Fees Imposed in Residential Mortgage Transactions

Comments

to the

Consumer Financial Protection Bureau

regarding

89 Fed. Reg. 48,400 (June 6, 2024)

Docket No. CFPB-2024-0021

by

National Consumer Law Center (on behalf of our low-income clients)

&

National Fair Housing Alliance

Submitted on August 2, 2024

Introduction

The National Consumer Law Center[1] (on behalf of our low-income clients) and National Fair Housing Alliance[2] thank you for the opportunity to respond to this Request for Information. We agree that closing costs are an expensive and confusing part of obtaining a mortgage. While addressing these issues can have some effect on entrance into the homeownership market and can also affect the cost of refinancing into a more affordable monthly payment, we urge the Bureau to also focus on other more significant barriers to affordable homeownership.

In particular, we recommend that the Bureau work with other regulators to adopt rules facilitating more special purpose credit programs and to encourage more small-dollar mortgage lending.

We have previously submitted comments to the Bureau discussing the importance of special purpose credit programs (SPCPs).[3] And the National Fair Housing Alliance has written extensively about them.[4] These comments have examples and recommendations for expanding the use of SPCPs to expand homeownership. They are particularly relevant to small-dollar mortgages. The dearth of small-dollar mortgages has a disparate impact on consumers of color and is a contributor to the racial

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[1] The nonprofit National Consumer Law Center® (NCLC®) works for economic justice for low-income and other disadvantaged people in the U.S. through policy analysis and advocacy, publications, litigation, and training. For questions about these comments, please contact NCLC Senior Attorney Andrew Pizor (APizor@nclc.org).

[2] The National Fair Housing Alliance® (NFHA™) is the country's only national civil rights organization dedicated solely to eliminating all forms of housing and lending discrimination and ensuring equal opportunities for all people. As the trade association for over 170 fair housing and justice-centered organizations and individuals throughout the U.S. and its territories, NFHA works to dismantle longstanding barriers to equity and build diverse, inclusive, well-resourced communities.

[3] *See* NCLC Comments to the CFPB on the Equal Credit Opportunity Act and Regulation B at 27, https://www.nclc.org/resources/comments-to-the-cfpb-request-for-information-on-the-equal-credit-opportunity-act-and-regulation-b-docket-no-cfpb-2020-0026/.

[4] *See, e.g.,* Special Purpose Credit Programs–Updates and Best Practices (Oct. 4, 2023), https://nationalfairhousing.org/special-purpose-credit-programs-updates-and-best-practices/; How Place-Based Special Purpose Credit Programs Can Reduce the Racial Homeownership Gap (June 6, 2022), https://nationalfairhousing.org/resource/how-place-based-special-purpose-credit-programs-can-reduce-the-racial-homeownership-gap/; NFHA and MBA Launch Online Toolkit to Help Lenders Develop Special Purpose Credit Programs for Underserved Communities (June 21, 2022), https://nationalfairhousing.org/resource/nfha-and-mba-launch-online-toolkit-to-help-lenders-develop-special-purpose-credit-programs-for-underserved-communities/;

homeownership gap.[5] We have also submitted comments to the Department of Housing and Urban Development regarding the problems facing borrowers seeking small-dollar mortgages.[6] Among the recommendations we made was to work with other agencies in order to advance and attempt various solutions, including pilots and any further regulatory guidance that may be needed to reduce barriers and facilitate more small-dollar loans.[7]

The Bureau can also make shopping easier and put downward pressure on closing costs as a group by moving toward an all-in finance charge disclosure, where consumers can use one number (the annual percentage rate, or "APR") to compare apples-to-apples without surprises at or near closing. While exemptions from the finance charge are statutory,[8] the Bureau has the authority to adjust the pre-closing and closing disclosures to enable shopping based on one all-inclusive figure,[9] or something similar. In the area of title insurance, having lenders pay for lender policies would itself place downward pressure on prices. Below, we also provide input on discount points and appraisal fees.

