The Bureau further sought 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.

The Bureau received no public comments regarding the application of this proposal to open-end credit and fees for renewal or extension of draw periods. The Bureau received comments from several consumer groups expressing support for the prohibition. Consumer advocates also urged the Bureau to clarify that the prohibition covers certain practices, including forbearances and conditioning a modification on a consumer paying a portion of the amount in arrears. Industry commenters, including community banks, voiced general opposition to the prohibition on the basis that loan modifications and deferrals involve administrative costs for the lender and the prohibition on charging consumers for them will lead to increased costs for all consumers. One commenter suggested that the prohibition may discourage lenders from offering modifications or deferrals, and several suggested that it would discourage lenders from making high-cost mortgages at all. Other industry commenters sought clarification on the specific types of fees and charges covered by the rule.

The Bureau is adopting § 1026.34(a)(7) as proposed. In the Bureau’s view, the language of section 129(s) of TILA suggests that Congress intended the prohibition on loan modification and deferral fees to be broad. The statute specifically prohibits “any fee to modify, renew, extend, or amend a high-cost mortgage” or “to defer any payment due under the terms of such mortgage.” The Bureau thus believes that the language of section



129(s) is sufficiently broad to include forbearances and that further clarifying commentary is unnecessary. In addition, the Bureau recognizes that industry commenters argued that proposed § 1026.34(a)(7) may lead to increased costs. However, industry's general concerns do not provide an adequate basis to alter the unequivocal prohibition on modification and deferral fees set forth in the statute. Accordingly, the Bureau will adopt proposed § 1026.34(a)(7) as proposed.

#### 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. Proposed § 1026.34(a)(8) would have implemented these limitations with minor modifications for clarity.

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 four 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) would have implemented new TILA section 129(k)(1) consistent with the statute.

The Bureau sought comment on whether additional guidance is needed concerning the meaning of the phrase "amount of the payment past due" or the application of § 1026.34(a)(8) to open-end credit plans. As discussed in detail below, the Bureau did not receive any comments addressing these issues. The Bureau received a small number of comments from industry objecting to the proposal's implementation of the limitation on late fees. The commenters expressed concern that the limitation is inconsistent with current industry practices, which typically allow for a 5 percent late charge. They also argued that a 4 percent limit is too low to cover lenders' collection cost or adequately incentive timely payments. The Bureau acknowledges these concerns, but does not believe that they provide a principled basis to depart from the specific limits set forth by the statute.

The Bureau is aware that some consumer groups believe that the new

prohibition of late fees should be placed within section 32(d) as a limitation rather than within section 34 as a prohibited act or practice. For purposes of organization, the Bureau believes that the late fee prohibition is most appropriately contained within section 34, and thus declines to depart from the proposal in this respect.

#### Amount Past Due

New TILA section 129(k)(1) does not define the phrase "amount of the payment past due." Proposed comment 34(a)(8)(i)-1 would have explained 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 was 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 sought comment on the appropriateness of this definition. The Bureau also sought comment on whether additional guidance was needed concerning the meaning of the phrase "amount of the payment past due" in the context either of closed-end credit transactions or in the case of partial mortgage payments. The Bureau did not receive any comments addressing these aspects of the proposal. Accordingly, the Bureau is adopting §§ 1026.34(a)(8)(i) and (ii) as proposed.

#### 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 proposed to implement this prohibition on such late-fee "pyramiding," consistent with the statutory language, in § 1026.34(a)(8)(iii). The Bureau noted 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 would have provided an illustration of

the rule. The Bureau requested comment as to whether additional guidance was needed concerning the application of proposed § 1026.34(a)(8)(iii) to open-end credit plans. The Bureau did not receive any comments addressing these aspects of the proposal. Accordingly, the Bureau is adopting § 1026.34(a)(8)(iii) and comment 34(a)(8)(iii)-1 as proposed.

#### 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 proposed to implement new TILA section 129(k)(3), consistent with the statutory language, in § 1026.34(a)(8)(iv), to clarify the application of the provision to open-end credit plans.

Proposed comment 34(a)(8)(iv)-1 would have provided an illustration of the rule. The Bureau requested comment on this example, including on whether additional guidance was needed concerning the application of proposed § 1026.34(a)(8)(iv) to open-end credit plans. The Bureau did not receive comment specifically regarding proposed § 1026.34(a)(8)(iv), or proposed comment 34(a)(8)(iv)-1, and will adopt § 1026.34(a)(8)(iv) and comment 34(a)(8)(iv)-1 as proposed.

#### 34(a)(9) Payoff Statements

The Bureau proposed 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), would have prohibited 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 would have allowed, 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 would have been 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 would have been 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. Under the proposal, 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 would have been permitted to charge a reasonable fee for providing payoff statements during the remainder of the calendar year. Finally, the proposal would have required 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).<sup>174</sup>

The Bureau sought public comment on what additional guidance would 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). The Bureau received a handful of comments from industry groups generally objecting to the prohibition against charging a fee to a consumer. Specifically, commenters pointed out that producing payoff

statements involves an administrative cost for creditors and suggested that prohibiting such fees may lead to higher borrowing costs generally if creditors spread those costs to all borrowers. On the other hand, one consumer group suggested an additional requirement that the amount specified in the payoff statement must remain accurate for 15 days after the statement is mailed.

The Bureau is adopting § 1026.34(a)(9) as proposed. In the Bureau's view, these public comments provided no principled basis for substantive changes to the prohibition and exceptions set forth in the statute.

#### 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. Proposed § 1026.34(a)(10) would have implemented new TILA section 129(m).

Proposed § 1026.34(a)(10) would have implemented all aspects of the statute, except that the Bureau omitted the statutory language concerning the financing of prepayment penalties payable by the consumer in a refinancing transaction. The Bureau noted 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) would have specified that credit insurance premiums are not considered financed when they are calculated and paid in full on a monthly basis.

Proposed comment 34(a)(10)-1 would have clarified 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 §§ 1026.32(b)(1) through (5). Proposed comment 34(a)(10)-1 specified 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.

Proposed comment 34(a)(10)-2 would have provided examples of prohibited financing of points and fees. The proposed comment explained 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 requested comment on its proposed implementation of new TILA section 129(m). In particular, the Bureau requested 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).

One commenter responded to the request for comments regarding whether to include bona-fide third party charges in the financing prohibition; the comment advised against it on the basis that it risked restricting access to credit. The Bureau also received comments from industry generally objecting to the prohibition on financing of points and fees. In particular, these commenters argued that the prohibition would restrict access to credit for low-income consumers without sufficient cash to pay up-front points and fees.

Though the Bureau acknowledges industry's concern regarding low-income borrowers' ability to pay up-front points and fees, it does not believe this provides a sufficient basis to alter the prohibition set forth in the statute. Moreover, the Bureau believes that the prohibition provides enhanced consumer protection because it will prohibit creditors from imposing excessive points and fees in connection with high-cost mortgages by rolling them into the loan balance.

Accordingly, the Bureau is adopting § 1026.34(a)(10) and comments 34(a)(10)-1 and 34(a)(10)-2 as proposed.

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

The Bureau proposed revisions to § 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

<sup>174</sup> 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.

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. 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 form of loan, including dividing the loan into separate parts. Proposed § 1026.34(b) would have implemented 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.

Proposed comment 34(b)–1 would have provided 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 to evade the requirement to include loan originator compensation in points and fees for closed-end credit transactions under proposed § 1026.32(b)(1).

The proposal renumbered 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 believed that the guidance set forth in proposed comment 34(b)–2 would be useful for situations where it appears that a closed-end credit transaction has been structured as an open-end credit plan to evade the closed-end HOEPA coverage thresholds. The Bureau proposed 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.

The Bureau received several comments from consumer groups encouraging an expansive interpretation of the new section 129(r). One specifically suggested additional requirements that all loans that have been divided into two or more loans should be evaluated to determine if they should be considered covered by HOEPA and that all open-end loans should be evaluated in the same manner as closed-end loans if they meet certain criteria. Several commenters also expressed concern over loan terms, such as rate increase after default and “performance based” rates that would allow a creditor to disclose an unrealistically low APR and avoid the high-cost mortgage requirements. Consumer advocates also described a practice in which a creditor extends to a consumer an initial, unsecured loan, the proceeds of which are used to pay points and fees associated with a subsequent mortgage loan. The Bureau considered these suggestions. With respect to the comments regarding the scope of the prohibition, the Bureau believes that the proposed language is sufficiently broad to cover loans structured to evade high-cost mortgage requirements. Other provisions in Regulation Z address APR determination and disclosure, and increased interest rates after default are impermissible under § 1026.32(d)(4). In response to the comment describing the practice of making an initial, unsecured loan, the proceeds of which are used to pay points and fees associated with a subsequent mortgage loan, the Bureau has slightly revised comment 34(b)–1.i to reflect that if a creditor structures a loan as two or more loans to evade HOEPA, those loans may constitute an evasion whether made consecutively or at the same time.

The Bureau also received comments from GSEs expressing concern regarding the ability of secondary market purchasers to determine whether a loan has been divided into one or more parts to evade high-cost mortgage requirements. Specifically, these commenters argued that, if an entity purchases only first-lien loans, it does not routinely receive documentation regarding subordinate loans and may have difficulty in uncovering evasion. Particular concern was noted that GSEs are unable to discern a creditor’s “intent” in making a given loan. The

GSE commenters thus requested a rule limiting liability for assignees when they purchase only one obligation.

The Bureau notes the GSEs’ concern, but is adopting § 1026.34(b) as proposed. The Bureau recognizes that the expansion of HOEPA coverage to include purchase-money transactions may increase the risk of assignee liability for GSEs and other secondary market purchasers. However, the Bureau does not believe this concern warrants departure from the statute. Since HOEPA’s inception, TILA has provided for assignee liability with respect to all claims and defenses the consumer could assert against the creditor unless the assignee could demonstrate, by a preponderance of the evidence, that “a reasonable person exercising due diligence” could not determine the loan at issue was a high-cost mortgage. See 15 U.S.C. 1641(c). The Dodd-Frank Act did not alter this long-standing provision, but did, however, add the prohibition against dividing a transaction into separate parts for the purpose and with the intent of evading HOEPA. The Bureau thus believes that interpreting TILA section 129(r) to limit liability for GSE purchasers would be inconsistent with Congress’s intent to impose a special assignee liability rule for high-cost mortgage.

In addition, the Bureau is not convinced that the GSEs will be unable to adequately control for risk of purchasing mortgages structured to evade HOEPA. While the GSEs raised concerns regarding increased risk of assignee liability, they also noted that creditors are currently required to identify loans with subordinate financing at the time of sale, and must represent and warrant that the subordinate lien loans comply with GSE requirements. In addition, they stated that GSEs are able to request additional documentation for subordinate liens. The Bureau believes these comments indicate that GSEs possess at least some capability to control for risk of purchasing loans that may have been structured to evade HOEPA through their own due diligence.

With respect to the GSEs’ claim that there is no way for them to determine whether the creditor’s “intent” was to evade HOEPA, the Bureau is providing comment 34(b)–1.i. to provide guidance on when loans may be deemed structured with the intent to evade HOEPA. Comment 34(b)–1.i. provides that a creditor structures a transaction to evade HOEPA if, for example, the creditor structures a loan that would otherwise be a high-cost mortgage as two or more loans, whether made consecutively or at the same time, to

divide the loan fees to avoid the points and fees threshold for high-cost mortgages.

Finally, the final rule incorporates several additional changes. Because of changes to requirements regarding points and fees calculations for open- and closed-end transactions, the final rule removes proposed comment 34(b)-1.ii as unnecessary. In light of the Bureau's decision to create an exemption from HOEPA coverage for transactions to finance the initial construction of a dwelling, the Bureau is substituting a different comment 34(b)-1.ii to clarify that a creditor does not structure a transaction in violation of § 1026.34(b) when a loan to finance the initial construction of a dwelling may be permanently financed by the same creditor, such as a "construction-to-permanent" loan, and the construction phase and the permanent phase are treated as separate transactions. The final rule adopts the other parts of § 1026.34(b) and related commentary as proposed.

#### Section 1026.36 Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling

##### 36(k) Negative Amortization Counseling

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 rule, 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. As noted in the preamble of the proposed HOEPA rule, because of the similarity of TILA 129C(f)(2) to the counseling requirement for high-cost mortgages, the Bureau is including the implementation of this counseling provision as part of this rule.

The Bureau proposed § 1026.36(k) 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 in proposed § 1026.36(k)(1), pursuant to its authority under TILA section 105(a), the Bureau proposed to include two additional provisions in §§ 1026.36(k)(3) and (4), consistent with the requirements for high-cost mortgage counseling. Proposed § 1026.36(k)(3) would have addressed steering by creditors to particular counselors or counseling organizations and proposed § 1026.36(k)(4) would have required the provision of a list of counselors to consumers. In addition to requesting comments on specific aspects of the counseling requirement for negative amortization loans, the Bureau requested 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 statutory language. The Bureau did not receive any comments suggesting that conforming the counseling requirements would be beneficial. As a result, the Bureau is finalizing § 1026.36(k) substantially as proposed, but with certain revisions, as discussed in greater detail below.

##### 36(k)(1) Counseling Required

Proposed § 1026.36(k)(1) would have implemented the statutory requirement 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 secured by 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.<sup>175</sup> The Bureau omitted 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" because a

<sup>175</sup> As noted in the preamble to the proposal, the Bureau is exercising its authority under section 105(a) of TILA Act to allow counseling to be provided by HUD-approved counselors or organizations, in addition to HUD-certified counselors or organizations, as is specifically required by TILA section 129C(f)(2). The Bureau is proposing to exercise its authority to provide flexibility and to facilitate compliance by ensuring greater availability of competent housing counselors for the required counseling.

qualified mortgage by definition does not permit a payment schedule that results in an increase of the principal balance under new TILA 129C(b)(2)(A).

Proposed comment 36(k)(1)-1 would have provided that counseling organizations or counselors certified or approved by HUD to provide the counseling required by § 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.

The Bureau also proposed several additional comments to provide further clarification. Proposed comment 36(k)(1)-2 would have addressed 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, proposed comment 36(k)(1)-2 would have required that homeownership counseling pursuant to § 1026.36(k)(1) include information regarding the risks and consequences of negative amortization. The Bureau noted in the preamble of the proposal that it believes that a requirement that the counseling address the negative amortization feature of a loan is consistent with the purpose of the statute.

To help facilitate creditor compliance with proposed § 1026.36(k)(1), proposed comment 36(k)(1)-3 would have provided 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.

Finally, proposed comment 36(k)(1)-4 would have addressed 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 proposed 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 solicited comment on the proposed general requirement and accompanying comments. A significant number of consumer groups strongly objected to the proposed counseling requirement for first-time borrowers of negative amortization loans as inadequate. These commenters noted that negative amortization loans are very high-risk and difficult for consumers to understand. Commenters asked the

Bureau to ban negative amortization loans entirely, or at least to ban negative amortization loans secured by a consumer's principal dwelling. Alternatively, commenters asked the Bureau to require counseling for all borrowers of negative amortization loans, rather than just first-time borrowers. Some commenters also requested that the Bureau set further standards for negative amortization counseling, such as requiring the counseling to include review of loan terms and household finances. A few commenters asked the Bureau to ban negative amortization specifically for high-cost mortgages.

The Bureau is finalizing § 1026.36(k)(1) as proposed. While the Bureau agrees that negative amortization loans are inherently more risky than fully amortizing loans, the Bureau also notes that Congress considered the risks associated with these loans, but did not ban these loans in connection with the comprehensive mortgage reforms contained in title XIV of the Dodd-Frank Act. Instead, Congress has made the determination to address the increased risk associated with these mortgages by other means, such as requiring additional disclosures and counseling for first-time borrowers, and preventing loans containing negative amortization from being qualified mortgages. The Bureau does not believe it is appropriate to ban negative amortization loans more broadly in the context of this rulemaking to implement section 1414. At this time, the Bureau does not believe it is necessary to set any further standards for negative amortization counseling, beyond those in the proposal. As noted above, the Bureau proposed that the required counseling must address the risks and consequences of negative amortization, and the Bureau is now adopting that additional requirement in this final rule. Finally, in response to comments asking the Bureau to ban negative amortization for high-cost mortgages, the Bureau notes that high-cost mortgages are already prohibited from negatively amortizing, pursuant to § 1026.32(d)(2).

#### 36(k)(2) Definitions

TILA section 129C(f) does not define the terms, "first-time borrower" and "negative amortization." To afford creditors guidance on the circumstances under which § 1026.36(k)(1) applies, proposed § 1026.36(k)(2) would have provided definitions of these two key terms. Specifically, proposed § 1026.36(k)(2)(i) would have stated 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) would have provided that negative amortization means a payment schedule with regular periodic payments that cause the principal balance to increase. The Bureau did not receive comments on either of these definitions, and is finalizing them as proposed.

#### 36(k)(3) Steering Prohibited

TILA section 129C(f)(2) does not address potential steering of consumers by creditors to particular counselors. Consistent with its proposal to prohibit steering for high-cost mortgage counseling in § 1026.34(a)(5)(vi), the Bureau proposed 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). The Bureau proposed this prohibition pursuant to its authority under TILA section 105(a). 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 and an example of an action that does not constitute steering. The Bureau did not receive comment on this provision, and is therefore finalizing it as proposed.

#### 36(k)(4) List of Counselors

##### Proposed Provisions Not Adopted

Also consistent with its proposal in § 1026.34(a)(5)(vii) for high-cost mortgage counseling, the Bureau proposed in § 1026.36(k)(4)(i) to add a requirement that a creditor provide a list of counselors to a consumer for whom counseling is required under proposed § 1026.36(k) and proposed in § 1026.36(k)(4)(ii) a safe harbor for a creditor that provides a list of counselors pursuant to the obligation in Regulation X § 1024.20. However, as with the parallel requirement related to high-cost mortgages, the Bureau is not finalizing this requirement because it will essentially duplicate the counseling list requirement finalized in § 1024.20, which will require a counseling list to be provided to all applicants of federally related mortgage loans, including negative amortization mortgages.

#### VI. Effective Date

This final rule is effective on January 10, 2014. The rule applies to transactions for which the creditor or lender received an application on or after that date. As discussed above in part III, the Bureau believes that this approach is consistent with the

timeframes established in section 1400(c) of the Dodd-Frank Act and, on balance, will facilitate the implementation of the rules' overlapping provisions, while also affording creditors sufficient time to implement the more complex or resource-intensive new requirements.

