August 1, 2024

Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Information Regarding Fees Imposed in Residential Mortgage Transactions; Docket No. CFPB-2024-0021

To Whom It May Concern:

On behalf of the American Bankers Association, American Land Title Association, Broker Action Coalition, Consumer Bankers Association, Housing Policy Council, Independent Community Bankers of America, Leading Real Estate Companies of the World, Mortgage Bankers Association, Real Estate Services Providers Council, and The Realty Alliance (the Associations), we appreciate the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB) Request for Information on Mortgage Closing Costs ("RFI"). Collectively, we represent companies across the consumer financial services landscape, and we share a common interest with the CFPB to serve consumers well in a properly regulated financial services market.

The Associations support the Bureau's interest in understanding the affordability challenges facing the housing market.[1] It is regrettable that the CFPB is inaccurately characterizing certain fully disclosed, statutorily required and necessary mortgage-related fees as "junk fees" through blogs, circulars, advisory opinions, and public speeches. It is damaging for consumers and industry stakeholders alike to have the principal consumer financial protection regulator mischaracterize legitimate and fully disclosed fees associated with products and services that are of crucial financial utility and serve critical risk management purposes.

Principles & Considerations:

The purpose of this RFI is to gather information on "[t]he impact closing costs have on borrowers and the mortgage market, including the degree to which they add overall costs or otherwise cause borrower harm, and any impact such fees may have on the ability to purchase a home, anticipate and afford monthly payments, or refinance an existing mortgage."[2] Information gathering is an essential predicate to future policy decisions by the Bureau. However, we believe more stakeholder outreach is necessary to ensure any solution that the Bureau pursues is properly supported by accurate information and facts. Although our organizations are also filing individual comments, we believe it is important to collectively make the following points:

[1] Request for Information Regarding Fees Imposed in Residential Mortgage Transactions, 89 Fed. Reg. 48400 (June 6, 2024) available at https://www.govinfo.gov/content/pkg/FR-2024-06-06/pdf/2024-12443.pdf
[2] 89 Fed. Reg. 48406.

i. Regulatory changes must adhere to statutory authority.

Any policy action resulting from this RFI must respect the letter and spirit of the legislative intent and framework set forth by Congress. For over 50 years Congress has determined that the best way to promote competition and consumer choice in the mortgage market – while also promoting rigorous consumer protection – is through disclosure-based laws and regulations. The authority to set or cap fees, or to require certain market arrangements, is not found in any of the statutes governing the mortgage origination process.

In addition to an absence of explicit authority, the legislative history of mortgage-related consumer protection statutes makes clear that Congress never intended to create price-setting powers in administrative agencies. For instance, the history of the Real Estate Settlement Procedures Act (RESPA) is explicit that the statute was not intended to be a rate-setting statute and that Congress instead favored a market-based approach.[3]

Similarly, the Truth in Lending Act (TILA), enacted in 1968, was intended to require the dissemination of meaningful disclosures to enable consumers to compare credit terms more readily and knowledgeably.[4] Before its enactment, consumers were faced with a vast array of credit terms, making it difficult to compare loans because the terms and rates were seldom presented in the same format. The primary impetus for mandating disclosure was to ensure that borrowers' informed choices, in the aggregate, spurred competition among lenders and thereby reduced prices for all.

Forty years after the passage of these two laws, Congress affirmed the primacy of disclosure-based consumer protection when it enacted Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The legislative history of the Dodd-Frank Act makes clear that, first and foremost, "[t]he Bureau is authorized to act to ensure that consumers are provided with accurate, timely, and understandable information in order to make effective decisions about financial transactions."[5] This also is reflected in contemporaneous statements made during the debate prior to the enactment of the Dodd-Frank Act.[6] With other laws that the

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[3] S. Rep. No. 93-866 at 6546 (1974). The legislative history reveals that Congress intended RESPA to guard against unreasonable and excessive settlement costs in two specific ways. Under Section 4, Congress sought to "mak[e] information on the settlement process available to home buyers in advance of settlement and requir[e] advance disclosures of settlement charges." (S. Rep. 93-866, at 6548). The Senate Report explained that "home buyers who would otherwise shop around for settlement services, and thereby reduce their overall settlement costs, are prevented from doing so because frequently they are not apprised of the costs of these services until the settlement date or are not aware of the nature of the settlement services that will be provided." Second, under Section 8, Congress sought to eliminate what it termed "abusive practices" – kickbacks, referral fees, and unearned fees. In enacting these prohibitions, Congress intended that "the costs to the American home buying public will not be unreasonably or unnecessarily inflated." (S. Rep. 93-866, at 6548).

[4] *See* 15 U.S.C. § 1601(a).

[5] S. Rep. No. 111-176, at 164 (2010).

[6] Statement of Michael Barr, Subcommittee on Commerce, Trade, and Consumer Protection, The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC, (July 8, 2009) *available at* https://home.treasury.gov/news/press-releases/tg199 ("[The CFPB] will be able to reduce regulatory burden while

CFPB enforces – such as the Truth in Savings Act and the Electronic Funds Transfer Act – Congress took the same approach to consumer protection. Each law reflects Congress' conclusion that "clear and conspicuous" disclosures promote informed use of products, which enhances competition and access to financial services.