Response to Selected Questions

1. Are there particular fees that are concerning or cause hardships for consumers?

All closing costs lack transparency and risk inflating the cost of credit. Even if costs were more transparent, they are just one component of an expensive transaction, small by comparison to the home price and the mortgage, and come at a time when the borrower is likely to be distracted by other decisions and preparations for closing. And, for a refinance, it is hard for homeowners to make an "apples to apples" comparison across lenders or settlement service providers. To the extent that closing costs pose a barrier to homeownership, we believe it is, instead, the *total* cost that is burdensome and hard for consumers to affect.

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[5] *See* NCLC's Comments to HUD regarding Small Dollar Lending at 3, https://www.nclc.org/resources/nclcs-comments-to-hud-regarding-small-dollar-lending/.

[6] NCLC's Comments to HUD regarding Small Dollar Lending, https://www.nclc.org/resources/nclcs-comments-to-hud-regarding-small-dollar-lending/.

[7] *Id.* at 12.

[8] 15 U.S.C. § 1605.

[9] Such as by adding a second APR that includes all closing costs and is prominently disclosed at the top of the first page.

As the Bureau's Federal Register notice notes, consumers under-react to closing costs and disaggregation leads to paying higher costs.[10] An inclusive number for shopping would address many of these problems.

Nevertheless, some of the closing costs we are most concerned about are listed below.

Discount points may be one of the most confusing and troublesome costs for several reasons.[11]

- The use of discount points interferes with consumers' ability to shop for the lowest interest rate, because they make comparison between different lenders and products more difficult;
- They can facilitate deceptive advertising, particularly when lenders advertise a low rate that is only achieved by using discount points that are hidden in the fine print;
- It is difficult for consumers to detect spurious discount points, i.e. when the rate is not actually lowered in an amount commensurate with the points charged;[12]
- There is evidence that many consumers do not actually benefit from discount points. Researchers have found that borrowers typically pay too much for discount points (prepaying their loans sooner than expected). Others keep their loans too long, missing out on the savings they would have gained by refinancing sooner.[13]

Title insurance has been identified by many as a place where cost reduction could help consumers. While lowering the cost of title insurance for refinancings could provide some payment relief to consumers, there are still many outstanding questions regarding the current GSE pilot programs. Moreover, the issues for purchase transactions are more complex, such as the purchase of owner's policies and broader questions about the need for protection against forgery, fraud, and the cost of any title

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[10] 89 Fed. Reg. 48400, 48401 (June 6, 2024) (citing https://www.consumerfinance.gov/about-us/newsroom/cfpb-publishes-research-finding-higher-price-complexity-leads-consumers-to-pay-more/ and https://www.bankofengland.co.uk/-/media/boe/files/working-paper/2019/non-salient-fees-in-the-mortgage-market.pdf).

[11] *See generally* National Consumer Law Center, Mortgage Lending § 9.7.1 (4th ed. 2024), *updated at* www.nclc.org/library.

[12] *See* National Consumer Law Center, *Truth in Lending* § 9.8.2.2.3 (11th ed. 2023), *updated at* www.nclc.org/library (discussing bona fide discount points).

[13] Yan Chang & Abdullah Yavas, Do Borrowers Make Rational Choices on Points and Refinancing, 27 Real Estate Econ. 635 (2009). *See* Amy Hoak, Paying Mortgage Points Rarely Pays Off for Borrowers: Study (Dec. 20, 2006), www.marketwatch.com.

clearing activities (which varies dramatically across states). In our [recent coalition letter](#) to FHFA, we discuss the pilot programs and the broader issues around title insurance regulation. We also point out that homeowners pay for lender policies and that having lenders pay for lender policies would make significant progress toward placing downward pressure on lender title policy costs. Moreover, an all-inclusive price for shopping would ensure that lenders who put this cost back on the homeowner would still have that amount incorporated into the consumer's shopping considerations.