In response to the proposal, the Bureau received a number of comments from industry referencing the other title XIV rules and indicating that implementing so many new requirements at the same time would create a significant cumulative burden for creditors. Many of these commenters suggested that the Bureau provide as late an effective date as possible, with many commenters suggesting periods of between 18 and 24 months, in order to have time to adjust computerized systems, compliance procedures, and train staff. While a few commenters suggested sequenced implementation dates for all of the title XIV rulemakings, other commenters asked the Bureau to provide a longer implementation date but to avoid implementing the regulations in a piecemeal fashion. One industry association commenter suggested that the Bureau employ an approach similar to that taken for the 2012 TILA-REPSA proposal, and issue a rule temporarily delaying implementation of the HOEPA rule.

For the reasons already discussed above, the Bureau believes that an effective date of January 10, 2014 for this final rule and most provisions of the other title XIV final rules will ensure that consumers receive the protections in these rules as soon as reasonably practicable, taking into account the timeframes established by the Dodd-Frank Act, the need for a coordinated approach to facilitate implementation of the rules' overlapping provisions, and the need to afford creditors and other affected entities sufficient time to implement the more complex or resource-intensive new requirements.

#### VII. Dodd-Frank Act Section 1022(b)(2)

In developing the final rule, the Bureau has considered the regulation's potential benefits, costs, and impacts.<sup>176</sup> The proposal set forth a preliminary analysis of these effects, and the Bureau requested and received comments on this analysis. In addition, the Bureau

<sup>176</sup> 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 Dodd-Frank Act; and the impact on consumers in rural areas.

has consulted or offered to consult with the prudential regulators, the Federal Trade Commission, HUD, FHFA, and USDA in connection with this rulemaking, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.<sup>177</sup>

As discussed above, HOEPA currently addresses potentially harmful practices in refinancing and closed-end home-equity mortgages. Loans that meet HOEPA's thresholds are subject to restrictions on loan terms as well as to special disclosure requirements intended to ensure that consumers in high-cost mortgages understand the features and implications of such loans. Borrowers with high-cost mortgages 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 mortgages and HELOCs secured by a consumer's principal dwelling. The Dodd-Frank Act also expanded the protections associated with high-cost mortgages, including by adding new restrictions on loan terms, extending the requirement that a creditor verify a consumer's ability to repay to a HELOC, and adding a requirement that consumers receive homeownership counseling before high-cost mortgages may be extended.

In this rulemaking, the Bureau is amending Regulation Z to implement the changes to HOEPA set forth in the Dodd-Frank Act. In addition to the amendments related to high-cost mortgages, the Bureau is also finalizing 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 mortgages, respectively.

In the proposal, the Bureau generally requested comment on the section 1022 impact analysis set forth therein. Among other things, the Bureau requested comment on the use of the data described in the proposal and sought additional data regarding the potential benefits, costs, and impacts of the proposal. Industry commenters raised general concerns that expanding the set of loans potentially subject to HOEPA, changing the HOEPA coverage thresholds, and imposing additional restrictions on high-cost mortgages could decrease access to credit. Several commenters stated that few creditors are

willing to make high-cost mortgages because of the reputational, regulatory, and legal risks so that expanding HOEPA coverage will reduce access to credit. In contrast, consumer groups generally did not raise similar concerns regarding access to credit as a result of expanding the set of loans potentially subject to HOEPA and changing the HOEPA coverage thresholds. Some consumer groups further suggested stronger protections for consumers with high-cost mortgages were warranted.

Both industry and consumer groups commented that the Bureau should collect additional data to analyze the potential impacts of the proposed rule and to assess the empirical bases for implementing or deviating from statutory thresholds. For example, both manufactured housing industry commenters and consumer groups argued that the Bureau should collect additional data to inform its specification of APR and points-and-fees thresholds that differ by collateral type and loan size.

In addition to soliciting comment generally on the impact analysis, the proposal solicited comment on and suggestions for additional data regarding specific aspects of the proposal. For example, the Bureau requested information concerning how provisions in the rule may affect the share of HELOCs that would meet the HOEPA thresholds and the costs and benefits of requiring that the list of homeownership counseling providers for loans covered by Regulation X to be given to applicants for all federally related mortgages rather than to only applicants for purchase-money mortgages. In addition, the Bureau requested information and data on the proposal's potential impact on consumers in rural areas specifically as well as the proposal's potential impact on depository institutions and credit unions with total assets of \$10 billion or less. The Bureau generally received limited detail and data in response to many of these specific requests. The comments are discussed throughout this preamble and below in the context of the analysis of the benefits and costs of the respective provisions of the final rule.<sup>178</sup>

<sup>178</sup> An exception is comments received on the proposed transaction coverage rate. Numerous commenters raised concerns regarding this provision. As discussed above, however, the Bureau is not implementing the proposed provisions relating to the transaction coverage rate in this final rule. Consequently, comments on the costs and benefits of the transaction coverage rate are not discussed below.

#### 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 final rule, as well as certain alternatives considered, which include:

1. Expanding the types of transactions potentially covered by HOEPA to include purchase-money mortgages and HELOCs;

2. Revising the existing HOEPA APR and points-and-fees thresholds to implement Dodd-Frank Act requirements, as well as modifying the APR and points-and-fees calculations to determine whether a transaction is a high-cost mortgage;

3. Adding a prepayment penalty coverage threshold;

4. Adding and revising several restrictions and requirements on loan terms and practices for high-cost mortgages;<sup>179</sup> and

5. Implementing two separate homeownership counseling-related provisions mandated by the Dodd-Frank Act, namely, generally requiring lenders to provide a list of homeownership counseling organizations to applicants for federally related mortgages subject to 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 mortgages 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. When relevant, the discussion of these five categories of provisions incorporates the comments and data the Bureau received in response to its proposal and considers the costs and benefits of changes made between the proposal and final rule.

<sup>179</sup> These restrictions and requirements include requiring that a creditor receive certification that a HOEPA consumer has received pre-loan counseling from an approved homeownership counseling organization; 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 consumer's ability to repay a HELOC.

<sup>177</sup> Section 1022(b)(2)(B) of the Dodd-Frank Act requires the Bureau to engage in such consultation "prior to proposing a rule and during the comment process."

The analysis relies on data that the Bureau has obtained, which include updated versions of data analyzed in the proposed rule such as data on 2011 mortgages collected under HMDA that were released after publication of the proposed rule and revised data on nondepository mortgage originators from the National Mortgage Licensing System.<sup>180</sup> The analysis also draws on evidence of the impact of State anti-predatory lending statutes that often place additional or tighter restrictions on mortgages 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 final rule. For example, data on the terms and features of HELOCs are more limited and less available than data on closed-end mortgages. The Bureau is not aware of and commenters did not provide any systematic and representative data on the terms and features of HELOCs. Moreover, some potential costs and benefits, such as the value of homeownership counseling, or reduced likelihood of an unanticipated fee or change in payments, are extremely difficult to quantify and to measure. Therefore, the analysis generally provides a qualitative discussion of the benefits, costs, and impacts of the final 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 final rule considered below would arise largely or entirely from the statute, not from the final rule. The final rule would provide substantial

benefits compared to allowing the HOEPA amendments to take effect alone by clarifying parts of the statute that call for interpretation, such as how to determine whether a HELOC is a high-cost mortgage and by creating certain exemptions. Greater clarity on parts of the statute that call for interpretation should reduce the compliance burdens on covered persons by reducing costs for attorneys and compliance officers and also by reducing the litigation risk and potential liability creditors and assignees of high-cost mortgages would face in the absence of regulatory guidance. In addition, the Bureau believes that exempting construction loans, for example, should reduce burden on not only covered persons that originate these types of loans but also on consumers because potential HOEPA coverage of these loans may have led to sharper reductions (relative to other types of loans) in the availability of construction loans. In this light, the costs that the regulation would impose beyond those imposed by the statute itself are likely to be at most 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. The Bureau has nonetheless also considered the potential benefits, costs, and impacts of the major provisions of the final 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).<sup>181</sup> 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 a high-cost mortgage.<sup>182</sup> One trade association commenter asserted that the Bureau's analysis of the compliance burden due to the expansion of HOEPA to purchase-money mortgages and HELOCs is incomplete in part because it did not consider the costs of determining whether a loan is a high-cost mortgage. The trade association noted that these

costs would now be incurred for all purchase-money mortgages and HELOCs, including those that are ultimately not originated or that are modified to avoid classification as a high-cost mortgage. As noted in its preliminary section 1022 analysis, the Bureau does not consider these benefits and costs because these changes are required by the Dodd-Frank Act's amendments to HOEPA. The Bureau's discretion to exempt broad categories of loans from HOEPA coverage is limited, and the Bureau does not believe such exemptions are consistent with the mandate of the statute. The Bureau has discretion in future rulemakings to choose the most appropriate baseline for each particular rulemaking.

A few industry commenters argued that the analysis did not adequately consider the proposal's costs and benefits in the context of related rulemakings including the cumulative effects of these rules on consumers and systemic risk. The Bureau, however, interprets the consideration required by section 1022(b)(2)(A) to be focused on the potential benefits, costs, and impacts of the particular rule at issue, and to not include those of other pending or potential rulemakings. Moreover, the commenters do not suggest a reliable method for assessing cumulative impacts of multiple rulemakings. The Bureau believes that there are multiple reasonable approaches for conducting the consideration called for by section 1022(b)(2)(A) and that the approach it has taken in this analysis is reasonable and that, particularly in light of the difficulties of reliably estimating certain benefits and costs, it has discretion to decline to undertake additional or different forms of analysis. The Bureau notes that it has coordinated the development of the final rule with its other rulemakings and has, as appropriate, discussed some of the significant interactions of the rulemakings.

One commenter stated that the Bureau did not sufficiently weigh the negative effects of the proposed rule against the likely benefits as measured by the goal of U.S. financial stability. The Bureau notes that, as discussed in this 1022(b)(2) analysis and other parts of the preamble, it has carefully taken into account the potential negative effects of the proposed rule and has accordingly added exceptions and other provisions to mitigate these potential negative effects while preserving the benefits of the rule within the constraints mandated by Congress.

<sup>180</sup> The Bureau noted in its Summer 2012 mortgage proposals that it sought to obtain additional data to supplement its consideration of the rulemakings, including additional data from the National Mortgage Licensing 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. Each of these data sources was not necessarily relevant to each of the rulemakings. The Bureau used the additional data from NMLS and NMLS Mortgage Call Report data to better corroborate its estimate of the contours of the non-depository segment of the mortgage market. The Bureau has received loan file extracts from three lenders, but at this point, the data from one lender is not usable and the data from the other two is not sufficiently standardized nor representative to inform consideration of the final rules. Additionally, the Bureau has thus far not yet received data from the National Mortgage Database pilot phases. The Bureau also requested that commenters submit relevant data. All probative data submitted by commenters are discussed in this document.

<sup>181</sup> The Bureau chose as a matter of discretion to consider costs and benefits of provisions that are required by the Dodd-Frank Act to inform the rulemaking more completely.

<sup>182</sup> 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 final rule would be expected to reduce both its costs and its benefits.

### C. Coverage of the Final Rule

**HOEPA.** The provisions of the final 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 credit transactions (including purchase-money mortgages) and open-end credit plans (*i.e.*, home-equity lines of credit, or HELOCs), but not to reverse mortgages, transactions to finance the initial construction of a dwelling, transactions originated by a Housing Finance Agency, or transactions originated under the United States Department of Agriculture's Rural Development Section 502 Direct Loan Program.

In this part of this Supplementary Information, the term "creditor" is used generally 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 part discusses affected persons other than creditors, 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 extending the prohibition on recommended default to mortgage brokers.

**Additional Counseling Provisions.** The requirement that lenders provide mortgage applicants a list of homeownership counseling organizations applies to applications for a loan covered by RESPA including purchase-money mortgages, subordinate mortgages, refinancings, closed-end home-equity mortgages, and open-end credit plans. The negative amortization counseling provision applies only to closed-end credit transactions that are made to first-time borrowers, are secured by a dwelling, and may result in negative amortization. These counseling-related provisions do not apply to reverse mortgages or to transactions secured by a consumer's interest in a timeshare plan (as 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 mortgages and HELOCs would increase the number of loans potentially subject to

HOEPA coverage and as a result, almost certainly, the number of closed-end mortgages and HELOCs classified as high-cost mortgages. Data collected under HMDA offer a rough illustration of the scope of the expansion of loans potentially covered by HOEPA.<sup>183</sup> Home-improvement and refinance loans accounted for 66 percent of closed-end mortgages secured by a principal dwelling reported in the 2011 HMDA data.<sup>184</sup> Therefore, the data suggest that about 34 percent of home-secured closed-end mortgages in 2011 were not potentially subject to HOEPA coverage because they were purchase-money mortgages.<sup>185</sup> If one additionally considers HELOCs, it is likely that closer to 42 percent of all mortgages (*i.e.*, closed-end mortgages and HELOCs) in 2011 were not eligible for HOEPA coverage.<sup>186</sup> The rule would expand the types of loans potentially subject to HOEPA coverage to essentially all closed-end mortgages and open-end credit plans secured by a principal dwelling, except reverse mortgage

<sup>183</sup> 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 creditors report under 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 2011: Highlights from the Data Reported under the Home Mortgage Disclosure Act*, Fed. Res. Bull. (forthcoming), at n.2.

<sup>184</sup> As noted above, the analysis of the final rule uses updated data relative to the proposal. For example, the analysis of the proposal relied on 2010 HMDA data, since 2011 HMDA were not yet available.

<sup>185</sup> The share of closed-end originations reported under HMDA that were purchase-money mortgages was somewhat lower in 2011 than in most preceding years. The share ranged between 43 percent and 47 percent of originations over the 2004–2008 period before it fell to 31 percent in 2009. The share changed more substantially in earlier years, when it declined from 59 percent in 2000 to 26 percent in 2003. Robert B. Avery, Neil Bhutta, Kenneth P. Brevoort & Glenn B. Canner, *The Mortgage Market in 2011: Highlights from the Data Reported under the Home Mortgage Disclosure Act*, Fed. Res. Bull. (forthcoming), Table 3.B.

<sup>186</sup> Experian-Oliver Wyman's analysis of credit bureau data indicates that there were roughly 13 percent as many HELOC originations in 2011 as there were originations of closed-end mortgage or home equity loans. Specifically, Experian-Oliver Wyman estimated that there were roughly 6.4 million mortgages and 418,000 home equity loans originated in 2011 compared with about 909,000 HELOC originations. The estimate of 42 percent assumes that the fraction of closed-end originations that were purchase-money mortgages among creditors that did not report under HMDA was comparable to the estimated 34 percent for HMDA reporters. More information about the Experian-Oliver Wyman quarterly Market Intelligence Report is available at <http://www.marketintelligencereports.com>.

transactions, transactions to finance the initial construction of a dwelling, transactions originated by a Housing Finance Agency, or transactions originated under the United States Department of Agriculture's Rural Development Section 502 Direct Loan Program.<sup>187</sup>

The Bureau expects, however, that only a small fraction of loans would qualify as high-cost mortgages under the final rule and that few creditors would make a large number of high-cost mortgages. The Bureau's analysis of loans reported under HMDA suggests that the share of all closed-end mortgages for creditors that report under HMDA might increase from about 0.04 percent under the current thresholds to between 0.1 to 0.3 percent of loans under the revised thresholds.<sup>188</sup> Based on analysis of data from HMDA and from depositories' Reports of Condition and Income (Call Reports) and statistical extrapolation to non-reporting entities, the Bureau estimates that about 6–7 percent of depository institutions made any closed-end high-cost mortgages in 2011 under the current HOEPA thresholds, and that this likely would have been approximately 10 percent if the revised thresholds had been in place.<sup>189</sup> Many of these creditors are predicted to make few high-cost mortgages: The share of depository institutions that make ten or more high-cost mortgages is estimated to increase from less than 1 percent under the current thresholds to about 2 percent under the final rule.<sup>190</sup> Similarly, the

<sup>187</sup> The estimates of the shares of mortgages potentially subject to HOEPA exclude construction loans, which are not reported under HMDA. Similarly, the estimates likely exclude reverse mortgages because these mortgages generally are not reported under HMDA.

<sup>188</sup> These estimates may overstate the extent to which high-cost mortgage lending may increase under the revised thresholds. In particular, the estimate of 0.04 percent of loans that are currently classified as high-cost mortgages in HMDA is based on the HOEPA flag in those data. This estimate of the current share of high-cost mortgages rises to nearly 0.06 percent if the fraction is estimated in an approach comparable to that for projection of the share of loans that exceed the revised thresholds.

<sup>189</sup> 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/](http://www2.fdic.gov/call_tfr_rpts/).

<sup>190</sup> These estimates of creditors that make any or more than 10 high-cost mortgages under the final rule assume that some lenders avoid making high-cost mortgage loans. In particular, these estimates assume that lenders that are estimated to have not made any high-cost mortgages 2009–2011 do not originate loans that exceed the revised HOEPA thresholds.



share of non-depository creditors for which high-cost mortgages comprise more than 1 percent of all closed-end originations is estimated to rise from 5 percent to 7 percent.<sup>191</sup> Finally, although it is difficult to estimate precisely the share of HELOCs that will meet the HOEPA thresholds, the effect of the final rule on creditors' businesses is likely limited because open-end lending generally comprises a small fraction of creditors' lending portfolios. Based on the estimated shares of high-cost mortgages for creditors, the Bureau considered creditors' potential revenue losses under the assumption that creditors made no high-cost mortgages, which is likely a conservative assumption if lenders are able to substitute loans that do not exceed the HOEPA thresholds in place of a high-cost mortgage. As discussed in more detail below, these estimates suggest that the effect of the final rule would be minor for the vast majority of creditors.

Some industry commenters argued that, as a result of HOEPA's expansion to include purchase-money transactions, HOEPA would apply to construction loans, a large fraction of which would be classified as high-cost mortgages because these loans typically have higher fees and APR. In addition, manufactured housing creditors expressed concerns that a substantial fraction of loans that they originate would exceed the HOEPA thresholds. Those concerns are addressed in detail below.

#### 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 high-cost mortgages, should be similar qualitatively to the benefits and costs of current HOEPA provisions.<sup>192</sup> The Bureau believes that these benefits likely include improving some applicants' and consumers' understanding of the terms and features of a given high-cost mortgage as a result of the enhanced disclosures required for high-cost mortgages and as a result of the counseling requirement.<sup>193</sup> In

<sup>191</sup> 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.

<sup>192</sup> As discussed below, the Bureau believes that the magnitude of the benefits and costs of HOEPA coverage are generally expected to increase under the final rule due to, for instance, new and revised restrictions and requirements on loan terms and origination practices for high-cost mortgages.

<sup>193</sup> 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

addition, the rule would restrict or prohibit loan terms such as prepayment penalties and, in many cases, balloon payments whose risks may be difficult for some consumers to evaluate.<sup>194</sup> Improving consumers' understanding of loan terms and such restrictions on loan terms could reduce the likelihood that a HOEPA consumer faces a sizable, unanticipated fee or increase in payments.