Finally, the Bureau's use of its unfair, deceptive, and abusive practices (UDAAP) authority, granted to it in the Dodd Frank Act, must be read together with that same Act's requirement that the Bureau combine the TILA and RESPA disclosures. That requirement indicates that Congress intended for disclosure to continue to be the primary consumer protection in the mortgage market. And, the clear and conspicuous nature of mortgage disclosures, buttressed by the Bureau's own extensive consumer testing and subsequent survey research, show that consumers understand the fees associated with mortgages and the circumstances under which they might incur the fees. These facts cannot support even preliminary findings that consumers are being misled or being treated unfairly or abusively. With RESPA and TILA, Congress created a clear statutory framework for mortgages, and Congress—rather than the Bureau—is the appropriate source of legislative power to amend these laws if appropriate.[7]

ii. *Regulations impose costs and complications that must be considered relative to any benefits derived.*

The mortgage industry is governed by multiple regulatory and executive agencies with overlapping authorities. The compendium of regulations governing mortgage lending is extraordinarily complex and agencies with jurisdiction often under-collaborate. This has real negative impacts. For instance, the TRID Rule is particularly prescriptive and detailed, imposing a significant compliance burden. In this challenging market environment with lower volumes and compressed margins — which the Bureau itself noted in the RFI — additional regulatory costs will ultimately be passed on to consumers who already are struggling with housing affordability challenges. Industry surveys and the Bureau's own regulatory assessments demonstrate that TRID and other related residential mortgage regulations have caused significant disruptions in mortgage operations, mitigated only by extraordinary efforts and expenditures by industry participants.[8]

The Associations believe it is critical that the Bureau propose new regulations only pursuant to a thorough understanding of actual repercussions on markets and consumers. Even those rules that aim to fix or clarify technical elements require institutions to make costly changes to their disclosure and compliance systems. In short, the Bureau should be cautious about intervening;

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helping consumers, for example, by creating one simple mortgage disclosure form for all consumers to use. It will not set prices for any service").

[7] *See e.g., Chamber of Com. of United States of Am., et al. v. Consumer Fin. Prot. Bureau*, 691 F. Supp. 3d 730 (E.D. Tex. 2023) (holding that the statutory text, structure, and history of the Dodd–Frank Act's language authorizing the CFPB to regulate unfair acts or practices is not the sort of exceedingly clear language that the major-questions doctrine demands before finding a conferral of agency authority to regulate independently of the CFPB's separately conferred power in specific areas).

[8] Consumer Financial Protection Bureau, Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) Rule Assessment (October 1, 2020), available at https://www.consumerfinance.gov/data-research/research-reports/trid-rule-assessment/ (Pages 90 – 117).

the cost impact could well be counterproductive to the efforts to control price inflation in mortgage-related fees.

iii. *Further action by CFPB affecting mortgage disclosures should be fully informed by previous regulatory reviews and assessments.*

On October 2020, the Bureau released its assessment of the TRID regulations, which was required by section 1022(d) of the Dodd Frank Act.[9] The Associations believe that the results of that assessment must inform the Bureau's evaluation of further policy action. We note that in the request for information for the 2020 TRID assessment, the Bureau stated that a goal of the TRID assessment is "to inform the Bureau's general understanding of implementation costs and regulatory benefits for future rulemakings."[10]

In response to the 2020 assessment, our associations submitted detailed comments on the impact of the TRID regulations on our members' operations, including—(1) survey data and contextual information confirmed that implementing the TRID Rule (and subsequent amendments and clarifications) was costly, technically difficult, and fraught with logistical and interpretive difficulties; (2) ongoing operational costs may pose inflationary pressures on consumer prices; (3) the layering of regulatory requirements on institutions created disruptions in lending operations.[11] Importantly, the Bureau's TRID assessment report confirmed that there were sizeable implementation costs for lenders and closing companies.

This should serve as a cautionary tale. For the reasons we detail above, regulatory changes should well consider cost impacts to both industry and consumers.

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[9] *See* Consumer Financial Protection Bureau, Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) Rule Assessment (October 1, 2020), available at https://www.consumerfinance.gov/data-research/research-reports/trid-rule-assessment/

[10] 84 Fed. Reg. 64436, 64437 (emphasis added).

[11] *See* Comment letter jointly submitted by the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Housing Policy Council, and Mortgage Bankers Association in response to the CFPB's Request for Information Regarding the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) Rule Assessment (Jan. 21, 2020), available at https://www.regulations.gov/comment/CFPB-2019- 0055-0136. *See also* https://www.aba.com/advocacy/policy-analysis/joint-letter-to-cfpb-on-integrated-mortgage-disclosures

Conclusion

The Associations share the Bureau's overarching goal of ensuring that home financing is sustainable and affordable. Many of the associations plan to comment individually in addition to these collective comments and we look forward to working with the Bureau on constructive solutions to affordability challenges which are consistent with statutory authority.

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