Appraisal fees are concerning because the consumer pays for the appraisal, but the contract is actually between the appraiser and the lender as client. Similar to title insurance, having lenders pay for the appraisal would further reduce the consumer's closing costs and place the cost burden more appropriately on the appraiser's actual client (the lender).

3. Provide data or evidence on the degree to which consumers compare closing costs across lenders.

In our experience, consumers rarely shop for closing costs as they are mostly focused on the monthly mortgage payment. In fact, consumers should not shop based on closing costs. With rare exceptions, consumers are much more likely to save money by shopping for the cheapest lender. As a recent JPMorganChase study found, borrowers are more likely to save money by focusing first on the *type* of lender they apply to. "[T]he choice of lender plays a pivotal role, significantly impacting the financial strain a borrower may face."[14] This, alone, can save borrowers hundreds of dollars, especially for borrowers of color.[15]

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[14] Chris Wheat & Henry Nickie Makada (JPMorgan Chase Institute), Hidden costs of homeownership: Race, income, and lender differences in loan closing costs," (Apr. 22, 2024), https://web.archive.org/web/20240724174408/https://www.jpmorganchase.com/institute/all-topics/financial-health-wealth-creation/hidden-costs-of-homeownership-race-income-and-lender-differences-in-loan-closing-costs#footnote-src-1.

[15] JPMorganChase, *supra* ("borrowers who choose broker-intermediated loans can expect their loans to be, on average, $739 more expensive than if they had dealt with a bank, a closing cost surcharge of 14.4 percent." and "Shifting to broker-intermediated loans could add several hundred dollars to the baseline disparities, raising affordability concerns that are especially pronounced for Black borrowers. Black borrowers using broker-issued loans incurred, on average, a total race-based premium of $812, whereas the Hispanic premium was comparatively smaller at nearly $600.").

But even within types of lenders, borrowers will be better off focusing on the bottom line—the total cost, as indicated by the APR.[16] The rare consumer who saves money on a particular closing cost is still likely to save more by finding a loan with a lower APR. For example, a consumer who saves 1/4th of a percentage point on the interest rate for a typical loan at current rates will save about $800 per year and over $4000 in five years.[17] While those are not significant sums in comparison to median home prices, we believe they are still more than a typical homeowner would be able to save by shopping or negotiating for specific closing costs.[18]

Not only is shopping based on the APR likely to result in more savings, but it is also easier. Research has shown that people only have a limited amount of mental "bandwidth." The more things they have to deal with, the more that bandwidth is depleted. This can have a serious impact on financial and other life decisions.[19] The typical loan has a dozen or more closing costs, but only one APR. Borrowers have a limited amount of time and energy to use on shopping, so their mental "bandwidth" is best focused where it will get the most "bang for the buck." Also, lenders—unlike settlement service providers—are used to negotiating. And they have the option of reducing the APR by lowering the interest rate, any closing cost over which they have control, or simply by providing a credit. A settlement service provider, in contrast, only has control over a significantly smaller portion of the total cost of credit.

8. Would lenders be more effective at negotiating closing costs than consumers?

Lenders would be substantially more effective at negotiating costs than consumers because they have more market power, the ability to deliver a greater volume of business, and greater insight into the actual cost of settlement services. For these reasons, the Bureau should take steps to encourage use of an all-in finance charge disclosure, and lenders should pay for lender title policies. Setting up a system where

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[16] JPMorganChase, *supra* ("Understanding the implications of shopping with different types of lenders should be as integral to mortgage literacy fundamentals as understanding interest rates and annual percentage rates. Even when comparing multiple loan estimates, rate-sensitive borrowers could end up choosing a higher-cost mortgage if they only shop with brokers.").

[17] Comparing a $400,000 fixed-rate, 30-year mortgage at 7% and 6.75%.

[18] *Cf.* Doug Duncan & Steve Deggendorf, Consumer Mortgage Shopping: A National Housing Survey Perspective, Housing Insights 9, no. 1 (March 2019) (finding that borrowers who shopped around tend to have more success in negotiations, regardless of income) (cited in JPMorganChase, *supra*).