Improving consumers' understanding of a given loan would likely increase some consumers' ability—and potentially their propensity—to shop for a mortgage. A greater ability to shop could have additional benefits to consumers if, as a consequence, consumers shop more extensively and select a more favorable mortgage (which may be a loan that does not meet the HOEPA thresholds) or if consumers forgo taking out any mortgage, if none would likely be affordable. At least for some consumers, obtaining information in the process of choosing a mortgage 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 consumer 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 what the consumer perceives to be the expected savings, reduced risk, or other benefits that could be realized if shopping resulted in the choice of another mortgage. The Bureau expects that the final rule would reduce the costs of understanding the loan terms for some high-cost loan applicants through enhanced disclosures and counseling. In doing so, the final rule could benefit applicants who opt, based on better information, not to take out a high-cost mortgage.

It appears that many consumers do not shop extensively when selecting a mortgage. A 2012 survey by Fannie Mae found that nearly 40 percent of mortgage consumers received offers from only one creditor when selecting their current

anti-predatory lending laws and, where relevant, findings of these studies are discussed below.

<sup>194</sup> As discussed in the preamble as well as below, balloon payments are generally prohibited for high-cost mortgages but would be permitted for short-term bridge loans made in connection with the acquisition of a new dwelling and for certain loans made by specific categories of creditors serving rural or underserved areas.

mortgage.<sup>195</sup> Given the estimated benefits to a consumer from shopping, this suggests that consumers find the time and effort of additional shopping costly; they underestimate the potential value from shopping; or both.<sup>196</sup>

Some mortgage consumers appear to have difficulty understanding or at least recalling details of their mortgage, particularly the terms and features of adjustable-rate mortgages.<sup>197</sup> Improved information about loan terms may be especially beneficial in the case of high-cost mortgages. At least along some dimensions, the types of consumers who may be less certain about their mortgage terms are also the types of consumers who are more likely to have taken out a subprime loan.<sup>198</sup> In addition, focus groups suggest that many subprime consumers perceive their choice set as limited or experience a sense of desperation.<sup>199</sup> Consumers

<sup>195</sup> Fannie Mae, "Mortgage Shopping: Are Borrowers Leaving Money on the Table?," November 27, 2012 available at <http://www.fanniemae.com/resources/file/research/housingsurvey/pdf/nhsq22012presentation.pdf>. This finding is broadly consistent with information obtained from creditors through outreach and with earlier studies that suggest roughly 20–30 percent of consumers contacted only one creditor in shopping for a mortgage and that a similar fraction considered only two lenders. 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); 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>.

<sup>196</sup> 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](http://www.nber.org/papers/w16007).

<sup>197</sup> See Brian Bucks & Karen Pence, *Do Borrowers Know Their Mortgage Terms?*, 64 J. Urb. Econ. 218 (2008); 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 Fannie Mae, "Mortgage Shopping: Are Borrowers Leaving Money on the Table?," November 27, 2012 available at <http://www.fanniemae.com/resources/file/research/housingsurvey/pdf/nhsq22012presentation.pdf>.

<sup>198</sup> See Brian Bucks & Karen Pence, *Do Borrowers Know Their Mortgage Terms?*, 64 J. Urb. Econ. 218 (2008).

<sup>199</sup> 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

who wish to obtain a mortgage and believe that they have few options may be more likely to accept loan terms offered to them and, in turn, less likely to consider terms of the mortgage in depth. Similarly, consumers seeking a mortgage to alleviate short-term financial pressures may focus on near-term features of the mortgage, rather than on the risk of, for example, a large payment increase at some later point due to a teaser rate expiring or to fluctuations in interest rates.

Clearer or more readily accessible information about loan terms may also be particularly beneficial for consumers that take out a purchase-money mortgage. A recent survey of mortgage borrowers suggests that purchase-money mortgage consumers are less likely to be familiar with the mortgage process and with mortgage terms such as interest rates and fees, down payments, and money for closing.<sup>200</sup> The final rule would expand HOEPA coverage to purchase-money mortgages so that the potential benefits of improved information may now accrue for the first time to this set of high-cost mortgage consumers.

These benefits to consumers arise from making information less costly, but the potential benefits to consumers may be even greater if at least some consumers make systematic errors in processing information. For example, some studies find that some consumers may not accurately gauge the probability of uncertain events.<sup>201</sup> Thus, it is possible that, in assessing the expected costs of a mortgage offer, some consumers 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 final rule could increase the cost of credit or curtail access to credit for a small share of HELOC consumers and purchase-money consumers because, as detailed below, creditors may be reluctant to make high-cost mortgages and may no longer offer loans that they currently make but that would meet the new HOEPA thresholds. Studies of State anti-predatory mortgage lending laws, however, indicate these impacts of extending HOEPA coverage may be

and Economic Sciences Research Center, Technical Report 03-39, 2003), <http://www.sesrc.wsu.edu/sesrcsite/Papers/files/dfi-techreport-FINAL2-16-04.pdf>.

<sup>200</sup> Freddie Mac, "National Mortgage Database, Phase 2 National Survey of Mortgage Borrowers," (May 2011).

<sup>201</sup> 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).

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 thresholds.<sup>202</sup>

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.<sup>203</sup> It is possible that some consumers 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 terms that would not trigger HOEPA coverage. It is also possible, however, that some consumers would receive a less-favorable loan or no loan at all.<sup>204</sup>

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 consumers 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.<sup>205</sup> On the one hand, this finding

<sup>202</sup> 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](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.

<sup>203</sup> 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1460871).

<sup>204</sup> It is possible that some borrowers would receive a less favorable mortgage if, for example, lenders avoid making high-cost mortgages and, consequently, competition in lending to some consumers is reduced.

<sup>205</sup> Ding, Roberto G. Quercia, Carolina K. Reid, and Alan M. White (2011), "State Anti-Predatory

might be seen as consistent with the possibility that at least some consumers receive more beneficial loans. On the other hand, it might reflect the possibility that access to credit is more limited in States with comparatively strong anti-predatory statutes, *i.e.*, that consumers 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 mortgages and HELOCs would likely require creditors to generate and to provide HOEPA disclosures to a greater number of consumers than today. It is difficult to predict the extent to which creditors may avoid making newly eligible loans under the final rule. The Bureau's estimation methodology in analyzing the paperwork burden associated with the final rule implies that on the order of 25,000-30,000 loans might qualify as high-cost mortgages or high-cost HELOCs. Regardless, the Bureau expects that the share of consumers that receive a high-cost mortgage would remain a small fraction of all mortgage consumers (by the Bureau's estimates, likely about 0.3 percent of all closed-end and open-end originations). Creditors would likely also incur costs (*e.g.*, the costs of time involved in receiving the certification and data retention costs) to comply with the final rule's requirement that a creditor obtain certification that a consumer has received homeownership counseling prior to extending a high-cost mortgage.

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 creditors believe they will be negatively perceived if they make high-cost mortgages. This belief coupled with the restrictions and liability provisions associated with high-cost mortgages and limited secondary market demand for high-cost mortgages may reduce creditors' ability or willingness to make high-cost purchase-money mortgages and HELOCs. Creditors may also be reluctant to make high-cost purchase-money mortgages that they previously would have extended because of the

Lending Laws and Neighborhood Foreclosure Rates," *Journal of Urban Affairs*, Volume 33, Number 4, pages 451-467.

general inability to sell high-cost mortgages in the current market, primarily because of assignee liability.

If creditors were indeed unwilling to make the likely small fraction of loans that newly meet the revised HOEPA thresholds and did not substitute other loan terms, they would lose the full revenue from any loans that they choose not to originate. A second possibility is that creditors restrict high-cost mortgage lending in part by substituting alternative terms that do not meet the HOEPA thresholds. Even if all potential high-cost mortgages 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.

#### 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 high-cost mortgages, high-cost mortgages are expected to continue to account for a small fraction of both closed-end mortgages and HELOCs. Thus, the final rule would be expected to have no direct impact on the vast majority of creditors, because, as noted above, at most about 10 percent of creditors are predicted to make loans that would be classified under the final rule, and few creditors are expected to make significant numbers of high-cost mortgages. Similarly, the final rule would not be expected to affect directly the vast majority of consumers—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 mortgages for creditors that report under HMDA might increase from about 0.04 percent under the current thresholds to about 0.1 to 0.3 percent of loans under the revised thresholds. The estimated proportion of purchase-money mortgages that would qualify as high-cost mortgages is slightly greater, 0.5 percent, but is still a small fraction of all such loans.

One trade association argued that the Bureau's analysis of the compliance burden was incomplete because it did not properly consider the costs of determining whether a purchase-money mortgage or a HELOC is a high-cost mortgage. In particular, the trade association asserted that, in general, most creditors as a matter of course seek

to avoid high-cost mortgages, due to the reputational stigma and liability risks associated with making these loans. According to this commenter, creditors thus incur costs to identify potential high-cost mortgages in order to avoid making such loans. But, the commenter asserted, now that HOEPA has been expanded to include both purchase-money transactions and open-end credit transactions, creditors will incur new costs to identify (and avoid making) these types of loans that may potentially fall under the HOEPA thresholds as well. The Bureau believes that these costs include, for example, the costs of changing or upgrading software or computer systems, costs of legal and compliance review of how HOEPA applies to HELOCs, and the costs of training staff that may have previously originated only purchase-money mortgages or HELOCs so that they did not previously need to be familiar with HOEPA. In the trade association's view, the Bureau did not properly account for these new costs in its analysis. However, the Bureau's Section 1022 analysis does not consider the benefits and costs of determining whether purchase-money mortgages and HELOCs exceed the HOEPA thresholds because, as noted in the discussion of the baseline, these benefits and costs arise directly from the statute.

The final rule addresses commenters' concerns, discussed above, that expanding HOEPA coverage to purchase-money mortgages would apply to transactions to finance the initial construction of a dwelling (construction loans)—which typically have higher fees and interest rates than other home-secured loans—and, consequently would unduly reduce access to such credit with little benefit to consumers. One industry commenter estimated that about one-fifth of its construction-only loans originated in recent years would have exceeded the HOEPA thresholds. The benefits to consumers of extending HOEPA coverage to construction loans may be smaller than for other types of loans because many restrictions on high-cost mortgages are generally inapplicable to construction loans including restrictions on acceleration, fees for loan modifications or payoff statements, and negative amortization features.<sup>206</sup> The Bureau is exempting transactions to finance the initial construction of a dwelling from the final rule. Thus, the final rule should have no

<sup>206</sup> In addition, the Bureau notes that the Board concluded that, at least historically, there have been fewer concerns regarding potentially abusive lending practices for construction loans compared with other mortgages.

direct costs or benefits to consumers that seek such financing or to covered persons insofar as they originate these transactions. As compared with the proposed rule, the final rule will result in lower costs for construction loan creditors.

Some commenters argued that the Bureau incorrectly concluded that only a small fraction of manufactured home loans would be covered. However, the Bureau notes that it concluded based on available data that the proposed rule was expected to have little direct impact on the vast majority of consumers and creditors (not manufactured-home borrowers specifically), and that the share of high-cost mortgages would likely be higher for loans secured by manufactured housing than for loans secured by other types of homes. Under the current thresholds, the share of home improvement or refinance loans (those types of loans currently covered by HOEPA) that are identified as high-cost mortgages in the 2011 HMDA data is about 2 percent for loans secured by a manufactured home compared with about 0.04 percent of loans secured by other types of 1–4 family homes, for example.

The Bureau recognized that HMDA data that form the basis of these estimates likely under-represent mortgages extended in rural areas, where manufactured housing is more common. The Bureau requested additional data on the share of manufactured housing mortgages that would qualify as high-cost mortgages and on the proposed rule's effects on rural areas. By and large, however, the data the Bureau received in response to these requests came from entities that report in HMDA. Thus, although the commenters' analysis and data broadly aligned with the Bureau's analysis of data reported by these creditors under HMDA, the request for data did not yield information on loans extended by creditors that do not report under HMDA.

The benefits and costs to consumers who would potentially seek a mortgage to finance the purchase of a manufactured home and the costs to covered persons of extending HOEPA coverage to purchase-money mortgages depends critically on the source of these differences in the share of loans that qualify as high-cost mortgages. On the one hand, industry commenters argued that the differences reflect manufactured housing creditors' higher cost of funds (due, at least in part, to a lack of secondary market funding for mortgages on manufactured homes) as well as manufactured-home purchasers' typically lower income and credit scores

than mortgage consumers as a whole. In addition, mortgages for manufactured housing tend to be for smaller amounts, so these loans may be more likely to exceed the points-and-fees thresholds, particularly if origination costs are fixed or do not fall in line with loan size. On the other hand, consumer group commenters raised concerns that higher interest rates and points and fees on manufactured-home purchase-money mortgages may reflect limited competition or harmful lending practices applied to disproportionately to vulnerable consumers.

Available data cannot distinguish the extent to which the factors suggested by commenters underlie the comparatively large fraction of manufactured housing mortgages that meet the existing HOEPA thresholds. Analyzing data for the subset of creditors that report under HMDA, manufactured home loans are more likely than other mortgages to be flagged as high-cost mortgages, and this conclusion still holds after controlling for differences in loan size, consumer income, and other factors reported in HMDA that may differ systematically between owners of manufactured housing and other homeowners. Even so, the remaining gap in the probability that a mortgage has a relatively high interest rate could conceivably reflect differences in consumers' credit scores, collateral value, predicted loan performance, or other factors that are not measured in HMDA.

Without comprehensive data on a range of manufactured housing creditors, including the credit characteristics of their consumers, points and fees, and loan performance, it is difficult to determine the extent to which each of these hypothesized factors contribute to the observed differences in loan terms. Such data, in turn, would allow stronger inferences regarding both the costs and benefits of the final rule to consumers and covered persons alike. If the generally less-favorable terms on manufactured home loans reflected harmful lending practices, then HOEPA's disclosure and counseling requirements and borrower protections may have considerable benefit for consumers. In addition, some creditors that extend credit for the purchase of manufactured homes could gain market share from creditors that engage in harmful lending practices. If the higher interest rates and points and fees (as a percent of loan amount) on mortgages for manufactured homes instead reflect differences in, for example, default rates or creditors' costs, then subjecting a larger share of manufactured-home mortgages to HOEPA restrictions and requirements

may reduce access to credit for potential manufactured home buyers and the revenue of creditors that specialize in manufactured home loans. The Bureau notes that, in this scenario, the benefits and costs may vary across consumers and more comprehensive data would be required to gauge the extent of this variation in costs and benefits. Some borrowers that previously could have obtained a manufactured home mortgage would no longer be able to do so and may be worse off. At the same time, other borrowers that cannot finance the purchase of a manufactured home could be better off if the only loan that would have been available to them was a high-cost mortgage. Finally, borrowers who are able to obtain a high-cost loan with substantially similar terms under the existing and final rules may benefit from the additional HOEPA disclosures and protections. If creditors are able to avoid making high-cost mortgages by adjusting loan terms to avoid the thresholds, as may be the case particularly if there is a lack of competition, some borrowers may receive a loan with a lower rate or points and fees than they would have if HOEPA did not apply to purchase-money mortgages.

## 2. Revised APR and Points-and-Fees Thresholds

The statute, and therefore the final rule, revise the APR and points-and-fees thresholds. These revisions would likely result in an increase in the number of high-cost mortgages. The Bureau estimates, for example, that these changes in the APR thresholds along with the change in the benchmark interest rate from Treasuries to average prime offer rate would increase the fraction of refinance and home improvement loans that are high-cost mortgages made by creditors that reported in the 2011 HMDA data from about 0.06 percent of loans to roughly 0.2 percent of loans. The Dodd-Frank Act also expanded the definition of points 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 threshold and to result in a greater number of loans that exceed the new points-and-fees threshold.

One trade association commenter drew on a survey of its members to argue that many mortgages for small dollar amounts would exceed the points-and-fees-threshold. According to the trade association, its survey respondents indicated that all mortgages for amounts of \$61,500 or less exceeded

the points-and-fees threshold and 67 percent of loans for \$80,000 or less exceeded the threshold.<sup>207</sup> The Bureau welcomed the additional information provided by this trade association's survey of its membership. Nonetheless, without additional detail about the survey design, for example, the Bureau believes the summary results may be illustrative but cannot be assumed to be representative.

### a. Benefits and Costs to Consumers

The Dodd-Frank Act revisions to the thresholds may benefit consumers by increasing the number of credit transactions 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 thresholds to capture a greater share of credit transactions. As a result of the revised thresholds, these benefits and costs would apply to a larger set of transactions, although as noted above, the Bureau believes that high-cost mortgages would likely remain a small fraction of all mortgages. The Bureau believes that, in some cases, these benefits likely include a better understanding of the risks associated with the transaction, which in turn may reduce the likelihood that a consumer 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 consumers to understand.

Nonetheless, the final rule could impose costs on a small number of consumers by raising the cost of credit or curtailing access to credit if creditors choose not to make loans that meet the revised thresholds. 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.

For closed-end loans, the definition of points and fees in the final rule is narrower than in the proposal in several respects. First, compared with the proposal, the final rule specifies that charges are included in points and fees only if it is known at or before consummation that the consumer will incur the charges. The final rule also provides that waived third-party charges

<sup>207</sup> Roughly 15 percent of 2011 originations of mortgages secured by single-family, owner-occupied homes reported by lenders under HMDA were for amounts less than \$80,000 and about 9 percent were for less than \$61,500.

that the creditor may recoup if the consumer prepays the loan in full during the first three years following consummation will not be included in points and fees as prepayment penalties. The Bureau expects that, to the extent these differences result in fewer closed-end credit transactions that meet the points-and-fees thresholds, both the benefits and costs to consumers would be reduced relative to the proposal.

The definition of points and fees for open-end credit plans in the final rule also differs from that in the proposal along two dimensions. First, loan originator compensation (defined identically to compensation for closed-end loans) will be included in points and fees under the final rule, whereas the proposal would have excluded these payments. This change is expected to increase the number of HELOCs that qualify as high-cost mortgages and, accordingly, the costs and benefits to consumers and to covered persons. By contrast, the final rule's inclusion of participation fees payable at or before account opening—rather than for the life of the loan, as proposed—is expected to decrease the number of HELOCs that qualify as high-cost mortgages.

In calculating the APR for variable-rate transactions, the final rule specifies that this rate is based on the fully-indexed rate and relevant margin if the rate can vary based only on an index, even if that index is the creditor's own index. The proposal would have required that the APR be calculated based on the maximum rate that could be charged over the life of the loan if the relevant index was under the creditors' control. Thus, the proposal would potentially have led to a greater number of loans that exceed the APR threshold. For this reason as well, the Bureau expects that the benefits and costs to consumers would be reduced relative to the proposal. As discussed above, however, the Bureau expects that only a small number of variable-rate, closed-end credit transactions would employ an index in the creditor's control, so this revision to the proposal should not result in a significant change to the benefits and costs to consumers.

