



May 2, 2011

VIA ELECTRONIC & REGULAR MAIL

The Honorable Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal Reserve System  
20th Street and Constitution Avenue, NW  
Washington, DC 20551  
E-Mail: [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov)

Re: Regulation Z; Docket R-1406 Truth in Lending/Escrow Accounts

Dear Secretary Johnson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment on the Board of Governors of the Federal Reserve System’s (hereinafter, “the Board”) proposed rulemaking on *Regulation Z; Docket No R-1406 Truth in Lending*.<sup>1</sup> Advocacy would like to commend the Federal Reserve for taking steps to reduce the regulatory burden on small entities. However, Advocacy is concerned that information is lacking on the potential costs of the proposal on small entities, the disclosure requirements, and the narrow scope of the exemption for small entities. Advocacy is also concerned about the Board’s alternatives.

**The Office of Advocacy**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement

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<sup>1</sup> 76 Federal Register 11598.

<sup>2</sup> 5 U.S.C. § 601 et seq.

Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup> The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>5</sup>

### **Requirements of the RFA**

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the federal agency is required to prepare an IRFA to assess the economic impact of a proposed action on small entities. The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.<sup>6</sup> In preparing the IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.<sup>7</sup> The RFA requires the agency to publish the IRFA or a summary of the IRFA in the Federal Register at the time of the publication of a general notice of proposed rulemaking for the rule.<sup>8</sup>

### **The Proposed Rule**

On March 2, 2011, the Board published a proposed rule on Regulation Z: Truth in Lending (TILA). The proposal implements amendments to TILA made by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Regulation Z currently requires creditors to establish escrow accounts for higher-priced mortgage loans secured by a first

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<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

<sup>4</sup> Small Business Jobs Act of 2010 (PL 111-240) § 1601.

<sup>5</sup> Id.

<sup>6</sup> 5 USC § 603.

<sup>7</sup> 5 USC § 607.

<sup>8</sup> 5 USC § 603.

lien on a dwelling. The proposed rule implements statutory changes made by the Dodd-Frank Act that will lengthen the time for which a mandatory escrow account established for higher-priced mortgages must be maintained. In addition, it implements disclosure requirements regarding escrow accounts and also exempts certain loans from the escrow requirements.<sup>9</sup>

### **Compliance with the RFA**

The Board prepared an IRFA for the proposed rule. In the IRFA, the Board acknowledges that escrow accounts are burdensome. However, the Board states that the costs to small entities are difficult to predict. The Board also states that there are several unknown factors such as the cost to update systems, and the cost to prepare and provide disclosures and the costs to administer and maintain escrow accounts.<sup>10</sup> The Board seeks information and comment on the costs.

While Advocacy is pleased that the Board is soliciting comment on the costs, Advocacy is concerned that the Board may be shifting its burden to provide information about the potential economic impact of the rulemaking onto the small entities that may need to comply. In the Paperwork Reduction Act section, the Board is able to provide an estimate about the potential increase in paperwork hours. Does the Board have information about what the costs of those hours may be, such as the estimated hourly wage of the person who will be performing the compliance duties or the costs of training employees on how to implement the changes?

Moreover, as the Board acknowledges, some entities are already utilizing escrow accounts. Did the Board consider surveying a small number of those entities or even publishing an advance notice of proposed rulemaking to obtain the information? The Board has an obligation under the RFA to provide the public with information about the potential costs. Advocacy encourages the Board to take proactive steps to do so.

### **Alternatives**

Advocacy is also concerned about the consideration of alternatives in the rulemaking. In the RFA section of the proposal, the Board states that it considers alternatives in the supplementary information section of the preamble and provides the steps that it has taken to minimize the impact on small entities as required by the RFA. Namely, the Board states that it is proposing a different standard for defining higher-priced loans, exempting certain small entities from the escrow requirement, and allowing creditors to use the same amounts for overlapping RESPA disclosures.<sup>11</sup> Advocacy is concerned about 1) the exemption and 2) the disclosures.

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<sup>9</sup> 76 Federal Register 11599.

<sup>10</sup> 76 Federal Register 11617.

<sup>11</sup> Id.

### *1) Exemption Should Be Broadened*

In terms of the exemption, Advocacy is concerned about the narrow scope of the exemption. Pursuant to proposed § 226.45(b)(2)(iii), the escrow requirement would not apply to a higher priced mortgage loan extended by a creditor that makes most of its first-lien higher-priced mortgage loans in counties designated by the Board as rural or underserved,” together with its affiliates originates and services 100 or fewer first-lien mortgages loans, and together with its affiliates does not escrow for any mortgage loan it services. The requirements will be difficult for small entities to meet.