[19] *See generally,* S. Mullainathan & E. Shafir, Scarcity: Why having too little means so much (2013); Frank Schilbach, Heather Schofield & Sendhil Mullainathan, The Psychological Lives of the Poor, Am. Economic Rev., 106 (5): 435–40 (2016).

consumers shop on APR and can compare apples to apples would cause lenders to negotiate more of the loan closing costs.

As noted above, we are not aware of any evidence that consumers shop for closing costs. Instead, anecdotal evidence suggests that, in the rare cases where someone tries, it is very difficult and largely ineffective. Settlement service providers do not market to consumers and do not compete for their business. Instead, they direct their marketing efforts toward lenders, mortgage brokers, and real estate agents. One recent analysis emphasizes the pernicious impact of affiliated business arrangements.[20] In general, once a settlement service provider is identified and assigned a transaction, consumers rarely switch to another.

Moreover, as discussed above, currently homeowners must pay for lender title policies and appraisals, even though they primarily benefit the lender.

The Bureau should explore ways to use an all-in finance charge, or something similar, as a way to reduce the cost of credit.

The single best way to shop for a mortgage is to compare the APR across similar mortgage products.[21] But current law allows creditors to exclude certain closing costs from the APR, thereby making it less effective. Rather than trying to address individual closing costs, in a game of whack-a-mole, disclosures based on an all-in finance charge, or comparable measure created by the Bureau, would be more effective.[22]

Disclosures based on one price, such as an all-in finance charge or similar measure, would include all closing costs plus interest (like the APR does). This would encourage lenders to keep closing costs down, because higher costs would make their APR less competitive. It would also reduce compliance cost and litigation risk. If creditors treat all closing costs as finance charges, they would eliminate the risk of TILA liability for improperly treating a closing cost as part of the amount financed. We have found that

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[20] Christopher Peterson & Jeffrey Ehrlich, Corrupt Joint Ventures in the Market for Residential Real-Estate-Settlement Services (July 05, 2024), available at https://ssrn.com/abstract=4886826.

[21] *See* NCLC Comments on the Importance of the APR and CFPB's Proposed TILA RESPA Integrated Disclosures (TRID), https://www.nclc.org/resources/nclc-comments-on-the-importance-of-the-apr-and-cfpbs-proposed-tila-respa-integrated-disclosures-trid/.

[22] *See* Renuart, Elizabeth, The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending. Yale Journal on Regulation, Vol. 25, No. 181, 2008, Albany Law School Research Paper No. 10, https://www.nclc.org/the-truth-the-whole-truth-and-nothing-but-the-truth-fulfilling-the-promise-of-truth-in-lending/; https://www.nclc.org/wp-content/uploads/2022/09/NCLC-comments-on-CFPB-Junk-Fees-RFI-87-FR-5801-pubd-2-2-22-filed-5-2-22.pdf

some lenders already err on the side of treating suspect closing costs as finance charges.

While mandating the all-in finance charge would require amending TILA,[23] the Bureau could take other steps, such as restricting the exemptions allowed by Regulation Z to the statutory minimum; encouraging voluntary use of the all-in finance charge by allowing creditors to eliminate the closing cost detail section if they treat all closing costs as finance charges; or mandating the addition of an all-in APR that is prominently disclosed at the top of the first page of the disclosures.[24] Such changes would benefit consumers by encouraging them to focus on the overall cost.[25]

Conclusion

The Bureau's attention to closing costs and junk fees in general is valuable and will help America's most vulnerable consumers. But to significantly reduce barriers to fair and affordable housing, we urge the Bureau to focus on other issues as well, primarily steps that will increase the availability of special purpose credit programs and small-dollar mortgages, and rule changes that will enable the disclosure of an all-in finance charge.

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[23] *See* 15 U.S.C. § 1605.

[24] This option would require further minimizing the statutory APR disclosure on the last page and adding explanatory text.

[25] Another way to facilitate comparison shopping would be to move the APR to the top of the first page of the disclosures.