The final rule does not implement the measures contained in the proposed rule that were intended approximately to offset an increase in HOEPA coverage as a result of the more expansive finance charge definition contained in the Bureau's 2012 TILA-RESPA Proposal. Since the alternative measures would have been crafted so that the number of high-cost mortgages would have been approximately unchanged, the Bureau expects that this difference between the

proposed and final rules would not appreciably alter the potential costs and benefits to consumers.

#### b. Benefits and Costs to Covered Persons

The benefits and costs to covered persons of revising the statutory HOEPA thresholds would likely be expected to be similar, at least qualitatively, to those that would result from expanding the types of credit transactions 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 transactions that would be covered by the revised HOEPA thresholds, as well as costs associated with obtaining certification that a consumer has received homeownership counseling prior to taking out a high-cost mortgage. As discussed above, the Bureau estimates that a small number of creditors may also lose a modest fraction of revenue if they are reluctant to make high-cost mortgages and cannot offer alternatives that are as profitable as a high-cost mortgage.<sup>208</sup>

Again, the final rule differs from the proposal in its more limited definitions of points and fees for closed- and open-end credit transactions and its use of the fully indexed rate (rather than maximum allowable rate) in calculating the APR for certain variable-rate transactions. The Bureau expects that, to the extent these differences result in fewer loans that meet the points-and-fees or APR thresholds, benefits and costs to covered persons would be reduced relative to the proposal, just as for consumers. At the same time, the clarifying changes made to points and fees (e.g., changes noting when loan originator compensation must be included) will reduce covered persons' compliance burden; the definition of loan originator compensation is identical to the definition adopted in the Bureau's qualified-mortgage rulemaking.

The final rule does not implement the alternative proposal to adopt a Transaction Coverage Rate (TCR) in the

<sup>208</sup> As noted above, a trade association commenter stated, based on a survey of its members, that many mortgages for comparatively small dollar amounts would exceed the points-and-fees threshold. For example, the survey respondents indicated that about two-thirds of loans for \$80,000 or less would exceed the threshold. The Bureau notes that loans of this size comprise about 15 percent of home-secured, single-family, owner-occupied loans reported the 2011 HMDA data and, presumably, a similar small fraction of revenue. Further, the Bureau believes that without additional detail regarding, for example, the survey design and question wording, the summary results from the survey may be illustrative, but cannot be assumed to be representative.

event that a more expansive definition of finance charge were finalized in connection with the Bureau's 2012 TILA-RESPA Proposal. The Bureau is therefore not addressing at this time commenters' concerns with respect to the costs that may be associated with calculating a TCR.

#### 3. New Prepayment-Penalty Test

The Dodd-Frank Act added a new HOEPA coverage test 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 test effectively caps both the time period after consummation during which such a penalty may be charged and the amount of any such penalty.

As discussed below, due to data limitations, the Bureau cannot fully quantify the benefits and costs to consumers and the costs to covered persons. Nevertheless, the Bureau believes that the number of credit transactions that might qualify as high-cost mortgages because of the prepayment penalty test is likely small.

Trends and aggregate statistics suggest that mortgages 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 mortgages, a market that has disappeared. Second, a roughly 90 percent of dollar-weighted mortgage originations in recent years were purchased by Fannie Mae or Freddie Mac or were FHA or VA loans.<sup>209</sup> Fannie Mae and Freddie Mac purchase very few loans with prepayment penalties—in a random sample of mortgages from the FHFA's Historical Loan Performance data, a very small percentage of mortgages originated between 1997 and 2011 had a prepayment penalty.<sup>210</sup>

<sup>209</sup> In dollar-weighted terms, loans purchased by Fannie Mae or Freddie Mac accounted for about two-thirds of 2011 mortgage originations, and FHA/VA loans comprised roughly 22 percent of originations. Figures for 2010 are similar. Inside Mortgage Finance "The 2012 Mortgage Market Statistical Annual, Volume 1: The Primary Market," (2012) at 17. See also 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>.

<sup>210</sup> The Bureau notes that a trade association noted in its comments that all but one of its members that it surveyed regarding the effects of

Further, the Bureau observes that the prevalence of prepayment penalties, in general, could be reduced over time by other Dodd-Frank Act provisions related to ability-to-repay requirements that separately restrict such penalties for closed-end credit transactions that are not qualified mortgages.<sup>211</sup> For example, under the Dodd-Frank Act, most closed-end, dwelling-secured mortgages 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 mortgages may not have a prepayment penalty that exceeds 3 percent, 2 percent, or 1 percent of the amount prepaid during the first, second, and third years following 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 3 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 transaction.<sup>212</sup>

#### a. Benefits and Costs to Consumers

The final rule would potentially benefit a small number of consumers by potentially making it easier to refinance a high-cost mortgage. Prepayment penalties can prevent a consumer 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 if the consumer's credit score improves. The prepayment penalty test coupled with

the proposed rule would be unaffected by the new prepayment penalty test. The Bureau observes, however, that the representativeness and weight of this finding from the survey cannot be assessed without additional detail such as the context and wording of the questionnaire, the number and characteristics of the creditors that responded to the survey, and information on how these respondents differ from the population of creditors that extend mortgages as a whole.

<sup>211</sup> See 15 U.S.C. 1639c.

<sup>212</sup> Further, the Bureau notes that a trade association noted in its comments that all but one of its members that it surveyed regarding the effects of the proposed rule would be unaffected by the new prepayment penalty test. The Bureau further notes, nonetheless, that the representativeness and weight of this finding from the survey cannot be assessed without additional detail such as the context and wording of the questionnaire, the number and characteristics of the creditors that responded to the survey, and information on how these respondents differ from the population of creditors that extend mortgages as a whole.

the prohibition on prepayment penalties would remove this barrier to obtaining a more favorable loan.

The final rule may be particularly beneficial to consumers who, in taking out a mortgage, underestimate 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 consumers 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 final rules regarding prepayment penalties would potentially result in some consumers taking out a mortgage that is less favorable than they would if the rule were not implemented. For example, this would be true for a consumer 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 creditor offered mortgage products with such a trade-off.<sup>213</sup> The final 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 final rule.

At this time, the Bureau cannot quantify the extent to which creditors may restrict lending or increase fees or interest rates as a result of the final 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. Similarly, the Bureau cannot quantify the share of consumers or the costs to consumers who may receive a less-favorable mortgage than if the final rule did not restrict prepayment penalties. Estimating these quantities would require not only data on the alternative mortgage contracts that consumers might be offered but also information on how consumers value each of the alternative contracts.

#### b. Costs to Covered Persons

The final 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 final 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 final 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 final 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 final 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 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 consumer has received pre-loan homeownership counseling prior to extending a high-cost mortgage.

#### a. Benefits and Costs to Consumers

Taken together, the final rule's requirements and restrictions provide a variety of potential benefits to the likely small number of consumers with a high-cost mortgage. These potential benefits include reducing the likelihood that a consumer would face unexpected payment increases, increasing the likelihood a consumer can refinance, and improving a consumer'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 consumers with high-cost mortgages if, as might be expected, these consumers tend to have fewer resources to draw upon to meet unanticipated payment increases.

Similarly, the final rule generally prohibits balloon payments for high-cost

<sup>213</sup> 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).

mortgages except in certain limited circumstances. Although scheduled balloon payments may be more predictable than, for example, a late fee, balloon payments may typically be much larger. The final rule's limits on balloon payments may reduce the likelihood that a consumer 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. In contrast to the proposal, which would have exempted from the balloon restriction only mortgage transactions with payment schedules adjusted to the seasonal income of the consumer, the final rule also exempts certain short-term bridge loans (which generally are structured with balloon payments) and high-cost mortgages originated by specific categories of creditors serving rural or underserved areas that also meet other prescribed conditions set forth in the 2013 ATR Final Rule. Consumers with a high-cost short-term bridge loan or with a mortgage that meets these specific criteria would not benefit from avoiding the potential contingency of facing pressure to refinance a high-cost mortgage in order to avoid a scheduled balloon payment.

Several of the requirements and restrictions may help consumers 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 consumer. 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 consumer is pressured or constrained to consummate a mortgage, particularly one whose terms had changed unfavorably after the initial application. Third, prohibiting loan modification fees and restricting fees for payoff statements would reduce the costs to borrowers of obtaining a more favorable loan through modification or refinancing. Fourth, by prohibiting financing of points and fees (including a prepayment penalty as part of a refinance), the final rule could improve consumers' 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 consumers 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 consumers, and

consequently the consumer may more readily recognize a relatively high fee. Fifth, 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 consumer by, for example, improving the consumer's assessment of his or her ability to meet the scheduled loan payments and by making the consumer 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 consumers. As noted above, however, to date the evidence suggests that, in general, restrictions on 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.

As discussed above, however, the Bureau agreed with commenters that prohibiting balloon payments on a high-cost mortgage could reduce consumers' access to credit more substantially in some specific instances and therefore impose greater costs on some consumers with a high-cost mortgage. In light of this, the final rule exempts certain short-term bridge loans and mortgages extended by creditors serving rural or underserved communities from the general prohibition of balloon payments for high-cost mortgages.

Finally, the pre-loan counseling requirement could impose costs on consumers. Not only might the consumer 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 consumers.

#### b. Benefits and Costs to Covered Persons

Creditors that already assess a HELOC-consumer's ability to repay may benefit from the final rule's requirement by gaining market share as their competitors incur costs to meet this requirement. The requirement that a creditor receive certification that a consumer obtaining 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 consumer select a mortgage or to answer a consumer's questions.

In light of the tighter restrictions and requirements on high-cost mortgages, creditors may be less willing to make high-cost mortgages. If so, then some creditors' revenues may decline by a likely small proportion either because they do not extend any credit to a consumer to whom they would have previously made a high-cost mortgage, or because they extend an alternative loan that does not qualify as a high-cost mortgage but that results in lower revenue. In addition, as commenters stated, restrictions such as limiting fees for payoff statements and prohibiting loan modification fees would result in higher costs to all mortgage borrowers. One community bank commented that current restrictions on high-cost mortgages had already driven creditworthy customers to seek credit from less-regulated creditors.

In some instances the potential impacts of these restrictions may extend beyond creditors. The 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 high-cost mortgage. 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 final requirement that a creditor receive certification that a consumer received pre-loan counseling. Based on the estimation methodology for analyzing the paperwork burden associated with the final rule, the Bureau estimates that the total ongoing costs for all creditors that make any high-cost mortgages to be about \$43,000 annually. 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 final rule, like the proposal, 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 final rule would require lenders to provide a list of homeownership counseling organizations to applicants for all mortgages covered by RESPA except for reverse mortgages and transactions secured by a consumer's interest in a timeshare plan.

Several industry commenters, including community banks, objected to the requirement that the RESPA homeownership counseling list be provided to refinance or HELOC applicants. Consumer groups commented that the counseling list requirement should apply to all federally related mortgages because concerns regarding potentially abusive lending practices and borrower confusion also exist for refinancings and HELOCs, not just for purchase-money mortgages. The Bureau agrees that the potential benefits of homeownership counseling are not limited to purchase-money mortgage consumers.

Commenters suggested that compliance burden would be lower if creditors were not required to provide an applicant-specific counseling list. Alternatives that commenters suggested include State-specific lists and a uniform document with general information regarding homeownership counseling along with information on internet or telephone resources to identify homeownership counseling resources. The Bureau agrees that requiring creditors to provide a list of homeownership counseling resources that is not tailored to each applicant's location would reduce lenders' compliance burden. However, the Bureau also believes that a more-generic list would reduce the likelihood that at least some mortgage applicants obtain and potentially benefit from homeownership counseling. Moreover, the Bureau notes that the Dodd-Frank Act specifies that applicants receive a list of counseling resources organized by location, and the Bureau notes that it interprets this statutory prescription to mean the location of the applicant who is being served by the lender.

The proposal would also have required that both consumers with a high-cost mortgage and first-time borrowers with a loan that may result in negative amortization receive a list of homeownership counselors or counseling organizations, but the final rule does not include this requirement. These proposed requirements that consumers with a HOEPA or negative-amortization mortgage receive a list of homeownership counseling resources would have been satisfied by complying with the RESPA counseling list requirement since RESPA covers both sets of loans. Therefore, there would have been no additional costs and benefits from the proposed requirements for HOEPA and negative-amortization mortgages. Similarly, removing the requirements for these sets of loans in the final rule does not alter the regulation's costs and benefits.

With respect to first-time borrowers with a loan that could have negative amortization, the final rule would require that a creditor receive documentation that the consumer received homeownership counseling. The final 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 final rule would generally have benefits to consumers that are similar in nature to those of requiring that creditors to receive certification that a consumer with a high-cost mortgage has received homeownership counseling. In particular, as discussed above, homeownership counseling may improve consumers' understanding of their mortgages, it may complement the information provided in disclosures, and it could counteract any tendency among consumers to consider only loan features that are most certain, most easily understood, most immediately relevant, or most clearly highlighted by creditors.

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

In contrast, the final 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 consumers, 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 homeownership 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 consumer to receive the disclosure should be minimal, and consumers may choose not to follow up on this information.

First-time borrowers with a loan that may have negative amortization may 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 consumers 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 consumer 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 consumers of loans covered by RESPA with a list of homeownership counseling organizations. The Bureau estimates that these costs are likely less than one dollar per application but recognizes that creditors would have to provide the list with each of well over 10 million applications each year. The Bureau expects that the list would be a single page and that it would be provided with other materials that the creditor is required to provide. In addition, the Bureau will create a Web site portal for lenders to use in generating the required lists of homeownership counseling organizations.

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 will most likely be very rare. Not only are loans with negative-amortization features uncommon, but also the provision would apply only to first-time borrowers for such loans.<sup>214</sup>

<sup>214</sup> Data from the 2010 Survey of Consumer Finances (SCF), the most recent survey year



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.

In the preamble of the proposal, the Bureau noted that the proposed counseling requirements for high-cost mortgages differed from those for mortgages that may result in negative amortization. The Bureau solicited comment on whether conforming these requirements to one another would reduce compliance burdens. The Bureau notes that it received no data from commenters on this point.

Creditors may benefit from these two counseling-related provisions by gaining market share relative to creditors that currently do not provide clear and complete information to consumers 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 Final 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 final 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 under HMDA, those data suggest that the vast majority of creditors do not make any high-cost mortgages. The Bureau expects this would be the case under the final rule as well, so few institutions would likely be directly impacted by the final rule. As might be expected given the fact that the vast majority of depository institutions that make mortgages are estimated to have less than \$10 billion in total assets, the estimated share of these creditors in HMDA that currently make any closed-end high-cost mortgages, 8 percent, is essentially identical to the estimate for all depository institutions. Likewise, nearly 16 percent of all depository institutions and credit unions that report under HMDA and of those with

available at the time this analysis was conducted, indicate that only 0.8 percent of first-lien mortgages in 2010 reportedly had negative-amortization features. This estimate is only suggestive because it is only for first-lien mortgages and it is an estimate of the stock, rather than the flow, of mortgages with such features. The 2010 estimate is higher than the corresponding estimate in the 2007 SCF, but it is lower than estimates from the six waves of the SCF between 1989 and 2004, for which the estimate fraction of first-lien mortgages with negative-amortization features ranged from 1.3 percent to 2.3 percent.

\$10 billion or less in total assets that report in HMDA are predicted to make any high-cost mortgages under the final rule. The impact of the final 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 Provisions on Consumers in Rural Areas

Data on mortgage lending in rural areas are comparatively sparse. In particular, the HMDA data, which inform the analysis of the final rule, only include creditors that have a branch in a metropolitan statistical area, so these data are unlikely to be representative of rural mortgage transactions. Thus, it is difficult to quantify how the final rule may affect rural consumers differently from consumers and applicants in urban areas. Nonetheless, in qualitative terms, one might expect that the impact of the final rule on consumers in rural areas could differ from those for consumers located in urban areas for several reasons. First, rural consumers may have fewer creditors that they readily comparison shop among and fewer nearby counseling resources. A potential reduction in lending for newly classified high-cost mortgages may therefore have a greater impact in rural areas, and a rural consumer that is offered a high-cost mortgage may be less able to obtain a mortgage from a different creditor that is not a high-cost mortgage. Similarly, consumers in rural areas may have fewer in-person counseling resources available in their immediate vicinity.

Second, the Bureau understands that creditors in rural areas are more likely to extend balloon loans. One reason for this is that smaller creditors in these areas may be less likely to be able to securitize their mortgages, at least in the current market environment. These smaller creditors therefore bear the interest rate risk for these loans, and they may rely on balloon-payment mortgages to manage this risk. To mitigate potential reductions in access to credit, the final rule allows an exemption from the balloon payment prohibition for creditors that make high-cost mortgages with balloon payments, but that also meet the conditions set forth in §§ 1026.43(f)(1)(i) through (vi) and 1026.43(f)(2), as adopted by the 2013 ATR Final Rule. This provision would reduce the burden of the final

rule for rural creditors that offer high-cost loans with balloon payments.

Third, the share of loans that qualify as high-cost mortgages may differ in rural areas relative to urban areas due to geographic differences in the housing stock and home values. The Bureau believes that mortgages in rural areas are more likely to be non-conforming because of, for example, seasonal or irregular income.<sup>215</sup> In addition, home values tend to be lower in rural areas, a pattern that has potentially ambiguous implications for the likelihood that a rural loan would qualify as a high-cost mortgage. Specifically, some mortgages in these areas may be more likely to qualify as high-cost mortgages because they have comparatively high points and fees as a percentage of the loan amount. At the same time, rural mortgages are also more likely to be for less than \$20,000 and thus subject to the higher points-and-fees threshold.

Finally, manufactured homes are more common in rural areas; about 15 percent of housing units in rural areas are manufactured homes compared to less than four percent of housing units in urban areas.<sup>216</sup> As noted above, mortgages secured by manufactured housing typically have higher interest rates and smaller loan amounts so they are more likely to meet the APR and points-and-fees thresholds. Since manufactured-home residents disproportionately reside in rural areas and loans secured by manufactured homes are more likely to exceed the HOEPA thresholds, the benefits of HOEPA protections and disclosures may be more likely to accrue to mortgage borrowers and applicants in rural areas as would the potential costs to consumers such as potentially higher cost of credit or more limited access to credit.

#### **VIII. Regulatory Flexibility Act**

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.<sup>217</sup> The Bureau

<sup>215</sup> The Bureau notes that the balloon payment restrictions included an exemption for seasonal or irregular income.

<sup>216</sup> Estimates are three-year estimates from the 2009–2011 American Community Surveys ([http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_11\\_3YR\\_GCT2501.US26&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_3YR_GCT2501.US26&prodType=table)).