It should be noted that the Board acknowledges that maintaining escrow accounts is burdensome. However, the Board reasons that if a creditor already maintains the accounts, it has no need for the exemption.<sup>12</sup> The Board does not provide any facts to support that assumption.

Advocacy has spoken with the Independent Community Bankers Association (ICBA) about this issue. According to ICBA, the requirement that the creditor not currently provide escrow accounts for any mortgage loan that an institution currently services is problematic. Some small community banks currently maintain escrow accounts but they are doing it with difficulty. To now say that they are not eligible for the exemption because they have maintained an escrow account in the past punishes them for trying to provide a product for their customers while complying with the law. Allowing them to take part in the exemption would ease the regulatory burden that they are currently under and allow them to continue to provide higher-priced loans for their customers.

As stated in the preamble, this particular requirement is not a statutory mandate. Rather, the Board is implementing it pursuant to Section 129D(c)(4) of TILA which states that the Board may include “any other criteria the board may establish.” Advocacy encourages the Board to remove this requirement so that small creditors who have been struggling to maintain escrows can benefit from this important cost saving measure.

In addition, in order to obtain the exemption, a creditor must have made during the preceding year more than 50% of its total first-lien, higher-priced mortgage loans in counties designated by the Board that are “rural” and “underserved.” The Board’s criteria for “rural” and “underserved” includes two definitions. Under § 226.45(b)(2)(iv)(A), a county would be designated as “rural” during a calendar year if it is not in a metropolitan area or a micropolitan area and either (1) it is not adjacent to any metropolitan area or a micropolitan; or (2) it is adjacent to a metropolitan area with fewer than one million residents or adjacent to a micropolitan area, and it contains no town with 2,500 or more residents. Under § 226.45(b)(2)(iv)(B) a county would be designated as underserved during a calendar year if no more than two creditors extend consumer credit secured by a first lien on real property or a dwelling five or more times in the county.<sup>13</sup>

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<sup>12</sup> 76 Federal Register 11612.

<sup>13</sup> 76 Federal Register 11612.

Advocacy asserts that the definitions of “rural” and “underserved” are confusing and narrow. The definitions could also serve to exclude small institutions from the market. For example, if two large banks each have five first liens, a small community bank would not qualify for the exemption. As such, it may be too burdensome for the small community bank to compete. Moreover, by basing it on criteria that could change on a calendar year basis, small banks may not be able to plan for the future.

As noted above, the requirements for the exemption are confusing and burdensome for small entities. According to ICBA, a better alternative would be to discard the Board’s proposed requirements for an exemption and exempt portfolio loans from the escrow requirement instead. By doing so, the Board would reduce the burden on small banks in a manner that is less confusing.

## *2) Any Rule on Disclosures Should Wait Until the CFPB Can Review the Issue*

The proposal requires two new disclosures relating to escrow accounts. The first disclosure would be required three business days before consummation of a mortgage transaction for which an escrow account will be established. The second disclosure would be given when a mortgage transaction is entered into without an escrow account or when an escrow account on an existing mortgage loan will be cancelled.<sup>14</sup> According to the Mortgage Bankers Association and the American Bankers Association, these changes could be problematic for small institutions, given the fact that the Consumer Financial Protection Bureau (CFPB) will be reviewing TILA in the near future and additional changes may be made.

On December 23, 2010, Advocacy submitted comments on the Board’s rulemaking on *Regulation Z; Docket No R-1390 Truth in Lending*.<sup>15</sup> A copy of that letter is attached. In that letter Advocacy asserted that the industry has had several burdensome regulatory changes recently. Each time the regulations change, the industry incurs an enormous amount of expense to implement the changes. Advocacy encouraged the Board to postpone the December rulemaking until after the July 21 transfer date to the CFPB so that the changes could be considered as part of the CFPB’s review of RESPA-TILA. Likewise, the disclosures in this rulemaking, like the ones in the December letter should wait until after TILA is transferred to the CFPB in July so that they can be considered as part of the comprehensive approach to resolving the RESPA-TILA issue.

## **Conclusion**

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule, to provide the information on those impacts to the public for comment, and to consider less burdensome alternatives. Advocacy encourages the Board to provide more information about the potential costs of this rulemaking on small entities. Advocacy also encourages the Board to consider less costly alternatives such as

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<sup>14</sup> 76 Federal Register 1159.

<sup>15</sup> 75 Federal Register 58539.

postponing the disclosure portion of the proposal and changing the proposed exemption so that more small banks can qualify for this important burden reduction measure.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. Advocacy is available to assist the agencies in their RFA compliance. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

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Cc: The Honorable Cass Sunstein, OMB/OIRA