<sup>217</sup> For purposes of assessing the impacts of the final rule on small entities, “small entities” is

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.<sup>218</sup>

The Bureau is certifying the final rule. Therefore, a FRFA is not required for this rule because it will 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 final rule on small entities as defined by the RFA.<sup>219</sup> It considers effects of the revised APR and points-and-fees coverage thresholds 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 are being implemented as part of the final 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 HOEPA may reduce the economic impact of the final rule.<sup>220</sup>

The analysis below uses a pre-statute baseline, except for the extension of HOEPA coverage to purchase-money mortgages and HELOCs. As noted in its section 1022 analysis, the Bureau does not consider these benefits and costs because these changes are required by the Dodd-Frank Act's amendments to HOEPA.<sup>221</sup> The Bureau's discretion to

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).

<sup>218</sup> 5 U.S.C. 609.

<sup>219</sup> The Bureau received comments addressing the impact of the final rule generally. These comments are addressed throughout this preamble, and in the context of its final section 1022 analysis.

<sup>220</sup> 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 thresholds below the then-existing HOEPA APR threshold for first-lien mortgage loans. 74 FR 43232, 43244 (Aug. 26, 2009).

<sup>221</sup> 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 final rule reduces

exempt broad categories of loans from HOEPA coverage is limited, and the Bureau does not believe such exemptions are consistent with the mandate of the statute. Creditors today generally have processes and often software systems to determine whether a transaction is a high-cost mortgage. Creditors will have to update these processes and systems to determine whether a purchase money mortgage or HELOC is a high-cost mortgage. The cost of determining whether a transaction is a high-cost mortgage is therefore unavoidable under the statute.

The analysis considers the impact of the final rule's revisions to HOEPA on closed-end lending by depository institutions (DIs), closed-end lending by non-depositories (non-DIs), and HELOCs 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).<sup>222</sup> The HMDA data include information on high-cost mortgage lending under the current HOEPA thresholds, but some creditors are exempt from reporting to HMDA.<sup>223</sup> For exempt DIs, the Bureau estimates the extent of creditors' high-cost, closed-end lending under the current and post-Dodd Frank Act thresholds 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 ("MCR").<sup>224</sup> The Bureau does not have

burdens by clarifying statutory ambiguities that may impose costs such as increased costs for attorneys and compliance officers, over-compliance, and unnecessary litigation.

<sup>222</sup> 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>.

<sup>223</sup> Depository institutions with assets less than \$40 million (in 2011), 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.

<sup>224</sup> 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

comprehensive loan-level data for HELOCs comparable to the HMDA data for closed-end mortgages, and this portion of the analysis draws on Call Report data as well as data from the 2010 Survey of Consumer Finances (SCF).<sup>225</sup> 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 threshold would have little impact on HOEPA coverage.<sup>226</sup>

As a measure of the potential impact of the final rule, the analysis considers the potential share of revenue a creditor may forgo if it were to make no high-cost mortgages.<sup>227</sup> 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 thresholds). The Bureau notes that at least some creditors currently extend high-cost mortgages. Further, creditors may still make some loans that might otherwise meet the new HOEPA thresholds by changing the loan terms to avoid being a high-cost mortgage (though perhaps with a partial revenue loss).<sup>228</sup> Moreover, this approach is consistent with the possibility that some

on HOEPA originations. The analysis in this part draws on HMDA and MCR data by classifying non-depository institutions with similar reported amounts of originations and of HOEPA lending in the two data sets.

<sup>225</sup> 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.

<sup>226</sup> 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.

<sup>227</sup> 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.

<sup>228</sup> By the same token, the analysis also implicitly assumes that creditors that do not currently make high-cost mortgages will not rethink their policies and make high-cost mortgages 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.

creditors may be less willing to make high-cost mortgages in the future due to new and revised restrictions on high-cost mortgages, but the Bureau believes that any such effect on creditors' willingness to extend high-cost mortgages likely is small.

#### B. Overview of Market for High-Cost Mortgages

High-cost mortgages comprise a small share of total mortgages. HMDA data indicate that less than one percent of loans meet the current HOEPA thresholds and that this share has generally declined over time.<sup>229</sup> Between 2004 and 2011, high-cost

mortgages 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 0.05 percent by 2011.<sup>230</sup> Similarly, few creditors originate high-cost mortgages. The number of creditors extending high-cost mortgages ranged between about 1,000 and 2,300 over the 2004 and 2009 period, or between 12 and 27 percent of creditors. The number of creditors extending high-cost mortgages fell in 2010 and 2011, and only about 570 creditors (roughly 8 percent) filing HMDA data reported any high-cost mortgages in 2011.<sup>231</sup>

#### C. Number and Classes of Affected Entities

Greater than half of commercial banks and about 40 percent of thrifts meet the Small Business Administration's definition of small entities, and the large majority of these institutions originate mortgages (Table 1). By comparison, not quite 80 percent of credit unions are small entities, but about 40 percent of credit unions and nearly half of credit unions that are small entities have no closed-end mortgage originations.<sup>232</sup> About 90 percent of non-DI mortgage originators have revenues below the relevant Small Business Administration threshold.<sup>233</sup>

**Table 1. Estimated number of affected entities and small entities by NAICS code**

Category	NAICS Code	Total Entities	Small Entities	Entities That Originate Any Mortgage Loans <sup>b</sup>	Small Entities that Originate Any Mortgage Loans
Commercial Banking	522110	6,505	3,601	6,307 <sup>a</sup>	3,466 <sup>a</sup>
Savings Institutions	522120	930	377	922 <sup>a</sup>	373 <sup>a</sup>
Credit Unions <sup>c</sup>	522130	7,240	6,296	4,178 <sup>a</sup>	3,240 <sup>a</sup>
Real Estate Credit <sup>d,e</sup>	522292	2,787	2,294	2,787	2,294 <sup>a</sup>
Total		17,462	12,568	14,194	9,373

Source: 2011 HMDA, Dec 31, 2011 Bank and Thrift Call Reports, Dec 31, 2011 NCUA Call Reports, Dec 31, 2011 NMLSR Mortgage Call Reports.

<sup>a</sup> For HMDA reporters, loan counts from HMDA 2011. For institutions that are not HMDA reporters, loan counts projected based on Call Report data fields and counts for HMDA reporters.

<sup>b</sup> Entities are characterized as originating loans if they make one or more loans.

<sup>c</sup> Does not include cooperativas operating in Puerto Rico. The Bureau has limited data about these institutions or their mortgage activity.

<sup>d</sup> NMLSR Mortgage Call Report (MCR) for 2011. All MCR reporters that originate at least one loan or that have positive loan amounts are considered to be engaged in real estate credit (instead of purely mortgage brokers). For institutions with missing revenue values, the probability that institution was a small entity is estimated based on the count and amount of originations and the count and amount of brokered loans.

<sup>e</sup> Data do not distinguish nonprofit from for-profit organizations, but Real Estate Credit presumptively includes nonprofit organizations.

#### D. Impact of Revised Thresholds on Depository Institutions

##### 1. Closed-End HOEPA Lending by Small Depository Institutions

To assess the final rule's impacts, the analysis aims to estimate the

counterfactual set of loans that would have met the definition of a high-cost mortgage if the revised thresholds had been in effect in 2011.<sup>234</sup> One can

<sup>229</sup> The information on whether a loan was a high-cost mortgage has been collected in HMDA since 2004.

<sup>230</sup> These percentages correspond to nearly 36,000 loans in 2005 and roughly 2,400 loans in 2011.

<sup>231</sup> The statistics for 2004–2010 are drawn from Federal Reserve *Bulletin* articles that summarize the HMDA data each year. In contrast, the 2011 numbers are based on the analysis of 2011 HMDA data and may differ slightly from those presented in the *Bulletin* article that summarizes the 2011 HMDA data due to subsequent data revisions and small differences in definitions (e.g., not counting a loan as a high-cost mortgage even if it is flagged as a high-cost mortgage if it appears ineligible to be

a high-cost mortgage because the property is not owner-occupied.)

<sup>232</sup> The estimates in this analysis are based upon data and statistical analyses performed by the Bureau. To estimate counts and properties of mortgages for entities that do not report under HMDA, the Bureau has matched HMDA data to Call Report data and NMLS and has statistically projected estimated loan counts for those depository institutions that do not report these data either under HMDA or on the NCUA call report. These projections use Poisson regressions that estimate loan volumes as a function of an institution's total assets, employment, mortgage holdings and geographic presence.

<sup>233</sup> The Bureau expects that the economic impact of the final rule on mortgage brokers that are small entities (for example, the provision prohibiting brokers from recommending default) would not be significant.

<sup>234</sup> The HMDA data contain a flag which indicates whether a loan was classified as a high-cost mortgage 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 spread of 3.5 percentage points or greater. Importantly, the "higher-priced" mortgage

Continued

identify 2011 HMDA loans that would have met the revised APR thresholds 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 2011 HMDA data would meet the revised points-and-fees threshold and, hence, whether the loan would have been flagged as a high-cost mortgage. To overcome this data limitation, the Bureau modeled the probability that a loan would have been flagged as a high-cost mortgage in HMDA as a function of:

(i) the loan amount and (ii) the difference between the loan's APR and the APR threshold.<sup>235</sup>

The changes to the APR and points-and-fees thresholds 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 0.09 percent of loans to 0.4 percent.<sup>236</sup> Under the current HOEPA regulations, fewer than 5 percent of small depository institutions are estimated to make *any* high-cost mortgages, and only about 0.2

percent of small DIs are estimated to have made at least 10 high-cost mortgages in 2011 (Table 2). As expected, the estimates imply that the shares of lenders would have been larger if the revised thresholds had been in place.<sup>237</sup> Nevertheless, by these estimates, high-cost mortgages would have remained a small fraction of closed-end originations by small DIs, and the majority of small DIs would have made no high-cost mortgages under the revised thresholds.<sup>238</sup>

TABLE 2—ESTIMATED NUMBER OF SMALL DIS THAT ORIGINATE ANY HIGH-COST MORTGAGES OR 10 OR MORE HIGH-COST MORTGAGES UNDER THE CURRENT AND REVISED HOEPA THRESHOLDS

	Pre-Dodd-Frank Act	Post-Dodd-Frank Act
Estimated number that make any high-cost mortgages .....	501	1710
Percent of small depository institutions .....	4.9%	16.6%
Estimated number that make 10 or more high-cost mortgages .....	22	48
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 closed-end high-cost mortgages, 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 mortgages and the share of total income (for banks and thrifts) or total outstanding balances (for credit unions) accounted for by mortgages based on Call Report data.<sup>239</sup>

The Bureau estimates that high-cost closed-end mortgages account for just a fraction of revenue for most small DIs under both the current and revised

thresholds (Table 3). The Bureau estimates that, post-Dodd-Frank Act, 6.8 percent of small DIs might lose more than 1 percent of revenue, compared with 2.2 percent of small DIs under the current thresholds. At most, about two percent of small DIs would have revenue losses greater than 3 percent if these creditors chose to make no closed-end high-cost mortgages.

loan thresholds are well below the APR thresholds 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 high-cost mortgage or that has an estimated APR spread that exceeds the relevant HOEPA threshold. The current HOEPA APR threshold 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 threshold, and not all loans that are estimated to be above the APR threshold are flagged as high-cost mortgages. The Bureau also considered a narrower definition of a high-cost mortgage, namely, any loan that was identified as a high-cost mortgage in the HMDA data. Conclusions based on this alternative definition are qualitatively similar to those under the primary, more conservative definition described above.

<sup>235</sup> The statistical model captures the effect of the changes in the APR thresholds through the fact that the gap between the thresholds and APR would generally narrow, which increases the estimated probability that a loan would have been flagged as a high-cost mortgage. Modeling the probability as a function of loan size indirectly approximates the effect of the Dodd-Frank Act revisions to the points-and-fees thresholds. More specifically, the points-and-fees threshold 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 high-cost mortgage.

Indeed, high-cost mortgages 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 high-cost mortgage. The Bureau solicited public comment seeking 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, but the Bureau did not receive any such information or data.

<sup>236</sup> 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 final rule. The estimated share of loans currently classified as high-cost mortgages is about 0.06 percent if purchase-money mortgages are included in the set of loans considered.

<sup>237</sup> The estimates of the share of loans that would be classified as high-cost mortgages if the revised thresholds had been in place are, more precisely, estimates of the number of loans potentially classified as high-cost mortgages and do not account for lenders' decision to originate or not originate a loan based on high-cost mortgage status. If some lenders avoid making high-cost mortgages, this estimate would be an upper bound on the number of high-cost mortgages that might be originated under the revised thresholds. The estimated number of high-cost mortgages in the

absence of lenders' responses is the relevant estimate for gauging the maximum loss in revenue that could occur for a lender that chose to make no high-cost mortgages under the revised thresholds.

<sup>238</sup> The share of small DIs estimated to make any high-cost mortgages under the revised HOEPA thresholds is substantially higher in this analysis than in the analysis conducted at the proposal stage. This primarily reflects a difference in how the results are reported. The previous analysis only counted lenders that were estimated to make at least one high-cost mortgage under the revised thresholds as making a high-cost mortgage. This analysis counts lenders that are estimated to have a small, but non-zero, probability of making a high-cost mortgage, weighted by that probability. Note that this does not increase the share of small DIs estimated to make 10 or more high-cost mortgages. These and other estimates in this analysis can of course differ from estimates presented in the proposal due to, for example, refinements in the estimation methodology and the incorporation of updated data.

<sup>239</sup> 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-high-cost mortgages 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 CLOSED-END HIGH-COST 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% <sup>a</sup> .....	229	696
Percent of small depositories .....	2.2%	6.8%
Number with HOEPA revenue share >3% <sup>a</sup> .....	76	225
Percent of small depositories .....	0.7%	2.2%

<sup>a</sup> Revenue shares for commercial banks and savings institutions are based on interest and fee income from loans secured by 1–4 family homes (including HELOCs, 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 mortgages, so the estimated numbers of affected entities are essentially identical to those shown in the first two rows of Table 1 when considering institutions that make either open- or closed-end mortgages.<sup>240</sup> Based on the credit union Call Report data, the

Bureau estimates that 248 credit unions—all but two of which were small entities—originated HELOCs but no closed-end mortgages in 2011. Thus, the Bureau estimates that 4,426 credit unions and 3,486 small credit unions would potentially be affected by either the changes to closed-end thresholds or the extension of HOEPA to HELOCs. 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 <sup>a</sup>	Number of DIs <sup>a</sup>
HELOCs > 10% of all loans/leases .....	11.6–13.2	1,196–1,354
HELOCs > 25% of all loans/leases .....	2.3–3.0	233–304

<sup>a</sup> 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 High-Cost Mortgages

Data from SCF indicate that an estimated 3.2 percent of outstanding HELOCs would potentially meet the APR thresholds. The analysis of closed-end mortgages for HMDA reporters imply that about 55 percent of loans that meet any HOEPA threshold meet the APR threshold. Thus, combining these estimates suggests that about 5.8 percent of HELOCs might meet the HOEPA thresholds.<sup>241</sup>

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. Thus, in addition to the approximation

error in extrapolating from closed-end mortgages to HELOCs due to data limitations, the SCF-based estimate of 3.2 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 thresholds. For context, as noted above, the Bureau estimates that roughly 0.4 percent of closed-end mortgages reported in HMDA would be high-cost mortgages, a percentage that is about one-fifteenth of the estimate for HELOCs, which might suggest that the HELOC estimate is conservative.

The Bureau estimates that, if the rough estimate of 5.8 percent described above were accurate, about 600 small

DIs (about six 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 50 percent higher than the Bureau estimates, *i.e.*, at 9 percent, then the estimated share of small depositories that might experience a 1 percent revenue loss increases to not quite 11 percent, and about 1.4 percent of small DIs might experience a loss greater than 3 percent of revenue by these estimates. Under the even more conservative assumption that 12 percent of HELOCs are high-cost mortgages (*i.e.*, more than double the SCF-based estimate), about 14 percent of small DIs might be expected to lose greater than 1 percent of revenue, and less than 3 percent of DIs would have estimated losses that exceed 3 percent of revenue.

<sup>240</sup> Seven of the 5,297 commercial banks and savings institutions with outstanding revolving mortgage receivables reported neither outstanding closed-end receivables nor originations in HMDA. Five of these were small depositories.

<sup>241</sup> The share of high-cost HELOCs that meet the APR threshold arguably might be greater or less than the share for closed-end high-cost mortgages. 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, the Bureau believes that points and fees may be less prevalent for HELOCs than for closed-end mortgages.

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		
	5.8 percent	9 percent	12 percent
Number with HOEPA revenue share >1% <sup>a</sup> .....	606	1,110	1,473
Percent of small depository institutions .....	5.9%	10.8%	14.3%
Number with HOEPA revenue share >3% <sup>a</sup> .....	31	139	300
Percent of small depository institutions .....	0.3%	1.4%	2.9%

<sup>a</sup> 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-end 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 12 percent of HELOCs would be high-cost mortgages.<sup>242</sup> Under this quite conservative assumption, the Bureau estimates that roughly 22 percent of small DIs would lose more than one percent of revenue if these creditors made neither closed-end nor open-end high-cost mortgages, and fewer than 6 percent of small DIs would lose 3 percent of revenue under this scenario. The Bureau believes that this estimate provides an extremely conservative upper bound on the revenue losses that a small DI might incur for at least three reasons. First, the estimate assumes that all of these small DIs cease making all loans that will be covered; in fact, lenders may continue to extend these loans, especially if they constitute an important source of revenue. Second, rather than forgo making these loans entirely, lenders may offer alternative loans that do not exceed the HOEPA thresholds. This may result in some loss of revenue, relative to loans above the thresholds, but not all of the revenue associated with the loan. Finally, the SCF-based estimate is the best available estimate of the current share of HELOCs that might meet the HOEPA threshold, but it is likely quite imprecisely estimated. The Bureau notes that the share of HELOCs that might exceed the APR threshold in the three prior waves of the SCF was below 2 percent, versus the 3.2 percent

<sup>242</sup> This calculation is based on estimating the potential revenue loss on HELOCs for each depository based on information in the Call Report data. This estimate is combined with an estimate of losses on closed-end mortgages for HMDA reporters. 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 the estimated potential percentage revenue loss on HELOCs.

estimate from the 2010 SCF. If the share of HELOCs that might exceed the APR threshold is in fact 2 percent, that would substantially reduce the estimated share of small DIs that would experience 1 percent or 3 percent reductions in revenue.

If instead 9 percent of HELOCs were high-cost mortgages—a proportion more than 50 percent greater than the estimate based on the SCF and therefore still conservative—the Bureau estimates approximately 19 percent of small DIs would have combined losses that exceed 1 percent of revenue, and about 4 percent of small DIs would lose more than 3 percent of revenue.<sup>243</sup>

*E. Impact of Revised Thresholds on Non-Depository Institutions Closed-End HOEPA Lending by Small Non-Depository Institutions*

The Bureau estimates based on the MCR data that 2,294 out of 2,787 total non-depository mortgage originators are small entities (Table 1). According to the MCR data, many non-DI creditors originate just a few loans. Just less than one-third of nonbank creditors are estimated to have originated ten or fewer loans, for example, and over 40 percent of non-DIs made at most 25 loans. These fractions are even greater for small non-DIs as well.<sup>244</sup>

The Bureau estimates that the number of high-cost mortgages originated by non-DIs that report in HMDA would increase from fewer than 200 loans under the current thresholds to over 12,000 if the post-Dodd-Frank Act thresholds applied.<sup>245</sup> The Bureau notes that this is a substantial increase. However, even with this large estimated increase in the absolute number of high-

<sup>243</sup> The corresponding estimates for all DIs are comparable.

<sup>244</sup> 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.

<sup>245</sup> Unlike the Call Report data for DIs, however, the Bureau cannot currently match the MCR data to HMDA to project HOEPA lending under the post-Dodd-Frank Act thresholds by non-DIs that do not report in HMDA.

cost mortgages, the Bureau estimates that this number corresponds to less than 0.8 percent of all closed-end credit transactions potentially subject to HOEPA coverage originated by non-DIs that report in HMDA. Moreover, roughly 80 percent of the estimated increase is driven by two creditors that made no loans in 2011 that were flagged as high-cost mortgages in HMDA but that account for the majority of the new high-cost mortgages. Three additional creditors account for another roughly 5 percent of the new high-cost mortgages. The majority of originations by these five creditors were mortgages on manufactured homes, particularly purchase-money mortgages. Based on the number of originations, 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 final rule on revenue for non-DIs, the Bureau estimates the probability that high-cost mortgages comprise more than 1 percent, 3 percent, or 5 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.<sup>246</sup>

Under this assumption, the MCR data indicate that high-cost mortgages accounted for more than 1 percent of revenue for about 5 percent of small non-DIs in 2011 (Table 6) and for more than 5 percent of revenue for a slightly smaller fraction.<sup>247</sup> Roughly one fifth of

<sup>246</sup> The extrapolation is done based on the number of originations and whether the non-DI originated any HOEPA loans in 2011 under the current HOEPA thresholds.

<sup>247</sup> 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 the MCR data.

small non-DIs are estimated to have more than 1 percent of revenue from high-cost mortgages under the new APR and points-and-fees thresholds, and about 11 percent and 7 percent of small non-DIs are estimated to have more than 3 percent of revenue or 5 percent of revenue, respectively, from high-cost mortgages.<sup>248</sup>

TABLE 6—ESTIMATED SHARES OF HIGH-COST MORTGAGE ORIGINATIONS FOR SMALL NON-DIS PRE- AND POST-DODD-FRANK ACT <sup>a</sup>

	Pre-DFA		Post-DFA	
	Number	Percent	Number	Percent
High-cost mortgages > 1% of all loans .....	116	5.1	461	20.1
High-cost mortgages > 3% of all loans .....	116	5.1	258	11.3
High-cost mortgages > 5% of all loans .....	115	5.0	161	7.0

<sup>a</sup> Number and percent of post-Dodd-Frank Act HOEPA originations are projected based on estimated post-Dodd-Frank Act originations of high-cost mortgages by HMDA-reporting non-DIs, conditional on total originations in 2011 and on origination of any pre-Dodd-Frank Act high-cost mortgages in 2011. In particular, in projecting the probability that a creditor made more than a given percent of high-cost mortgages post-Dodd-Frank Act, the Bureau controls for whether the creditor made any pre-Dodd-Frank Act high-cost mortgages in 2011. 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.

*F. TILA and RESPA Counseling-Related Provisions*

The final rule also implements two Dodd-Frank Act provisions related to homeownership counseling. The Bureau expects that neither of these provisions will 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 0.8 percent of first-liens in the 2010 SCF reportedly had negative-amortization features, and by definition this is an upper bound on the share of negative-amortization first-lien mortgages held by first-time borrowers.<sup>249</sup> 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 VII and IX.

The second provision is a new requirement that lenders provide loan applicants a list of homeownership counseling agencies from either a Web site maintained by the Bureau or data made available by the Bureau or HUD for lenders to use in complying with this requirement. Under the final rule, this requirement would apply to all applicants for a federally related mortgage (except for applicants for a

reverse mortgage transaction or a mortgage secured by a timeshare) and so would apply to a large number of applications—under the Bureau’s estimation methodology in analyzing the paper work burden, nearly 15 million applications for mortgages and HELOCs. Nevertheless, the Bureau believes the burden is likely to be minimal—less than \$ 1 per application—because it should be straightforward to obtain and to provide the required information from the Web site or data made available to the lender. 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 final 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 creditors forgo making any high-cost mortgages. For example, under the assumption that 9 percent of HELOCs fell within the HOEPA thresholds—a proportion more than 50 percent higher than the estimate based on the SCF and therefore quite conservative—the Bureau estimates that about 19 percent of small DIs would have combined losses that exceed one percent of revenue, and about 4 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, about 20 percent of small non-DIs are estimated to have more than 1 percent of revenue from high-cost mortgages under the new APR and points-and-fees thresholds, and about 11 percent of small non-DIs are estimated to have more than three percent of revenue from high-cost mortgages.<sup>250</sup> 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 rule will not have a significant economic impact on a substantial number of small entities.

**IX. Paperwork Reduction Act**

Certain provisions of this final rule contain “collection of information” requirements within the meaning 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 a collection of information unless OMB approved the collection under the PRA and the OMB control number obtained is displayed. Further, notwithstanding any other provision of law, no person is required to comply with, or is subject to any penalty for failure to comply with, a collection of information does not display a currently valid OMB control number (44 U.S.C. 3512). The Bureau’s OMB control number for Regulation X is

<sup>248</sup> 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 that did or did not make high-cost mortgages. The extrapolation is subject to the caveat that, in classifying lenders based on origination volumes, it does not distinguish between originations of purchase-

money mortgages compared with refinance or home-improvement loans. As noted, the post-Dodd-Frank Act revisions to HOEPA may particularly increase the share of high-cost mortgages among creditors that specialize in home purchase loans, including creditors that specialize in loans for purchasing manufactured homes.

<sup>249</sup> 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, and the 2007 SCF estimate was 0.3 percent. 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.

3170-0016 and for Regulation Z is 3170-0015.

This Final Rule contains an information collection requirement that has not been approved by the OMB and, therefore, is not effective until OMB approval is obtained. The unapproved information collection requirement is contained in § 1024.20 of the regulation. The Bureau will publish a separate notice in the **Federal Register** announcing the submission of this information collection requirement to OMB as well as OMB's action on this submission including the OMB control number and expiration date. The Final Rule also comprises information collections contained in §§ 1026.32, 1026.34(a)(5), and 1026.36(k) of the regulation that have been pre-approved.

On August 15, 2012, notice of the proposed rule was published in the **Federal Register** (FR). The Bureau invited comment on:

(1) Whether the proposed collection of information is necessary for the proper performance of the Bureau's functions, including whether the information has practical utility;

(2) The accuracy of the Bureau's estimate of the burden of the proposed information collection, including the cost of compliance;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

The comment period for the final rule expired on October 15, 2012.

In conjunction with the proposal, the Bureau received comments on the merits of various aspects of the final rule, including the burden of compliance generally. These comments relate to core issues in the proposal, and the Bureau's consideration of these comments is discussed above. Several commenters stated generally that the Bureau underestimated the compliance burden. However, very few comments specifically addressed specific estimates, assumptions or calculations used to derive the paperwork burden estimates for the Bureau's amendments to Regulation Z. One commenter did provide an alternative specific estimate—6400 hours for each lender—of the time cost for legal and compliance staff to review the rule (including both the Regulation X and Regulation Z components). The commenter did not detail the basis for this estimate, and the Bureau believes it overestimates, possibly to a substantial degree, the time required for legal and compliance staff

to review the rule. The Bureau also notes that its methodology estimating the time cost of reviewing regulations bears similarities to those taken by other agencies. The Bureau is largely restating its burden estimates from the proposed rule for Regulation Z, though, to provide better public information, the analysis includes revised estimates that reflect, e.g., updated data.

The Bureau also received a few comments addressing the paperwork burden of providing a list of homeownership counseling organizations in connection with each mortgage loan application, as required by the Bureau's amendments to Regulation X. For example, one large bank stated that the new counselor list requirement would require manually generating a separate list for each applicant. The commenter argued that hundreds of hours per day would be required to generate and provide the disclosure lists and that the proposal could result in as many as 42,000 versions of the disclosure. Other commenters generally asserted that the Bureau underestimated the paperwork burden that will accompany generating and providing a counselor list in connection with every mortgage application. As discussed in the analysis of § 1024.20 above, some commenters provided suggestions for minimizing their compliance burden, which also impact their paperwork burden. The Bureau is modifying § 1024.20 in response to these comments by, for example, exempting some types of loans from the list requirement, reducing uncertainty regarding compliance with the requirement for lenders through the use of the Web site portal that the Bureau will provide, and giving lenders the option to comply through the use of data they can import into their systems to create the list.

This final rule amends 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. RESPA and Regulation X are intended to provide consumers with greater and timelier information on the nature and costs of the residential real estate settlement process. As previously discussed, the final rule amends the information collections currently required by Regulation X by requiring that lenders distribute to applicants for most federally related mortgage loans a list of homeownership counseling organizations located in the area of the applicant. See the section-by-section analysis to § 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 final rule amends the information collections currently required by Regulation Z by expanding the categories of loans for which a special HOEPA disclosure is required and 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 § 1026.32(a)(1) and (c), § 1026.34(a)(5), and § 1026.36(k).

The information collection in the final rule is required to provide benefits for consumers and is 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 final 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.<sup>251</sup>

Under the final rule, the Bureau accounts for the entire paperwork burden for respondents under Regulation X. The Bureau generally also accounts 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, privately insured credit unions, 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, and the Bureau has also allocated to itself half of the estimated burden for privately insured credit unions. 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

<sup>251</sup> 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.



are not required to, use the Bureau's burden estimation methodology.

Using the Bureau's burden estimation methodology, the total estimated burden under the changes to Regulation X for all of the nearly 15,000 institutions subject to the final rule, would be approximately 28,000 hours for one-time changes and nearly 250,000 hours annually. Using the Bureau's burden estimation methodology, the total estimated burden under the changes to Regulation Z for the roughly 3,000 institutions, including Bureau respondents,<sup>252</sup> that are estimated to make high-cost mortgages subject to the final rule would be approximately 23,000 hours of one-time costs and about 1,800 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 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 final rule would be information collection requirements under the PRA.

##### 1. Provision of List of Homeownership Counselors

The Bureau estimates one-time and ongoing costs to respondents of complying with the housing counselor disclosure requirements in § 1024.20 as follows.

**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 regulation that describe

<sup>252</sup> There are 153 depository institutions (and their depository affiliates) that are subject to the Bureau's administrative enforcement authority. In addition there are 146 privately insured credit unions that are subject to the Bureau's administrative enforcement authority. For purposes of this PRA analysis, the Bureau's respondents under Regulation Z are 136 depository institutions that originate either open or closed-end mortgages; 90 privately insured credit unions that are estimated to originate either open- or closed-end mortgages; and an estimated 2,787 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 2,787 non-depository institutions and 90 privately insured credit unions.

the housing counseling disclosures, based on the length of the sections. The Bureau also estimates that each loan officer or other loan originator and an equal number of loan processors will need to receive 7.5 minutes of training concerning the disclosures.<sup>253</sup> The Bureau estimates the total one-time costs across all relevant providers of reviewing the relevant portions of the regulation and conducting training to be about 28,000 hours and \$1,200,000, or about \$240,000 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 § 1024.20.

**Ongoing costs.** On an ongoing basis, the Bureau estimates that producing and providing the required list of housing counseling organizations to an applicant will take approximately one minute and that the cost of producing the required disclosures (e.g., paper and printing costs) will be \$0.10 per disclosure.<sup>254</sup> The estimated ongoing paperwork burden to all Bureau respondents taken together is approximately 246,000 burden hours and about \$7.8 million annually, or less than 55 cents 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 homeownership counseling organizations.

<sup>253</sup> 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.

<sup>254</sup> The estimated ongoing costs reflect the Bureau's expectation that producing the list of housing counseling organizations will require only a limited number of pieces of information and that the required information will be readily obtainable (e.g., the ZIP code of the applicant). In the proposed rule, the Bureau estimated the ongoing costs under the assumption that the housing counseling organization disclosure would be produced and provided by a loan officer. In contrast, the estimated ongoing costs of providing the disclosure in the final rule are based on the assumption that the disclosure is prepared by a loan processor. Accordingly, the estimated one-time training costs associated with this information collection reflects training costs for not only loan officers (as in the proposed rule) but also loan processors. The Bureau believes it is more likely that a loan processor will produce and provide the disclosure along with other documents that are typically prepared by loan processors and provided to mortgage applicants.

##### 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 § 1026.34(a)(5)(i) and (iv), as follows. The Bureau estimates that 40 depository institutions and 436 non-depository institutions subject to the Bureau's administrative enforcement authority would originate high-cost mortgages.<sup>255</sup> 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 1,400 hours and roughly \$68,000.

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 500 hours and \$25,000 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.

<sup>255</sup> 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.

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 § 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 2010 Survey of Consumer Finances, the Bureau estimates that only 0.8 percent of all outstanding mortgages in 2010 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 minimal 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 § 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 § 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 § 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 refinancing and closed-end home-equity loans subject to § 1026.32.

As discussed in the section-by-section analysis to § 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 37 depository institutions for which it has administrative enforcement authority, including 3 privately insured credit unions, 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 about 1,800 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 1,100 hours. The total one-time burden across all relevant providers to revise the HOEPA disclosure is therefore about 2,900 hours. The Bureau estimates the corresponding dollar-cost burden is

roughly \$170,000, 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.

*One-time costs.* Based on the length of the 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 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 1,500 hours and approximately \$81,000, or somewhat greater than \$16,000 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 500 hours and about \$27,000 annually.

TABLE 1—ONE-TIME COSTS FOR ALL CFPB RESPONDENTS

Information collection	Hours	Dollars
Provision of list of housing counselors .....	28,000	1,200,000
Receipt of certification of counseling for high-cost mortgages .....	1,400	68,000

TABLE 1—ONE-TIME COSTS FOR ALL CFPB RESPONDENTS—Continued

Information collection	Hours	Dollars
Revision of HOEPA disclosure for applicability to open-end credit .....	2,900	170,000
Provision of HOEPA disclosure .....	1,500	81,000
Total burden, All Respondents .....	34,000	1,520,000

TABLE 2—ONGOING COSTS FOR ALL CFPB RESPONDENTS

Information collection	Hours	Dollars
Provision of list of housing counselors .....	246,000	7,790,000
Receipt of certification of counseling for high-cost mortgages .....	500	25,000
Revision of HOEPA disclosure for applicability to open-end credit .....	.....	.....
Provision of special HOEPA disclosure .....	500	27,000
Total annual burden, All Respondents .....	247,000	7,840,000

The Bureau has a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may 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](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](mailto: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, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

#### Authority and Issuance

For the reasons stated in the preamble, the Bureau amends 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. Section 1024.20 is added to read as follows:

#### § 1024.20 List of homeownership counseling organizations.

(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 homeownership counseling organizations that provide relevant counseling services in the loan applicant's location. The list of homeownership counseling organizations distributed to each loan applicant under this section shall be obtained no earlier than 30 days prior to the time when the list is provided to the loan applicant from either:

(i) The Web site maintained by the Bureau for lenders to use in complying with the requirements of this section; or

(ii) Data made available by the Bureau or HUD for lenders to use in complying with the requirements of this section, provided that the data is used in accordance with instructions provided with the data.

(2) The list of homeownership counseling organizations provided under this section may be combined and provided with other mortgage loan disclosures required pursuant to Regulation Z, 12 CFR part 1026, or this part unless prohibited by Regulation Z or this part.

(3) A mortgage broker or dealer may provide the list of homeownership 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 counseling organizations, the lender is

not required to provide an additional list. The lender is responsible for ensuring that the list of homeownership counseling organizations is provided to a loan applicant in accordance with this section.

(4) If the lender, mortgage broker, or dealer does not provide the list of homeownership 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 (E-Sign Act), 15 U.S.C. 7001 *et seq.*

(5) The lender is not required to provide the list of homeownership 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.

(6) If a mortgage loan transaction involves more than one lender, only one list of homeownership counseling organizations required under this section shall be given to the loan applicant and the lenders shall agree among themselves which lender will 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 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 subject to Regulation Z, 12 CFR 1026.40, a lender or mortgage broker that provides the

loan applicant with the list of homeownership 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) *Exemptions.* (1) *Reverse mortgage transactions.* A lender is not required to provide an applicant for a reverse mortgage transaction subject to 12 CFR 1026.33(a) the list of homeownership counseling organizations required under this section.

(2) *Timeshare plans.* A lender is not required to provide an applicant for a mortgage loan secured by a timeshare, as described under 11 U.S.C. 101(53D), the list of homeownership counseling organizations required under this section.

**PART 1026—TRUTH IN LENDING (REGULATION Z)**

■ 3. The authority citation for part 1026 continues 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 credit transactions 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 high-cost mortgages, as defined in § 1026.32(a). 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) and adding paragraph (h) to read as follows:

**§ 1026.31 General rules.**

\* \* \* \* \*

(c) *Timing of disclosure.* (1) *Disclosures for high-cost 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).

(i) *Change in terms.* After complying with this paragraph (c)(1) 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 required by paragraph (c)(1)(i) of this section 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 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 this paragraph (c)(1), 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).

\* \* \* \* \*

(h) *Corrections and unintentional violations.* A creditor or assignee in a high-cost mortgage, as defined in § 1026.32(a), who, when acting in good faith, failed to comply with any requirement under section 129 of the Act will not be deemed to have violated such requirement if the creditor or assignee satisfies either of the following sets of conditions:

(1)(i) Within 30 days of consummation or account opening and prior to the institution of any action, the consumer is notified of or discovers the violation;

(ii) Appropriate restitution is made within a reasonable time; and

(iii) Within a reasonable time, whatever adjustments are necessary are made to the loan or credit plan to either, at the choice of the consumer:

(A) Make the loan or credit plan satisfy the requirements of this chapter; or

(B) Change the terms of the loan or credit plan in a manner beneficial to the consumer so that the loan or credit plan will no longer be a high-cost mortgage.

(2)(i) Within 60 days of the creditor's discovery or receipt of notification of an unintentional violation or bona fide error and prior to the institution of any action, the consumer is notified of the compliance failure;

(ii) Appropriate restitution is made within a reasonable time; and

(iii) Within a reasonable time, whatever adjustments are necessary are made to the loan or credit plan to either, at the choice of the consumer:

(A) Make the loan or credit plan satisfy the requirements of this chapter; or

(B) Change the terms of the loan or credit plan in a manner beneficial to the consumer so that the loan or credit plan will no longer be a high-cost mortgage.

■ 6. Section 1026.32 is amended by:

■ A. Revising paragraph (a);

■ B. Adding paragraphs (b)(2), (b)(3)(ii), (b)(4)(ii), and (b)(6)(ii);

■ C. Revising paragraphs (c)(3) through (5); and

■ D. Revising paragraph (d) introductory text, revising paragraphs (d)(1) and (6), removing and reserving paragraph (d)(7), and revising paragraph (d)(8).

The additions and revisions read as follows:

**§ 1026.32 Requirements for high-cost mortgages.**

(a) *Coverage.* (1) The requirements of this section apply to a *high-cost mortgage*, which is any consumer credit transaction that is secured by the consumer's principal dwelling, other than as provided in paragraph (a)(2) of this section, and in which:

(i) The annual percentage rate applicable to the transaction, as determined in accordance with paragraph (a)(3) of this section, will exceed the average prime offer rate, as defined in § 1026.35(a)(2), 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 loan amount is less than \$50,000; or

(C) 8.5 percentage points for a subordinate-lien transaction; or

(ii) The transaction's total points and fees, as defined in paragraphs (b)(1) and (2) of this section, will exceed:

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

(B) The lesser of 8 percent of the total loan amount or \$1,000 for a transaction with a loan amount of less than \$20,000; the \$1,000 and \$20,000 figures 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)(6) of this section, more than 36 months after consummation or account opening, or prepayment penalties that can exceed, in total, more than 2 percent of the amount prepaid.

(2) *Exemptions.* This section does not apply to the following:

(i) A reverse mortgage transaction subject to § 1026.33;

(ii) A transaction to finance the initial construction of a dwelling;

(iii) A transaction originated by a Housing Finance Agency, where the Housing Finance Agency is the creditor for the transaction;

(iv) A transaction originated pursuant to the United States Department of Agriculture's Rural Development Section 502 Direct Loan Program.

(3) *Determination of annual percentage rate.* For purposes of paragraph (a)(1)(i) of this section, a creditor shall determine the annual percentage rate for a closed- or open-end credit transaction based on the following:

(i) For a transaction in which the annual percentage rate will not vary during the term of the loan or credit plan, the interest rate in effect as of the date the interest rate for the transaction is set;

(ii) For a transaction in which the interest rate may vary during the term of the loan or credit plan in accordance with an index, the interest rate that results from adding the maximum margin permitted at any time during the term of the loan or credit plan to the value of the index rate in effect as of the date the interest rate for the transaction is set, or the introductory interest rate, whichever is greater; and

(iii) For a transaction in which the interest rate may or will vary during the term of the loan or credit plan, other than a transaction described in

paragraph (a)(3)(ii) of this section, the maximum interest rate that may be imposed during the term of the loan or credit plan.

(b) \* \* \*

(2) In connection with an open-end credit plan, *points and fees* means the following fees or charges that are known at or before account opening:

(i) All items included in the finance charge under § 1026.4(a) and (b), except that the following items are excluded:

(A) Interest or the time-price differential;

(B) Any premium or other charge imposed in connection with any Federal or State agency program for any guaranty or insurance that protects the creditor against the consumer's default or other credit loss;

(C) For any guaranty or insurance that protects the creditor against the consumer's default or other credit loss and that is not in connection with any Federal or State agency program:

(1) If the premium or other charge is payable after account opening, the entire amount of such premium or other charge; or

(2) If the premium or other charge is payable at or before account opening, the portion of any such premium or other charge that is not in excess of the amount payable under policies in effect at the time of account opening 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 transaction;

(D) Any bona fide third-party charge not retained by the creditor, loan originator, or an affiliate of either, unless the charge is required to be included in points and fees under paragraphs (b)(2)(i)(C), (b)(2)(iii) or (b)(2)(iv) of this section;

(E) Up to two bona fide discount points payable by the consumer in connection with the transaction, provided that the conditions specified in paragraph (b)(1)(i)(E) of this section are met; and

(F) Up to one bona fide discount point payable by the consumer in connection with the transaction, provided that no discount points have been excluded under paragraph (b)(2)(i)(E) of this section and the conditions specified in paragraph (b)(1)(i)(F) of this section are met;

(ii) All compensation paid directly or indirectly by a consumer or creditor to a loan originator, as defined in § 1026.36(a)(1), that can be attributed to

that transaction at the time the interest rate is set;

(iii) All items listed in § 1026.4(c)(7) (other than amounts held for future payment of taxes) 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;

(iv) 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 for which the creditor is a beneficiary, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract;

(v) The maximum prepayment penalty, as defined in paragraph (b)(6)(ii) of this section, that may be charged or collected under the terms of the open-end credit plan;

(vi) The total prepayment penalty, as defined in paragraph (b)(6)(ii) of this section, incurred by the consumer if the consumer refinances an existing closed-end credit transaction with an open-end credit plan, or terminates an existing open-end credit plan in connection with obtaining a new closed- or open-end credit transaction, with the current holder of the existing plan, a servicer acting on behalf of the current holder, or an affiliate of either;

(vii) Any fees charged for participation in an open-end credit plan, payable at or before account opening, as described in § 1026.4(c)(4); and

(viii) Any transaction fee, including any minimum fee or per-transaction fee, that will be charged for a draw on the credit line, where the creditor must assume that the consumer will make at least one draw during the term of the plan.

(3) \* \* \*

(ii) *Open-end credit.* The term *bona fide discount point* means an amount equal to 1 percent of the credit limit for the plan when the account is opened, paid by the consumer, and that reduces the interest rate or time-price differential applicable to the 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. See comment 32(b)(3)(i)-1 for additional guidance in determining whether a discount point is bona fide.

(4) \* \* \*

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

\* \* \* \* \*

(6) \* \* \*

(ii) *Open-end credit*. 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, other than a waived bona fide third-party charge that the creditor imposes if the consumer terminates the open-end credit plan sooner than 36 months after account opening.

(c) \* \* \*

(3) *Regular payment; minimum periodic payment example; balloon payment*. (i) For a closed-end credit transaction, 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 § 1026.30.

(5) *Amount borrowed; credit limit*. (i) For a closed-end credit transaction, the total amount the consumer will borrow, as reflected by the face amount of the note. Where the amount borrowed includes financed charges that are not prohibited under § 1026.34(a)(10), 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 shall not include the following terms:

(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.

(ii) *Exceptions*. The limitations in paragraph (d)(1)(i) of this section do not apply to:

(A) A mortgage transaction with a payment schedule that is adjusted to the seasonal or irregular income of the consumer;

(B) A loan with maturity of 12 months or less, 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; or

(C) A loan that meets the criteria set forth in §§ 1026.43(f)(1)(i) through (vi) and 1026.43(f)(2).

(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 do not apply to any adjustment in the regular periodic payment that results solely from the credit plan's transition from the draw period 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 all periods of the credit plan.

\* \* \* \* \*

(6) *Prepayment penalties*. A prepayment penalty, as defined in paragraph (b)(6) of this section.

(7) [Reserved]

(8) *Acceleration of debt*. A demand feature that permits the creditor to accelerate the indebtedness by terminating the high-cost mortgage in advance of the original maturity date and to demand repayment of the entire outstanding balance, except in the following circumstances:

(i) There is fraud or material misrepresentation by the consumer in connection with the loan or open-end credit agreement;

(ii) The consumer fails to meet the repayment terms of the agreement for any outstanding balance that results in a default in payment under the loan; 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 revised 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*. (1) *Home improvement contracts*. A creditor shall not pay a contractor under a home improvement contract from the proceeds of a high-cost mortgage, 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 or otherwise assign a high-cost mortgage 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 consumer 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 consumer into another high-cost mortgage, unless the refinancing is in the consumer's interest. An assignee holding or servicing a high-cost mortgage shall not, for the remainder of the one-year period following the date of origination of the credit, refinance any high-cost mortgage to the same consumer into another high-cost mortgage, unless the refinancing is in the consumer'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.

(4) *Repayment ability for high-cost mortgages.* 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 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, and current obligations including any mortgage-related obligations that are required by another credit obligation undertaken prior to or at account opening, and are secured by the same dwelling that secures the high-cost mortgage transaction. The requirements set forth in § 1026.34(a)(4)(i) through (iv) apply to open-end high-cost mortgages, but do not apply to closed-end 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. 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, are exempt from this repayment ability requirement.

(i) *Mortgage-related obligations.* For purposes of this paragraph (a)(4), mortgage-related obligations are property taxes; premiums and similar charges identified in § 1026.4(b)(5), (7), (8), and (10) that are required by the creditor; fees and special assessments imposed by a condominium, cooperative, or homeowners association; ground rent; and leasehold payments.

(ii) *Basis for determination of repayment ability.* Under this paragraph (a)(4) a creditor must determine the consumer's repayment ability in

connection with an open-end, high cost mortgage 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) A creditor must verify the consumer's current obligations, including any mortgage-related obligations that are required by another credit obligation undertaken prior to or at account opening, and are secured by the same dwelling that secures the high-cost mortgage transaction.

(iii) *Presumption of compliance.* For an open-end, high cost mortgage, a creditor is presumed to have complied with this paragraph (a)(4) with respect to a transaction if the creditor:

(A) Determines 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.

(C) Assesses the consumer's repayment ability taking into account at least one of the following: The ratio of total current obligations, including any mortgage-related obligations that are required by another credit obligation undertaken prior to or at account opening, and are secured by the same dwelling that secures the high-cost mortgage transaction, to income, or the income the consumer will have after paying current obligations.

(iv) *Exclusions from presumption of compliance.* Notwithstanding the previous paragraph, no presumption of compliance is available for an open-end, high-cost mortgage transaction for which the regular periodic payments when aggregated do not fully amortize

the outstanding principal balance except as otherwise provided by § 1026.32(d)(1)(ii).

(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 section 5(c) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2604(c)) or the disclosures required by § 1026.40.

(iii) *Affiliation prohibited.* The counseling required under this paragraph (a)(5) shall not be provided by a counselor who is employed by or affiliated with the creditor.

(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 required by section 5(c) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2604(c)) 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).

(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 4 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 by a method other than by fax or courier without charge.

(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, or a person authorized by the consumer to obtain such information, 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 charges that are required to be included in the calculation of points and fees, as that term is defined in § 1026.32(b)(1) and (2). 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 (2)(iv) 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; 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 amended by adding and reserving paragraphs (g) and (j) and adding paragraph (k) to read as follows:

\* \* \* \* \*

**§ 1026.36 Prohibited acts or practices in connection with credit secured by a dwelling.**

\* \* \* \* \*

(g) [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, 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 credit transaction 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).

■ 9. In Supplement I to Part 1026—Official Interpretations:

■ A. Under Section 1026.31—General Rules:

- i. Under 31(c) *Timing of disclosure*:
  - a. Under 31(c)(1), the heading is revised.
  - b. Under newly designated 31(c)(1), paragraph 1 is revised.
  - c. Under 31(c)(1)(i) *Change in terms*, paragraph 2 is revised.
  - d. Under 31(c)(1)(ii) *Telephone disclosures*, paragraph 1 is revised.
  - e. Under 31(c)(1)(iii), the heading is revised.
- ii. 31(h) *Corrections and unintentional violations* and paragraphs 1 and 2 are added.

■ B. Under Section 1026.32—Requirements for High-Cost Mortgages:

- i. Under 32(a) *Coverage*:
    - a. Paragraph 32(a)(1) and paragraph 1 are added.
    - b. Under Paragraph 32(a)(1)(i), paragraphs 1, 2, and 3 are revised, and paragraph 4 is removed.
    - c. Paragraph 32(a)(1)(i)(B) and paragraph 1 are added.
    - d. Under Paragraph 32(a)(1)(ii), paragraph 1 and the introductory text of paragraph 2 are revised, and paragraph 3 is added.
    - e. Paragraph 32(a)(1)(iii) and paragraphs 1 and 2 are added.
    - f. Under Paragraph 32(a)(2), the heading is revised.
    - g. Paragraph 32(a)(2)(ii) and paragraph 1 are added.
    - h. Paragraph 32(a)(2)(iii) and paragraph 1 are added.
    - i. 32(a)(3) *Determination of annual percentage rate* and paragraphs 1, 2, 3, 4, and 5 are added.
    - ii. Under 32(b) *Definitions*:
      - a. Paragraph 32(b)(2), Paragraph 32(b)(2)(i), and paragraph 1 are added.
      - b. Paragraph 32(b)(2)(i)(B) and paragraph 1 are added.
      - c. Paragraph 32(b)(2)(i)(C) and paragraph 1 are added.
      - d. Paragraph 32(b)(2)(i)(D) and paragraph 1 are added.
      - e. Paragraph 32(b)(2)(i)(E) and paragraph 1 are added.
      - f. Paragraph 32(b)(2)(i)(F) and paragraph 1 are added.
      - g. Paragraph 32(b)(2)(ii) and paragraph 1 are added.
  - h. Paragraph 32(b)(2)(iii) and paragraph 1 are added.
  - i. Paragraph 32(b)(2)(iv) and paragraph 1 are added.
  - j. Paragraph 32(b)(2)(vii) and paragraph 1 are added.
  - k. Paragraph 32(b)(2)(viii) and paragraphs 1 and 2 are added.
  - l. Under Paragraph 32(b)(6), as added elsewhere in this issue of the **Federal Register**, paragraphs 3 and 4 are added.
  - iii. Under 32(c) *Disclosures*:
    - a. 32(c)(2) *Annual percentage rate* and paragraph 1 are added.
    - b. Under 32(c)(3), the heading is revised.
    - c. Under newly designated 32(c)(3), paragraph 1 is revised.
    - d. Paragraph 32(c)(3)(i) and paragraph 1 are added.
    - e. Under 32(c)(4) *Variable rate*, paragraph 1 is revised.
    - iv. Under 32(d) *Limitations*:
      - a. Paragraph 1 is revised.
      - b. Under 32(d)(1)(i) *Balloon payment*, paragraph 1 is revised and paragraphs 2 and 3 are added.
      - c. Under 32(d)(2) *Negative Amortization*, paragraph 1 is revised.
      - d. 32(d)(6) *Prepayment Penalties* and paragraph 1 are removed.
      - e. 32(d)(7) *Prepayment Penalty Exception*, Paragraph 32(d)(7)(iii) and paragraphs 1, 2, and 3, and Paragraph 32(d)(7)(iv) and paragraphs 1 and 2 are removed.
      - f. Under 32(d)(8), the heading is revised.
      - g. Under newly designated 32(d)(8), Paragraph 32(d)(8)(i) and paragraph 1 are added.
      - h. Under Paragraph 32(d)(8)(ii), paragraph 1 is revised.
      - i. Under Paragraph 32(d)(8)(iii), paragraphs 1 and 2.ii are revised.
  - C. Under Section 1026.34—Prohibited Acts or Practices for High-Cost Mortgages:
    - i. Under 34(a) *Prohibited Acts or Practices for High-Cost Mortgages*:
      - a. Under 34(a)(4) *Repayment ability*, paragraphs 1 through 5 are revised.
      - b. Under Paragraph 34(a)(4)(ii)(B), paragraph 1 is revised and paragraph 2 is removed.
      - c. Paragraph 34(a)(4)(ii)(C) and paragraph 1 are removed.
      - d. Under 34(a)(4)(iii) *Presumption of compliance*, paragraph 1 is revised.
      - e. Under Paragraph 34(a)(4)(iii)(B), paragraph 1 is revised.
      - f. 34(a)(5) *Pre-loan counseling*, 34(a)(5)(i) *Certification of counseling required*, and paragraphs 1 through 5 are added.
      - g. 34(a)(5)(ii) *Timing of counseling* and paragraphs 1 and 2 are added.
      - h. 34(a)(5)(iv) *Content of certification* and paragraphs 1 and 2 are added.
    - i. 34(a)(5)(v) *Counseling fees* and paragraph 1 are added.
    - j. 34(a)(5)(vi) *Steering prohibited* and paragraphs 1 and 2 are added.
    - k. 34(a)(6) *Recommended default* and paragraphs 1 and 2 are added.
    - l. 34(a)(8) *Late Fees*, 34(a)(8)(i) *General*, and paragraph 1 are added.
    - m. 34(a)(8)(iii) *Multiple late charges assessed on payment subsequently paid* and paragraph 1 are added.
    - n. 34(a)(8)(iv) *Failure to make required payment* and paragraph 1 are added.
    - o. 34(a)(10) *Financing of points and fees* and paragraphs 1 and 2 are added.
  - ii. Under 34(b) *Prohibited Acts or Practices for Dwelling-Secured Loans; Open-End Credit*, the heading is revised.
  - iii. Under revised 34(b) *Prohibited acts or practices for dwelling-secured loans; structuring loans to evade high-cost mortgage requirements*, paragraph 1 is revised and paragraph 2 is added.
- D. Under Section 1026.36—Prohibited Acts or Practices in Connection with Credit Secured by a Dwelling:
  - i. 36(k) *Negative amortization counseling* is added.
  - a. 36(k)(1) *Counseling required* and paragraphs 1 through 4 are added.
  - b. 36(k)(3) *Steering prohibited* and paragraph 1 are added.

The revisions and additions read as follows:

**Supplement I to Part 1026—Official Interpretations**

\* \* \* \* \*

**Subpart E—Special Rules for Certain Home Mortgage Transactions**

**§ 1026.31 General Rules**

\* \* \* \* \*

31(c)(1) *Disclosures for high-cost 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. *Premiums or other charges financed at consummation or account opening.* If the consumer finances the payment of premiums or other charges as permitted under § 1026.34(a)(10), 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.

*31(c)(1)(ii) Telephone disclosures.*

1. *Telephone disclosures.* Disclosures by telephone must be furnished at least three business days prior to consummation or account opening, as applicable, calculated in accordance with the timing rules under § 1026.31(c)(1).

*31(c)(1)(iii) Consumer's waiver of waiting period before consummation or account opening.*

\* \* \* \* \*

*31(h) Corrections and unintentional violations.*

1. *Notice requirements.* Notice of a violation pursuant to § 1026.31(h)(1) or (2) should be in writing. The notice should make the consumer aware of the choices available under § 1026.31(h)(1)(iii) and (2)(iii). For notice to be adequate, the consumer should have at least 60 days in which to consider the available options and communicate a choice to the creditor or assignee.

2. *Reasonable time.* To claim the benefit of § 1026.31(h), a creditor or assignee must implement appropriate restitution and the consumer's elected adjustment within a reasonable time after the consumer provides notice of that election to the creditor or assignee. What length of time is reasonable will depend on what changes to a loan or credit plan's documentation, disclosure, or terms are necessary to effectuate the adjustment. In general, implementing appropriate restitution and completing an adjustment within 30 days of the consumer's providing notice of the election can be considered reasonable.

**§ 1026.32 Requirements for High-Cost Mortgages**

*32(a) Coverage.*

*Paragraph 32(a)(1).*

1. The term *high-cost mortgage* includes both a closed-end credit transaction 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. *Average prime offer rate.* High-cost mortgages include closed- and open-end consumer credit transactions secured by the consumer's principal dwelling with an annual percentage rate 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 term "average prime offer rate" is defined in § 1026.35(a)(2).

2. *Comparable transaction.* Guidance for determining a comparable transaction is set forth in comments 35(a)(1)–1 and 35(a)(2)–2 and –3, which direct creditors to published tables of average prime offer rates for fixed- and variable-rate closed-end credit transactions. Creditors opening open-end credit plans must compare the annual percentage rate for the plan to the average prime offer rate for the most closely comparable closed-end transaction. To identify the most closely comparable closed-end transaction, the creditor should identify whether the credit plan is fixed- or variable-rate; if the plan is fixed-rate, the term of the plan to maturity; if the plan is variable-rate, the duration of any initial, fixed-rate period; and the date the interest rate for the plan is set. If a fixed-rate plan has no definite plan length, a creditor must use the average prime offer rate for a 30-year fixed-rate loan. If a variable-rate plan has an optional, fixed-rate feature, a creditor must use the rate table for variable-rate transactions. If a variable-rate plan has an initial, fixed-rate period that is not in whole years, a creditor must identify the most closely-comparable transaction by using the number of whole years closest to the actual fixed-rate period. For example, if a variable-rate plan has an initial fixed-rate period of 20 months, a creditor must use the average prime offer rate for a two-year adjustable-rate loan. If a variable-rate plan has no initial fixed-rate period, or if it has an initial fixed-rate period of less than one year, a creditor must use the average prime offer rate for a one-year adjustable-rate loan.

3. *Rate set.* Comment 35(a)(1)–2 provides guidance for determining the average prime offer rate in effect on the

date that the interest rate for the transaction is set.

*Paragraph 32(a)(1)(i)(B).*

1. *Loan amount less than \$50,000.*

The creditor must determine whether to apply the APR threshold in § 1026.32(a)(1)(i)(B) based on the loan amount, which is the face amount of the note.

*Paragraph 32(a)(1)(ii).*

1. *Annual adjustment of \$1,000 amount.* 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.

2. *Historical adjustment of \$400 amount.* Prior to January 10, 2014, 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:

\* \* \* \* \*

3. *Applicable threshold.* For purposes of § 1026.32(a)(1)(ii), a creditor must determine the applicable points and fees threshold based on the face amount of the note (or, in the case of an open-end credit plan, the credit limit for the plan when the account is opened). However, the creditor must apply the allowable points and fees percentage to the "total loan amount," as defined in § 1026.32(b)(4). For closed-end credit transactions, the total loan amount may be different than the face amount of the note. The \$20,000 amount in § 1026.32(a)(1)(ii)(A) and (B) is adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1.

*Paragraph 32(a)(1)(iii).*

1. *Maximum period and amount.* Section 1026.32(a)(1)(iii) provides that a closed-end credit transaction 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 a prepayment penalty more than 36 months after consummation or account opening, or total prepayment penalties that exceed 2 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 credit transaction or open-end credit plan (other than such a mortgage as described in § 1026.32(a)(2)) secured by a consumer's principal dwelling. Closed-end credit transactions covered by § 1026.43 are subject to the additional prepayment penalty restrictions set forth in § 1026.43(g).

2. *Examples; open-end credit.* If the terms of an open-end credit agreement allow for a prepayment penalty that exceeds 2 percent of the initial credit limit for the plan, the agreement will be deemed to be a transaction with a prepayment penalty that exceeds 2 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 § 1026.32(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)(6)(ii), and the penalty is greater than 2 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 2 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)(6)(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 2 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).

*32(a)(2) Exemptions.*

\* \* \* \* \*

*Paragraph 32(a)(2)(ii).*

1. *Construction-permanent loans.* Section 1026.32 does not apply to a transaction to finance the initial construction of a dwelling. This exemption applies to a construction-only loan as well as to the construction phase of a construction-to-permanent loan. Section 1026.32 may apply, however, to permanent financing that replaces a construction loan, whether the permanent financing is extended by the same or a different creditor. When a construction loan may be permanently financed by the same creditor, § 1026.17(c)(6)(ii) permits the creditor to give either one combined disclosure for both the construction financing and the permanent financing, or a separate set of disclosures for each of the two phases as though they were two separate transactions. *See also* comment 17(c)(6)–2. Section 1026.17(c)(6)(ii) addresses only how a creditor may elect to disclose a construction to permanent transaction. Which disclosure option a creditor elects under § 1026.17(c)(6)(ii) does not affect the determination of whether the permanent phase of the transaction is subject to § 1026.32. When the creditor discloses the two phases as separate transactions, the annual percentage rate for the permanent phase must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine coverage under § 1026.32. Likewise, a single amount of points and fees, also reflecting the appropriate charges from the permanent phase, must be calculated and compared with the total loan amount to determine coverage under § 1026.32. When the creditor

discloses the two phases as a single transaction, a single annual percentage rate, reflecting the appropriate charges from both phases, must be calculated for the transaction in accordance with § 1026.32(a)(3) and appendix D to part 1026. This annual percentage rate must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine coverage under § 1026.32. Likewise, a single amount of points and fees, also reflecting the appropriate charges from both phases of the transaction, must be calculated and compared with the total loan amount to determine coverage under § 1026.32. If the transaction is determined to be a high-cost mortgage, only the permanent phase is subject to the requirements of §§ 1026.32 and 1026.34.

*Paragraph 32(a)(2)(iii).*

1. *Housing Finance Agency.* For purposes of § 1026.32(a)(2)(iii), a Housing Finance Agency means a housing finance agency as defined in 24 CFR 266.5.

*32(a)(3) Determination of annual percentage rate.*

1. *In general.* The guidance set forth in the commentary to § 1026.17(c)(1) and in § 1026.40 addresses calculation of the annual percentage rate disclosures for closed-end credit transactions and open-end credit plans, respectively. Section 1026.32(a)(3) requires a different calculation of the annual percentage rate solely to determine coverage under § 1026.32(a)(1)(i).

2. *Open-end credit.* The annual percentage rate for an open-end credit plan must be determined in accordance with § 1026.32(a)(3), regardless of whether there is an advance of funds at account opening. Section 1026.32(a)(3) 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; index rate plus maximum margin.* i. Section 1026.32(a)(3)(ii) applies in the case of a closed- or open-end credit transaction when the interest rate for the transaction varies solely in accordance with an index. For purposes of § 1026.32(a)(3)(ii), a transaction's interest rate varies in accordance with an index even if the transaction has an initial rate that is not determined by the index used to make later interest rate adjustments provided that, following the first rate adjustment, the interest rate

for the transaction varies solely in accordance with an index.

ii. In general, for transactions subject to § 1026.32(a)(3)(ii), the annual percentage rate is determined by adding the index rate in effect on the date that the interest rate for the transaction is set to the maximum margin for the transaction, as set forth in the agreement for the loan or plan. In some cases, a transaction subject to § 1026.32(a)(3)(ii) may have an initial rate that is a premium rate and is higher than the index rate plus the maximum margin as of the date the interest rate for the transaction is set. In such cases, the annual percentage rate is determined based on the initial "premium" rate.

iii. The following examples illustrate the rule:

A. Assume that the terms of a closed-end, adjustable-rate mortgage loan provide for a fixed, initial interest rate of 2 percent for two years following consummation, after which the interest rate will adjust annually in accordance with an index plus a 2 percent margin. Also assume that the applicable index is 3 percent as of the date the interest rate for the transaction is set, and a lifetime interest rate cap of 15 percent applies to the transaction. Pursuant to § 1026.32(a)(3)(ii), for purposes of determining the annual percentage rate for § 1026.32(a)(1)(i), the interest rate for the transaction is 5 percent (3 percent index rate plus 2 percent margin).

B. Assume the same transaction terms set forth in paragraph 3.iii.A, except that an initial interest rate of 6 percent applies to the transaction. Pursuant to § 1026.32(a)(3)(ii), for purposes of determining the annual percentage rate for § 1026.32(a)(1)(i), the interest rate for the transaction is 6 percent.

C. Assume that the terms of an open-end credit agreement with a five-year draw period and a five-year repayment period provide for a fixed, initial interest rate of 2 percent for the first year of the repayment period, after which the interest rate will adjust annually pursuant to a publicly-available index outside the creditor's control, in accordance with the limitations applicable to open-end credit plans in § 1026.40(f). Also assume that, pursuant to the terms of the open-end credit agreement, a margin of 2 percent applies because the consumer is employed by the creditor, but that the margin will increase to 4 percent if the consumer's employment with the creditor ends. Finally, assume that the applicable index rate is 3.5 percent as of the date the interest rate for the transaction is set, and a lifetime interest rate cap of 15 percent applies to the transaction. Pursuant to

§ 1026.32(a)(3)(ii), for purposes of determining the annual percentage rate for § 1026.32(a)(1)(i), the interest rate for the transaction is 7.5 percent (3.5 percent index rate plus 4 percent maximum margin).

D. Assume the same transaction terms set forth in paragraph 3.iii.C, except that an initial interest rate of 8 percent applies to the transaction. Pursuant to § 1026.32(a)(3)(ii), for purposes of determining the annual percentage rate for § 1026.32(a)(1)(i), the interest rate for the transaction is 8 percent.

4. *Rates that vary other than in accordance with an index.* Section 1026.32(a)(3)(iii) applies when the interest rate applicable to a closed- or open-end transaction may or will vary, except as described in § 1026.32(a)(3)(ii). Section 1026.32(a)(3)(iii) thus applies where multiple fixed rates apply to a transaction, such as in a step-rate mortgage. For example, assume the following interest rates will apply to a transaction: 3 percent for the first six months, 4 percent for the next 10 years, and 5 percent for the remaining loan term. In this example, § 1026.32(a)(3)(iii) would be used to determine the interest rate, and 5 percent would be the maximum interest rate applicable to the transaction used to determine the annual percentage rate for purposes of § 1026.32(a)(1)(i). Section 1026.32(a)(3)(iii) also applies to any other adjustable-rate loan where the interest rate may vary but according to a formula other than the sum of an index and a margin.

5. *Fixed-rate and -term payment options.* If an open-end credit plan has only 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)(3)(i). However, if an open-end credit plan has a variable rate, but also offers a fixed-rate and -term payment option during the draw period, § 1026.32(a)(3) 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)(3)(ii).

#### 32(b) Definitions.

\* \* \* \* \*

#### Paragraph 32(b)(2)(i).

1. *Finance charge.* The points and fees calculation under § 1026.32(b)(2) generally does not include items that are included in the finance charge but that are not known until after account opening, such as minimum monthly finance charges or charges based on account activity or inactivity. Transaction fees also generally are not

included in the points and fees calculation, except as provided in § 1026.32(b)(2)(vi). See comments 32(b)(1)–1 and 32(b)(1)(i)–1 and –2 for additional guidance concerning the calculation of points and fees.

#### Paragraph 32(b)(2)(i)(B).

1. See comment 32(b)(1)(i)(B)–1 for further guidance concerning the exclusion of mortgage insurance premiums payable in connection with any Federal or State agency program.

#### Paragraph 32(b)(2)(i)(C).

1. See comment 32(b)(1)(i)(C)–1 and –2 for further guidance concerning the exclusion of mortgage insurance premiums payable for any guaranty or insurance that protects the creditor against the consumer's default or other credit loss and that is not in connection with any Federal or State agency program.

#### Paragraph 32(b)(2)(i)(D).

1. For purposes of § 1026.32(b)(2)(i)(D), the term *loan originator* means a loan originator as that term is defined in § 1026.36(a)(1), without regard to § 1026.36(a)(2). See comments 32(b)(1)(i)(D)–1, –3, and –4 for further guidance concerning the exclusion of bona fide third-party charges from points and fees.

#### Paragraph 32(b)(2)(i)(E).

1. See comments 32(b)(1)(i)(E)–1 through –3 for further guidance concerning the exclusion of up to two bona fide discount points from points and fees.

#### Paragraph 32(b)(2)(i)(F).

1. See comments 32(b)(1)(i)(F)–1 and –2 for further guidance concerning the exclusion of up to one bona fide discount point from points and fees.

#### Paragraph 32(b)(2)(ii).

1. For purposes of § 1026.32(b)(2)(ii), the term *loan originator* means a loan originator as that term is defined in § 1026.36(a)(1), without regard to § 1026.36(a)(2). See the commentary to § 1026.32(b)(1)(ii) for additional guidance concerning the inclusion of loan originator compensation in points and fees.

#### Paragraph 32(b)(2)(iii).

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.

#### Paragraph 32(b)(2)(iv).

1. *Credit insurance and debt cancellation or suspension coverage.* See comments 32(b)(1)(iv)–1 through –3 for further guidance concerning the inclusion of premiums for credit insurance and debt cancellation or suspension coverage in points and fees.

#### Paragraph 32(b)(2)(vii).

1. *Participation fees.* Fees charged for participation in a credit plan must be

included in the points and fees calculation for purposes of § 1026.32 if payable at or before account opening. 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.

*Paragraph 32(b)(2)(viii).*

1. *Transaction fees to draw down the credit line.* Section 1026.32(b)(2)(viii) 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)(2)(viii) 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)(2)(viii) 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)(2)(viii) 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.

\* \* \* \* \*

*32(b)(6) Prepayment penalty.*

\* \* \* \* \*

3. *Examples of prepayment penalties; open-end credit.* For purposes of § 1026.32(b)(6)(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.

4. *Fees that are not prepayment penalties; open-end credit.* For purposes of § 1026.32(b)(6)(ii), fees that are not prepayment penalties include, for example:

i. Fees imposed for preparing and providing documents when an open-end credit plan is terminated, if such fees

are imposed whether or not the consumer terminates the plan prior to the end of its term. Examples include a payoff statement, a reconveyance document, or another document releasing the creditor's security interest in the dwelling that secures the line of credit.

ii. Loan guarantee fees.

iii. 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 consumer 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."

*32(c)(4) Variable-rate.*

1. *Calculating "worst-case" payment example.* For a closed-end credit transaction, 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(d) Limitations.*

1. *Additional prohibitions applicable under other sections.* Section 1026.34 sets forth certain prohibitions in connection with high-cost mortgages, 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 closed-end high-cost mortgages 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.*

1. *Regular periodic payments.* The repayment schedule for a high-cost mortgage must fully amortize the outstanding principal balance through "regular periodic payments." A payment is a "regular periodic payment" if it is not more than 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. *Repayment period.* 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 § 1026.32(d)(1)(i) apply to regular periodic payments required by the credit plan during the draw period, but do not apply to any adjustment in the regular periodic payment that results from the transition from the credit plan's draw period to its repayment period. Further, 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.

3. *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 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 applicable law and the consumer's legal obligation.

\* \* \* \* \*

*32(d)(8) Acceleration of debt.*

*Paragraph 32(d)(8)(i).*

1. *Fraud or material misrepresentation.* A creditor may

terminate a loan or open-end credit agreement and accelerate the balance if there has been fraud or material misrepresentation by the consumer in connection with the loan or open-end credit agreement. What constitutes fraud or misrepresentation is determined by applicable State law and may include acts of omission as well as overt acts, as long as any necessary intent on the part of the consumer exists.

*Paragraph 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; 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) if the consumer fails to meet the repayment terms resulting in a default of the agreement. Section 1026.32(d)(8)(i) does not override any State or other law that requires a creditor to notify a consumer 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. *Impairment of security.* A creditor may terminate a loan or open-end credit agreement 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. \* \* \*

ii. By contrast, the filing of a judgment against the consumer would be cause for 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.

\* \* \* \* \*

**§ 1026.34 Prohibited Acts or Practices in Connection with High-Cost Mortgages**

\* \* \* \* \*

*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. 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.

2. *General prohibition.* Section 1026.34(a)(4) prohibits a creditor from extending credit under a high-cost, open-end credit plan 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 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 and secured by the same dwelling that secures the high-cost mortgage transaction.

4. *Discounted introductory rates and non-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. 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.* 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. 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. However, if a creditor has knowledge as of account opening 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.

\* \* \* \* \*

*34(a)(4)(ii) Verification of Repayment Ability.*

\* \* \* \* \*

*Paragraph 34(a)(4)(ii)(B).*

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 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); 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), 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 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 § 1026.32(c)(3).

\* \* \* \* \*

*34(a)(5) Pre-loan counseling.*

*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. *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.

3. *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).

4. *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.

5. *Purpose of certification.* Certification of counseling indicates that a consumer has received counseling as required by § 1026.34(a)(5), but it does not indicate that a counselor has made a judgment or determination as to the appropriateness of the transaction for the consumer.

*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 section 5(c) of 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 section 5(c) of 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 good faith estimate required by section 5(c) of RESPA 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)(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 in a manner that is likely to cause the consumer to default on the existing loan.

ii. When delay of consummation of a high-cost mortgage occurs for reasons outside the control of a creditor or mortgage broker, that creditor or mortgage broker does not "recommend or encourage" default because the creditor or mortgage broker informed a consumer that:

A. The consumer's high-cost mortgage is scheduled to be consummated prior to the due date for the next payment due on the consumer's existing loan, which is intended to be paid by the proceeds of the new high-cost mortgage; and

B. Any delay of consummation of the new high-cost mortgage beyond the payment due date of the existing loan will not relieve the consumer of the obligation to make timely payment on that loan.

*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(h)(2), 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 (2). 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)(1)(i)(D) and (b)(2)(i)(D), 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; structuring loans to evade high-cost mortgage requirements.*

1. *Examples.* i. A creditor structures a transaction in violation of § 1026.34(b) if, for example, the creditor structures a loan that would otherwise be a high-cost mortgage as two or more loans, whether made consecutively or at the same time, for example, to divide the loan fees to avoid the points and fees threshold for high-cost mortgages in § 1026.32(a)(1)(ii).

ii. A creditor does not structure a transaction in violation of § 1026.34(b) when a loan to finance the initial construction of a dwelling may be permanently financed by the same creditor, such as a "construction-to-permanent" loan, and the construction phase and the permanent phase are treated as separate transactions. Section 1026.17(c)(6)(ii) permits the creditor to give either one combined disclosure for both the construction financing and the permanent financing, or a separate set of disclosures for each of the two phases as though they were two separate transactions. *See also* comment 17(c)(6)-2.

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. Thus, in determining the "total loan amount" for purposes of applying the triggers under § 1026.32, 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.

\* \* \* \* \*



**§ 1026.36 Prohibited Acts or Practices in Connection with Credit Secured by a Dwelling**

\* \* \* \* \*

*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.

\* \* \* \* \*

Dated: January 10, 2013.

**Richard Cordray,**

*Director, Bureau of Consumer Financial Protection.*

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